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THE

# LAW TIMES REPORTS:

CONTAINING

All the Cases Argued and Determined

IN

THE HOUSE OF LORDS,  
THE PRIVY COUNCIL.

SUPREME COURT OF JUDICATURE.  
THE COURT OF APPEAL.

HIGH COURT OF JUSTICE.  
CHANCERY DIVISION,  
QUEEN'S BENCH DIVISION,  
COMMON PLEAS DIVISION,  
EXCHEQUER DIVISION,

DIVISIONAL COURT OF APPEAL,  
PROBATE, DIVORCE, AND ADMIRALTY  
DIVISION.

THE BANKRUPTCY COURT,  
CRIMINAL APPEAL COURT,  
COURT OF ARCHES.

SUPREME COURT OF JUDICATURE,  
IRELAND.

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day commences, and any event which occurs during that  
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place after the passing of the Act. (*Tomkinson v. Bul-*  
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7—Judicature Act 1874, ss. 1, 2—Judicature Act 1875, ss.  
2, 10.—Sub-sect. 1 of sect. 25 of the Judicature Act 1873  
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Accounts—Co-ownership—Settlement of—Not after date of  
writ—Agent—Right of action—Admiralty Court Act 1861,  
s. 8.—In an action brought by one co-owner of a ship  
against the other co-owners under the Admiralty Court  
Act 1861, sect. 8, for a settlement of accounts between  
the co-owners, the plaintiff is entitled to a settlement of  
such accounts only as are or ought to be rendered to the  
co-owners prior to the date of the writ in the action, and  
cannot recover any sum due upon accounts, which in the  
due course of the ship’s business could not be rendered  
to the co-owners until after such date. Where a ship’s  
accounts are rendered half-yearly, a co-owner is not  
entitled to recover upon accounts rendered for and at the  
end of the half-year in which the writ is issued. When a  
co-owner acts as ship’s agent (not managing owner) for a  
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a co-ownership action for the settlement of ship’s  
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Costs of appeal—Rules of Supreme Court, Order LVIII., r.  
6.—The fact that respondents in an appeal from the Ad-  
miralty Division, where both have been held to blame,  
have given notice under Order LVIII., r. 6, of their inten-  
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difference in the practice of dismissing the appeal with  
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costs as are occasioned by the respondent’s notice will be  
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Bottomry bond—Costs—Damages—Arrest.—Where the  
holder of a bottomry bond arrests the vessel and freight  
on which the bond is secured before the bond is due, and  
the bond is paid at or before maturity, the shipowner is  
entitled to the costs occasioned by the proceeding, but  
not, in the absence of malice or gross negligence on the  
part of the bondholder, to damages. (*The Endora.*) ... .. 166

Bottomry—Maritime risk—Payment due on arrival of ship.  
—An instrument by which a captain binds his ship to pay  
a sum of money for goods supplied within “six days after  
my arrival,” means after the ship’s arrival, and is an  
instrument of bottomry. (*The Cecilia.*) ... .. 200

Collision—Damage—Compulsory pilotage—Exemptions—  
When defendants rely solely on the defence of compul-  
sory pilotage and are successful, they may not get costs  
if the court is of opinion that under the circumstances the  
plaintiffs were justified in bringing the action. (*The*  
*Bankow.*) ... .. 335

Compulsory pilotage—Master of vessel on board—Criminal  
proceedings against master—Onus of proof—17 & 18  
Vict. c. 104, ss. 354, 370, 376, and 388—Thames Conservancy  
Act (29 & 30 Vict. c. 89), bye-laws 28 and 72.—In criminal  
proceedings against a master of a vessel who has a com-  
pulsory pilot on board, such master is not bound to prove  
that at the time of the act or omission the subject of  
such proceedings he was not interfering with the naviga-  
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notes of evidence—Witnesses on appeal.—In an Admiralty  
appeal from a County Court, under the County Courts  
Admiralty Jurisdiction Act 1868, where there are no  
shorthand writer’s notes of the evidence, and no notes  
taken by the judge of the County Court available for the  
purpose of appeal, the High Court (Admiralty Division)  
will order the appeal to be heard on *voir dire* evidence.  
(*The Confidence; The Susan Elizabeth.*) ... .. 201

Damage to cargo—Parties—Indorsee of bill of lading—  
Seaworthiness—Peculiar construction of ship—Stowage  
—Dunnage—Trinity Masters—Evidence of, as to report—  
18 & 19 Vict. c. 111, s. 2—24 Vict. c. 10, s. 6.—The ordinary  
warranty as to seaworthiness in a bill of lading is a  
warranty that the ship is seaworthy at the time, and  
reasonably likely to continue seaworthy on the voyage  
specified. If from special circumstances in her construc-  
tion she requires special appliances to preserve the cargo  
from sea damage, the owner is bound to provide those  
appliances, and will be liable for damage to cargo arising  
from the want of them. Where Trinity Masters are  
desired to inspect and report to the court, their report  
is not necessarily confined to those matters on which  
evidence has been given, but may include any circum-  
stances in their opinion affecting the merits of the case.  
An indorsee of a bill of lading has a right to sue for  
damage to the cargo arising from a breach of the contract

## SUBJECTS OF CASES.

- contained in the bill of lading under the Bills of Lading Act 1856, and in the case of a foreign vessel to take proceedings in rem under the Admiralty Court Act 1861, though at the time of the institution of the suit he has sold the cargo. (*The Marathia*.) ... 163
- Jurisdiction—Collision—Arrest—International law—Constitutional law—Ex-territoriality—Mail packet—Government vessel—Foreign sovereign State—Crown and subject—Treaty-making power.**—A vessel belonging to or chartered by a foreign Government, and regularly employed for the purpose of carrying mails and passengers and some cargo, is not entitled to the privileges of a man-of-war as to ex-territoriality; but is liable to an action for damage done by her to the vessel of a British subject, and to arrest if the suit is in rem. The Crown of this country has not power, by treaty with a foreign Government, to give its vessels of, or employed by, that Government other than vessels of war the privilege of freedom from civil process extended by international law to vessels of war. Where the Crown appears to protect against the jurisdiction of the court being exercised against a vessel belonging to a foreign power, it has the same right of reply as in cases where it appears on its own behalf. (*The Parlement Belge*.) ... 222
- Foreign vessel of war—Maritime lien—Ex-territoriality—Salvage.**—The High Court of Justice, Admiralty Division, will not allow a warrant to issue for the arrest of a foreign vessel of war, or of private property on board of her, and of which the Government to which she belongs have the care, at the suit of salvors. (*The Constitution*.) ... 219
- Lights—Damages—Collision—Infringement—Pilot vessel.**—A vessel in tow—Regulations for preventing collisions at sea—Articles 5 and 8—36 & 37 Vict. c. 85, s. 17.—A sailing vessel of any description when in tow is bound to carry at night the two coloured side lights prescribed by Articles 3 and 5. The white masthead light prescribed by Article 8 for sailing pilot vessels is only to be carried by those boats when independent, and not in tow of any other vessel. A sailing vessel, and, *semble*, any other vessel, towing another vessel, is responsible for the lights carried by both vessels being in accordance with the regulations, and an infringement by the towed vessel brings the towing vessel within the scope of sect. 17 of the Merchant Shipping Act 1873. (*The Mary Howarth*.) ... 368
- Practice—Amended writ—Default cause—In rem—Service.**—After a vessel has been sold under an order of the Judge of the Admiralty Division, and the proceeds are in the registry, no owner having appeared, the writ in an action against those proceeds, whether original or amended subsequent to the sale, must be personally served on the registrar. An amended writ must in all cases be served in the same way as an original writ would be under similar circumstances. Where a writ is served on the registrar, to render the service good, the provisions of Order IX., r. 13, must be strictly adhered to. (*The Cascovia*.) ... 869
- Costs—Cargo Owners suing—Both to blame.**—Where an action is brought by owners of cargo laden on board one ship against another ship for damages sustained by the cargo through collision between the ship in which it is laden and that other vessel, and both vessels are found to blame for the collision, the plaintiffs will recover their costs as well as half their damages from the ship against which they have brought their action. (*The City of Manchester*.) ... 591
- Discovery—Salvage—Tender and admission of statement of claim—Reply—Amendment.**—A plaintiff in a salvage action in the Admiralty Division, in which the defendants admit the allegations in the statement of claim, and tender a sum in satisfaction, is nevertheless entitled to discovery and inspection of documents, but at his own risk and cost if such discovery and inspection should be held at the hearing to have been unnecessary. *Quere*, is a reply necessary in a salvage action where the only defence is admission to the plaintiff's facts and tender of a sum in satisfaction which is rejected by the plaintiff? Leave given to reply, and claim amended before reply. (*The Maria*.) ... 295
- Trial by jury—Admiralty Division—Transfer—36 & 37 Vict. c. 77, s. 11 (3) (3) Order XXXVI. r. 5, 27.**—An action assigned to the Admiralty Division, but which would not have been within the cognizance of the High Court of Admiralty before the Judicature Acts, transferred to another division on that ground, not on the ground that it could not be tried in the Admiralty Division by a jury. *Semble*, an action may be tried, and the issues of fact therein decided, by a jury, in the Admiralty Division of the High Court as well as in the Common Law Divisions. (*The Seaham*.) ... 38
- Salvage—Damage to salvor—Demurrage.**—Where a vessel in rendering salvage service sustains damage without negligence on her part, she is entitled to be repaid for such damage, and demurrage during repairs, by the owner of the vessel salvaged. (*The Mud Hopper*.) ... 462
- Pilotage.**—A person, whether a pilot or not, who takes charge of a vessel in distress, with the consent of her master, is entitled to salvage reward, in the absence of an express contract to the contrary. *Semble*, it is immaterial whether, under such circumstances as would entitle a person to salvage reward in any case, the person claiming salvage does or does not hold himself out rightly or wrongly as being a pilot, so long as he performs the service. (*The Anders Knapp*.) ... page 684
- Salvage suits, consolidation of—Rival salvors—Tender.**—The court has power to order the consolidation of salvage suits in all cases, but it will not usually exercise the power contrary to the wish of the various plaintiffs; but if the plaintiffs institute and prosecute several suits without necessity, they will be condemned in costs. When there are separate suits instituted in respect of services rendered to a vessel and her crew by rival salvors, and the defendant is unable to estimate the respective values of two several services, he will be allowed to make a single tender in respect of the whole services rendered. (*The Jacob Landstrom*.) ... 38
- Thames Conservancy Rules—Collision—Damages—Practice—Costs.**—The owners of a vessel which has infringed a regulation as to lights, made by a competent authority, must, when plaintiffs, show that that infringement could not have caused or contributed to the collision. It is not necessary for the defendants, who are not counter-claiming for damages, to prove that in point of fact it did cause or contribute to it. *Quere*, whether an infringement of the Thames Conservancy Rules 1875 causes the vessel infringing them to be "deemed to be in fault," within the meaning of sect. 17 of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85). In future the costs in Admiralty appeals, as in all other appeals, will follow the event, notwithstanding the former practice of the Judicial Committee of the Privy Council in certain Admiralty appeals. (*The Condor*.) ... 443
- Towage—Salvage—Negligence—Damage—Tug and tow.**—Where in the performance of towage service the tow gets into a position of danger, to extricate her from which would entitle a stranger to salvage reward, the tug is not entitled to any reward if the situation in which the tow was placed was the result of negligence in the tug, and the tow is entitled to be reimbursed by the tug's owners for loss occasioned to the tow in being extricated from the position of danger. Where the tug is familiar with the navigation and the tow a foreigner, it is the duty of the tug to tow in a safe direction, without waiting for directions from the vessel in tow. (*The Robert Duncan*.) ... 313
- AIR.**
- Prescription—Obstructing access of air—Nuisance.**—The owner of a dwelling-house cannot claim, as against an adjoining occupier, a prescriptive right either at common law or by statute, to have a free access of air to his premises.—Plaintiff was owner of a house which for more than twenty years had the free access of air to it. Defendant, an adjoining occupier, raised the walls of his house, and piled timber upon the roof, so as to cause plaintiff's chimneys to smoke. Plaintiff claimed damages in respect of the nuisance so caused. Held, that plaintiff was not entitled to maintain the action. (*Bryant v. Lefevre and others*.) ... 579
- ANNUITY.**
- Grant of—Policy of insurance effected by grantee—Redemption—Right to policy.** (*Preston v. Neale*.) ... 303
- ARBITRATION.**
- Application to refer back an award—Discretion of the court or judge to entertain such an application within reasonable time—9 & 10 Will. 3, c. 15, s. 2—11 Geo. 4 & 1 Will. 4, c. 70, s. 6—17 & 18 Vict. c. 125, ss. 5 and 8.**—The court has a discretion to entertain an application to refer back an award if made within a reasonable time, or for good cause shown, though made after the time which was fixed for such applications under the old system of terms. (*Leicester v. Grazebrook*.) ... 883
- Architect—"Knowingly or negligently" certifying for insufficient amount—Not equivalent to fraudulently.**—An action will not lie against an architect for not using due care and skill in ascertaining the amounts to be paid by a builder's employer to the builder under a contract which provides that the builder is to be paid on the certificate of the architect, that all matters in dispute are to be left to the architect's decision, that he may order any additions to or deductions from the contract, and that the amount of such additions or deductions shall be ascertained by him at a certain fixed rate; the functions of the architect under the contract being not merely clerical, but requiring the exercise of a judgment or opinion.—An allegation that the architect "knowingly or negligently" certified for a much less sum than was due does not disclose a cause of action, as it does not amount to a charge of fraud. The architect is not bound, upon the application of one of the parties, to reconsider his certificate, or to give reasons for it. (*Stevenson v. Watson*.) ... 485
- Costs—Incorporation of general with special Act—Ascertainment of costs—Condition precedent—Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18) s. 34, and 1869 (32 & 33 Vict. c. 18) s. 1. (*Sharpe v. The Metropolitan District Railway Company*.) ... 416**
- Costs of reference and award—County Court Act 1867 (30 & 31 Vict. c. 142), s. 5.**—An order of reference, made by consent, in an action founded on contract, pro-

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vided that the costs of the certificate and award should be in the discretion of the arbitrator, who should award or certify by whom or to whom the same should be paid. The arbitrator awarded 10*l.* 8*s.* 4*d.* to the plaintiff, and directed that the defendant should pay to the plaintiff the costs of the reference and award, but did not certify under 30 & 31 Vict. c. 142, s. 5, that there was sufficient reason for bringing the action in a Superior Court. Held, that the plaintiff was entitled to these costs without such a certificate. (*Galatti v. Wakefield.*) ... ..page 30

## ASSIGN.

The defendant's predecessor in title purchased certain land, and covenanted for himself, his heirs, executors, administrators, and assigns, with the vendors and their assigns, and with the owners of adjoining lots, their heirs and assigns, not to carry on a certain trade. The plaintiff was lessee of one of such owners, and brought this action for an injunction to restrain the defendant from committing a breach of the covenant. Held, that the plaintiff was an "assign" within the meaning of the covenant, and was entitled to the injunction. (*Tait v. Goeling.*) ... .. 250

## ATTACHMENT.

Contempt—Untrue copy of order delivered—38 & 37 Vict. c. 12.—An order was made, and was served, ordering the father of an infant to deliver the infant to her mother. The order was entitled in the matter of the infant and in the matter of the Act 38 & 37 Vict. c. 12. The copy delivered was entitled only in the matter of the Act, and not in the matter of the infant, but was indorsed on the outside "Re Holt," the surname of the infant. A writ of attachment was issued for non-compliance with the order, and the father was imprisoned. Held, that the service was insufficient, and the writ of attachment must be set aside. (*Re Holt, an infant.*) ... .. 207

## BAILOR AND BAILEE.

Trover and conversion—Wrongful delivery of goods by warehousemen—Liability—Measure of damages—Nominal damages. (*Hort and another v. The London and North-Western Railway Company.*) ... .. 674

## BANKRUPTCY.

Absconding debtor—Debtors' summons—Foreigner in England for a temporary purpose—Arrest—Absconding Debtors' Act 1870, s. 1.—There is no presumption in the case of a foreigner about to leave England after a temporary stay here, as there might be in the case of a domiciled Englishman going abroad, that he is going away with the intention of defeating his creditors. (*Ex parte Gutierrez; Re Gutierrez.*) ... .. 355

Appeal—Time for—Adjudication as a trader—Person aggrieved—Affidavits not filed in time—Practice—Bankruptcy Act 1869, 10, 34, 71—Bankruptcy Rules 1870, rr. 143, 144.—An appeal against an order of adjudication by a person aggrieved must be brought within twenty-one days, notwithstanding that the alleged grievance does not arise until long after the twenty-one days prescribed by the 143rd rule have expired. Upon an appeal from the decision of a County Court the Chief Judge will not shut out evidence not before the court below, where the proposed evidence has been filed and notice given in ample time to allow the effect of such proposed evidence to be fully considered and answered by the other side. (*Ex parte Wigg; Re Johnson.*) ... .. 538

Notice to registrar—Delay—Evidence to explain—Practice—Bankruptcy Act 1869, sect. 71—Bankruptcy Rules 1870, rr. 143, 144, 147.—Where the order appealed from was made on the 21st April, and notice of appeal was duly left and entered with the registrar of appeals, but no notice of the appeal was served upon the registrar of the court appealed from until the 19th May: Held, that the appeal was out of time, and could not be heard. The court will not admit evidence not before the court below in order to explain the delay. (*Ex parte Donithorne; Re Green.*) ... .. 660

*Locus standi*—"Person aggrieved" by order—Alleged creditor—Bankruptcy Act 1869, s. 71. (*Ex parte Ditton; Re Woods.*) ... .. 297

Bill of sale—Consideration—Forbearance to seize under prior bill of sale—Assignment of whole of grantor's property—Act of bankruptcy.—The forbearance of a creditor to seize under a bill of sale is not a sufficient equivalent for a second bill of sale, so as to prevent it from being an act of bankruptcy and void as against the trustee in bankruptcy as an assignment of the whole of the grantor's property for a past debt. (*Ex parte Payne; Re Cross.*) ... 563

Prior agreement—Bankruptcy Act 1869, s. 6.—An agreement for value by a debtor to execute a further security to his creditor, "if required," is not conditional but absolute. Where a debtor shortly before his bankruptcy executed a bill of sale of all his property, with the exception of book debts, in pursuance of a memorandum of agreement previously executed by him for valuable consideration: Held, that, in the absence of fraud, the bill of sale was valid as against the trustee in the subsequent bankruptcy of the debtor. (*Ex parte Barker; Re Barker.*) ... .. 582

Bill of sale—Unregistered—Prior act of bankruptcy—No notice of—Possession taken—Adjudication—Protected transaction—Bankruptcy Act 1869, s. 85. (*Ex parte Cochrane; Re Cross; Ex parte Payne; Re Cross.*) ...page 296

Unregistered bill of sale by debtor in custody—Goods in hands of the police—Apparent possession—Bills of Sale Act 1854, s. 7. (*Ex parte Newham; Re Wood.*) ... .. 104

Composition—Registration—Costs of solicitors appointed by creditors—Jurisdiction—Bankruptcy Act 1869, sect. 126—Bankruptcy Rules 1870, r. 275. Where the creditors of a liquidating debtor resolved to accept a composition, and appointed a firm of solicitors to register the resolutions: Held on appeal that the court has no jurisdiction to order the debtor to pay the costs of the solicitors appointed by the creditors to register the resolutions, no provision having been made by the creditors for that purpose. (*Ex parte Gush; Re Pratt.*) ... .. 530

Small amount of assets—*Bona fides*—Second petition—Bankruptcy Rules 1870, r. 284.—A debtor filed a petition for liquidation, but his statement showed no available assets. The creditors nevertheless passed a resolution for a composition of one shilling in the pound, which was accordingly paid to them. The resolution not having been filed within the three days limited by the 284th rule, the debtor presented a second petition under which the creditors passed a similar resolution. Held, that the presentation of the second petition was regular, and that the resolution to accept the composition ought to be registered. Where there has been actual payment of a composition no security is necessary. (*Ex parte Thomas; Re Press.*) ... .. 835

Contract—Completion by surety—Right of assignee in bankruptcy to sue. (*Cohen v. Sandeman.*) ... .. 370

Debtors' Act 1869—Prohibition.—The application of the trustee in a liquidation under sect. 16 of the Debtors' Act 1869, for an order to prosecute the liquidating debtor for fraudulently removing his property, ought not to be refused merely upon the ground that the trustee has recovered the property so removed. (*Ex parte Monkhouse; Re Ward.*) ... .. 296

Debtor's summons—Bankruptcy petition—Tender of part of debt—Refusal to accept—Bankruptcy Act 1869, ss. 6, 7, 8, 9. (*Ex parte Astrup; Re Lefevre.*) ... .. 403

Discharge—Omission of creditor from debtor's statement—Right of action.—A debtor who has obtained his discharge in liquidation proceedings, under sect. 125 of the Bankruptcy Act 1869, is not liable, in respect of a debt provable in the liquidation at the suit of a creditor who, without fraud, was omitted from the debtor's statement of affairs, and had no notice of the liquidation. (*Elmalie and others v. Corrie.*) ... .. 150

Double proof—Two firms composed of same individuals—One estate administered in different countries—Bankruptcy Act 1869, s. 37. (*Ex parte Banoo di Portugal; Re Hooper.*) ... .. 406

Fraudulent preference—Repayment of money sent for specific purpose—Bankruptcy Act 1869, s. 92. (*Ex parte Kelly and Co.; Re Smith and Co.*) ... .. 404

Jurisdiction—Transaction void as against trustee—Bankruptcy Act, 1869, s. 72.—Where an assignment by a person who has subsequently become bankrupt is impugned on the ground that it is void by the operation of the bankrupt law, and not on a ground which would have been available to the bankrupt himself, the Court of Bankruptcy will decide the case itself, and not leave it to be dealt with by the ordinary tribunals. (*Ex parte Brown; Re Yates.*) ... .. 402

Lease—Disclaimer—Proof for damages—Lease for term determinable by lessee—Measure of damages—Bankruptcy Act 1869 (32 & 33 Vict. c. 71) s. 23.—A lease of a house for twenty-one years, at a rent of £130 a year, was determinable by lessee at the end of the first seven or fourteen years of the term on his giving six months' previous notice in writing to the lessor, and paying the rent and performing the covenants up to the day of the term being determined. Near the end of the sixth year of the term the lessee filed a liquidation petition. The trustees in the liquidation disclaimed the lease. There was evidence that the house could only be let at a diminished rent. Held, that the lessor was entitled to prove in the liquidation for the diminution in the rent up to the end of the seventh year of the term, and the amount necessary to put the house in repair. (*Ex parte Blake; Re McEwan.*) ... .. 859

Lease of chattels—"Leasehold interest"—Disclaimer—Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 23—Bankruptcy Rules July 1871, r. 28.—A lease of personal chattels is not a "leasehold interest" within rule 28 of the Bankruptcy Rules of July 1871; and a trustee in bankruptcy therefore need not obtain the leave of the court to disclaim such a lease. (*The Sheffield Waggon Company, Limited, v. Stratton and others.*) ... .. 98

Liquidation—Action for payment of judgment and mortgage debts—Writ of elegit—Receiver—Tacking—27 & 28 Vict. c. 112, s. 1—Bankruptcy Act 1869, s. 16, sub sect. 5. (*Ex parte Evans; Re Watkins.*) ... .. 536

Bank employed to collect average orders—Agency—Following money and cheque. (*Re The West of England and South Wales District Bank; Ex parte Dale, Young, and Co.*) ... .. 712

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- Liquidation**—Release of trustee—Property undistributed—*Bankruptcy Act 1869, ss. 51 and 125, sub-sects. 5, 7, 9—Bankruptcy Rules 1870, r. 124.*—All the property of a debtor which is vested in the trustee at the time of his liquidation continues vested in him, notwithstanding his release and the discharge of the debtor. (*Ex parte Witt; Re Armstrong.*) ... page 484, 823
- Married woman**—Separate estate—Debt contracted during coverture—Debtor's summons—*Bankruptcy Act 1869, ss. 6, 7.*—A married woman cannot be made a bankrupt in respect of a debt or obligation contracted by her after her marriage, although she has property settled to her separate use. (*Ex parte Jones; Re Grissell.*) ... 790
- Mortgage**—Secured creditor—Valuation of security—Proof for balance of debt—Costs of unsuccessful defence of title to part of security.—A secured creditor who has realised his security is entitled, in proving in the bankruptcy of the mortgagor for the balance of his debt, to bring into account the costs of an unsuccessful defence of the title to part of his security. (*Ex parte Carr; Re Hoffmann.*) ... 299
- Mutual dealings**—Joint and separate debts—Agreement to be liable—*33 & 35 Vict. c. 73, s. 39.*—For twenty years the defendants had been accustomed to settle each year the balance between the goods supplied to them by a firm and the goods supplied by them to the several members of that firm. Upon the firm's liquidation under the *Bankruptcy Act*, the defendants sought to set off the amounts due for goods supplied to the separate members against the amount of goods received from the firm. A County Court judge found, in an action raising this set-off, that there was no agreement, either express or implied, to make the firm liable for the debts of the separate members. Held, upon a rule nisi, that there could not be mutual dealings within the meaning of the 39th section of the *Bankruptcy Act 1869*, unless there were some agreement of the kind negatived by the judge's finding. (*Tyso v. Pettit.*) ... 132
- Official assignee**—Insolvency—Mortgage—Equity of redemption—Release—Colonial Insolvency Statute, 1865, sects. 27, 40, 66, 71, 78, 81—Executor's contract not under seal—Part performance—Consideration.—The general powers of an official assignee in bankruptcy give him a right to release the equity of redemption in mortgaged property vested in him to the mortgagee, in the absence of statutory provision to the contrary. (*The Melbourne Banking Corporation, Limited, v. Brougham.*) ... 15
- Partnership**—Business of, carried on by surviving partner and executors of deceased partner—Subsequent bankruptcy—Assets remaining in specie—Joint and separate creditors.—The Court of Bankruptcy is a court of equity, and the principles which govern the administration of property in the Court of Chancery are applicable to administration in bankruptcy. (*Ex parte Manchester and County Bank; Re Mellor.*) ... 7 8
- Petition**—Description of debtor—Registration of resolutions—*Locus standi*—Withdrawal of proof—*Bankruptcy Act 1869, s. 82—Bankruptcy rules 1870, rr. 208, 252, 273, 295—Bankruptcy forms 1870, No. 106.*—A farmer who occupied a farm at M., in the county of L., filed a liquidation petition, in which he described himself as "of M., in the county of L., cattle dealer." Held that the description was not misleading, so as to invalidate the liquidation resolutions. Semble, that a creditor who has withdrawn his proof at the first general meeting has not, under rules 273 and 295 of the *Bankruptcy Rules 1870*, any *locus standi* before the registrar on the registration of the resolutions. (*Ex parte Kirkwood; Re Mason.*) ... 567
- Possible surplus of estate**—Mortgage of such surplus—Examination of alleged creditor—*Bankruptcy Act 1869, s. 20—Bankruptcy Rules, 1870, r. 166.*—A person to whom a bankrupt has assigned the possible surplus of his estate, after paying all creditors in full, to secure advances made to him since the commencement of the bankruptcy, does not by such assignment acquire any right to interfere in the administration of the estate, and has no right, under rule 166 of the *Bankruptcy Rules 1870*, to have an alleged creditor examined with reference to his proof. (*Ex parte Sheffield; Re Austin.*) ... 15
- Post-nuptial settlement**—Trader—Leaseholds—Purchaser for value—*Bankruptcy Act 1869, s. 91.*—A trader within two years before the commencement of his bankruptcy executed a post-nuptial settlement, whereby he assigned to trustees, in favour of his wife and children, certain leasehold houses subject to the rent and covenants contained in the lease. Held, that the settlement was void as against the trustee in bankruptcy. (*Ex parte Hilmann; Re Pumfrey.*) ... 178
- Promissory notes** undorsed—Subsequent indorsement—Registration—Right of creditor—*Bankruptcy Act 1869, sects. 31 and 135.*—A *bond fide* holder for value of promissory notes, which were undorsed at the date of tender for proof, procured the necessary indorsement before application to register the resolutions. Held, that he was entitled to prove for the full amount of his debt, and that the time of the indorsement of the notes was immaterial. (*Ex parte Pike; Re Eslick.*) ... 529
- Proof**—Bankers' lien—Bills deposited for discount—Bankers with whom bills of exchange have been deposited by a customer for discount, and who in the meantime have made advances to the customer in respect of those bills, are entitled, upon the customer going into liquidation, to retain all the bills in their hands and prove for the full amount thereof, and receive dividends thereon from time to time, giving credit only for the sums received by them in respect of such of the bills as may have been paid in the meantime. (*Ex parte Schofield; Re Firth.*) ... page 484, 823
- Proof**—Felonies—Embezzlement by clerk—Omission to prosecute—*Bankruptcy of injured person*—Right of trustee to prove. (*Ex parte Ball; Re Shepherd.*) ... 141
- Equitable set-off**—Mutual credit—*Bankruptcy Act 1869, s. 39.* (*Ex parte Morier; Re Willis.*) ... 793
- Lender**—Share of profits by—Partnership Law Amendment Act 1865 (28 & 29 Vict. c. 86), ss. 1 and 5. (*Ex parte Taylor; Re Graesson.*) ... 838
- Rejection of**—Delay—*Bankruptcy Rules 1870, rr. 22, 72, 73, 75, 118.*—The *Bankruptcy Rules* are not imperative, but directory only. A trustee does not, by allowing three months to elapse after a proof is sent in, lose his right to reject it. (*Ex parte De Boos; Re Shallow and Ingle.*) ... 659
- Protected transaction**—Execution creditor—Sale by high bailiff before the time fixed by statute—Act of bankruptcy—Notice of County Courts Act 1846, s. 106—*Bankruptcy Act 1869, s. 95, sub-s. 3.*—An execution levied by seizure upon the goods of a trader under a County Court judgment, and sold by the high bailiff by consent of both parties after the commission of an act of bankruptcy of which the execution creditor had notice, and upon which the adjudication subsequently proceeded, but before the expiration of the five days required by the County Courts Act 1846 (9 & 10 Vict. c. 85), s. 106, is not a protected transaction within s. 95, cl. 3, of the *Bankruptcy Act 1869*. (*Ex parte Bulmer; Re Hughes.*) ... 40
- Reputed ownership**—Order and disposition—Goods sent on sale or return—Well-known custom of trade—*Bankruptcy Act 1869, s. 15, sub-sect. 5.*—Goods which have been sent to a dealer on sale or return, in accordance with a well-known custom of trade, and which are, at the commencement of the bankruptcy, in the possession of the bankrupt, do not pass to the trustee as being goods of which the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner within the meaning of sect. 15, sub-sect. 5, of the *Bankruptcy Act 1869*. A horse was sent to a dealer on sale or return, in accordance with a well-known custom of the horse-dealing trade, and the debtor was soon afterwards adjudicated a bankrupt, the horse being in his possession at the date of the adjudication. Held, that the custom of the trade excluded the reputation of ownership, that the bankrupt had not taken upon himself the sale or disposition of the horse as owner, and that the horse must be delivered up to the true owner. (*Ex parte Wingfield; Re Florence.*) ... 15
- Rights of the Crown**—Liquidation petition—Appointment of receiver—Extent issued between filing of petition and appointment of trustee—Relation back of trustee's title—*Bankruptcy Act 1869, ss. 11, 13, 32, 40, 65, 72, 125—Bankruptcy Rules 1870, rr. 260, 262.*—The Crown is not bound by the general provisions of the *Bankruptcy Act 1869*, but only by those sections in which it is expressly named, and consequently the Crown is not affected by the relation back of the title of the trustee in a bankruptcy or liquidation. Therefore, the Crown is entitled to levy an extent on the property of a liquidating debtor after the filing of the petition, and the appointment of a receiver, who has taken possession of the debtor's property, if it does so before the appointment of a trustee; for the filing of a petition, and the appointment of a receiver does not amount to a *cessio bonorum*, and the property remains in the debtor in the interval between the filing of the petition and the appointment of the trustee. (*Ex parte The Postmaster-General; Re Bonham; Ex parte The Lords of the Treasury; Re Bonham.*) ... 16
- BASTARDY.**
- Married woman living with her husband**—Justices' jurisdiction—*35 & 36 Vict. c. 65, s. 3.*—A single woman, after being delivered of a bastard child, got married, and, whilst living with her husband, applied for an affiliation summons against the putative father. Held, upon a case stated by justices, that the 3rd section of the *Bastardy Laws Amendment Act 1872* does not apply to such a case, and that the justices rightly refused to make an order. (*Stacey, app., v. Lintell, resp.*) ... 553
- BILL OF EXCHANGE.**
- Inchoate bill stolen**—*Bond fide* holder for value—Liability of acceptor for negligence—Forgery of drawer's name. (*Baxendale v. Bennett.*) ... 23
- Partnership**—Name of individual used as name of firm—Acceptance—Onus of proof. (*Yorkshire Banking Company v. Beaton and Mycock; Leeds and County Company v. the same.*) ... 654
- BILL OF SALE.**
- Change of residence before registration**—Description in affidavit—*17 & 18 Vict. c. 83, s. 1.*—Where the maker of a bill of sale has changed his residence between the date of the bill of sale and the date of registration the affidavit filed with the bill of sale should state the residence at



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the date of the affidavit, and not at the date of the bill of sale. (*Button v. O'Neill*.) ... 799

Construction—Power to take possession on grantor becoming embarrassed in his affairs—Subsequent proviso entitling grantor to retain possession till default in payment—Friendly possession—Order and disposition—Bankruptcy Act 1869, sect. 15. (*Ex parte The National Guardian Assurance Company; Re Francis*.) ... 237

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## BUILDING SOCIETY.

Mortgage—Action by member to redeem—Reference to arbitration—Friendly Societies Act.—The respondent was a member of a building society formed under the 6 & 7 Will. 4, c. 32, and not registered under the 37 & 38 Vict. c. 42 (the Building Societies Act 1874). As such member he had mortgaged property to the society to a large amount. In a suit brought by him for a redemption of the property and an account, the defendants asked that the matter might be referred to arbitration, in accordance with the rules of the society, under the 10 Geo. 4, c. 56, s. 27. Held, that the provisions of this section were not applicable to a dispute where the relation of mortgagor and mortgagee existed. (*Mulkern and another v. Lord*.) ... 594

## CHARGING ORDER.

Practice—Judgment debt—Death of judgment debtor prior to order nisi—1 & 2 Vict. c. 110, ss. 14, 15—Rules of Court 1875, Order L.—No order charging stock under 1 & 2 Vict. c. 110, will be made absolute where the judgment debtor has died; before the order nisi has been obtained. An order nisi, charging certain stock standing in the name of a judgment debtor, had been made absolute at chambers, although it was in evidence that at the time the order nisi had been obtained the judgment debtor was dead. Defendant's executor now appealed against the order. Held, that the order must be rescinded, as a charging order, under 1 & 2 Vict. c. 110, was merely in lieu of the old remedy of arrest by mesne process, and was only co-extensive with such remedy, and therefore could not be put in force where the judgment debtor had died before the order nisi had been obtained. (*Finney v. Hinde*.) ... 193

## COMPANY.

Costs of obtaining special Act.—By the special Act incorporating a company it was provided as follows: "All costs, charges, and expenses of and incident to the preparing for, obtaining, and passing of this Act, or otherwise in relation thereto, shall be paid by the company. Held, that a person who had done work towards obtaining the Act, but only as clerk to a promoter of the company, could not prove for his remuneration in the winding-up of the company. (*Re The Kent Tramways Company*.) ... 393

Creditor of Company—Preferred shareholders—Debentures and express charges—Priority. (*Between Thomas Bouch (Judgment Creditor); The Sevenoaks, Maidstone, and Tunbridge Railway Company (Judgment Debtors); The London, Chatham, and Dover Railway Company, Garinches; and George Herbert Pember*.) ... 560

Director—Loan by a firm to the company—Partner in the firm a director—Omission to register security—Companies Act 1862, s. 43. (*Re South Durham Iron Company; T. T. Smith's case*.) ... 572

Promotion money—Breach of trust or misfeasance—Companies Act 1862, s. 165.—A director of a company who has knowledge of a fraud, breach of trust, or misfeasance, committed before he was a director or connected with the company, by which the company's money was lost, is not liable under sect. 165 of the Companies Act 1862, or otherwise, for not communicating such knowledge to the company, or for not instituting proceedings for the recovery of the money lost. (*Re Forest of Dean Coal Mining Company*.) ... 237

Trust—Mortgage deed—Debentures—Companies Act 1862.—A deed was executed in favour of trustees who were not directors of a company, charging all the property of the company in favour of the holders of debentures issued thereunder. The trustees were not directors; but certain directors held debentures. Held, that the debentures created no charge on the company's assets, but derived force simply from the mortgage deed; that there was nothing to show that the directors "knowingly and wilfully authorised or permitted" the omission to register; and that there was nothing in the Act and nothing in the general principles of equity to deprive these directors of their charge. It is the function of equity to relieve from penalties and not to inflict others in addition to those imposed by an Act of Parliament. (*Re The Globe New Patent Iron and Steel Company Limited*.) ... 390

Fraud of directors—Rescission of contract—Winding-up. (*Finney v. The City of Glasgow Bank and Liquidators*.) ... 695

Mortgage—Attornment clause—Winding-up order—Distress—Judicature Act 1875, s. 10—Bills of Sale Act 1854. (*Re The Stockton Ironworks Company*.) ... 19

Mortgage by director—Companies Act 1862, s. 43. (*Re South Durham Iron Company; Smith's case*.) ... 63

Promotership—Promotion money, liability to refund—Purchase money, application of—Fiduciary character. (*Emma Silver Mining Company v. Lewis and Son*.) page 188, 749

Right of minority of shareholders—Suit by shareholders on behalf of all the shareholders—Frame of suit—Whether in name of company—Directors—Breach of trust. (*Mason v. Harris*.) ... 644

Shareholders suing in name of—Majority opposed to proceedings—Leave to add company's name as defendant. (*Silber Light Company, Limited, v. Silber*.) ... 96

Unlimited—Trustees—Personal liability—Construction of contract.—It is competent for a trustee to contract by apt words in such a manner as to bind only his trust estate; but whether in any particular case the contract of a trustee is one which binds himself personally, or is to be satisfied only out of the trust estate, is a question of construction to be decided with reference to the circumstances of the case. In this respect there is no difference in principle between English and Scotch law. In a case in which certain persons, trustees for S. and B., had become shareholders in a joint-stock company, in which the liability of the shareholders was, by the deed of partnership, unlimited, and their names and addresses were entered in the stock ledger of the company, followed by the words, "as trust disponents of S. and B." Held, that the trustees had thereby rendered themselves personally liable for the debts of the company; and that the above words served only to distinguish the particular fund. (*Muir and others v. The City of Glasgow Bank and Liquidators*.) ... 339

Voting—Meeting of shareholders—Mode of taking votes when no poll demanded—Companies Act 1862, ss. 51, 179 Table A, clauses 42, 43, 44.—By the articles of a company, each shareholder had a vote for each share. At a meeting at which the winding-up was resolved upon, five shareholders were present. One shareholder proposed M. as liquidator; another proposed K. Three shareholders voted for M. and two, who held a greater number of shares, for K. A poll was not demanded. Held, that a poll not having been demanded, the voting was by show of hands, and not according to the number of shares, and that K., for whom two persons only had voted, while three voted against him, was not duly elected, and that M. was. The common law of all meetings is that votes are taken by a show of hands, and that common law must prevail unless the articles of association of a company contain any provision to the contrary. (*Re Horbury Bridge Coal, Iron, and Waggon Company*.) ... 351

## WINDING-UP.

Action against liquidator—Transfer—Order L., r. 2a.—An action was commenced in the Exchequer Division against the liquidator of a company which was being wound-up in the Chancery Division, claiming damages for injuries sustained through the negligence of the company. A motion by the liquidator to transfer the action from the Exchequer Division to the Chancery Division was refused on the plaintiff undertaking to amend his writ by suing the liquidator personally; the plaintiff's right to prove against the company in the winding-up not to be prejudiced thereby. (*Re Thames Ferry Company*.) ... 422

Agreement for a lease between creditor and a stranger—Sanction of company—Companies Act 1862—Joint-Stock Companies Arrangement Act 1870.—Where the approval of the shareholders of a company, by the requisite majority, has been given to an honest arrangement between the company and its creditors, such approval is not a condition precedent to giving the sanction of the court. (*Smith v. The Dynevor, Dyffryn, and Neath Abbey United Collieries Company*.) ... 409

Compromise—Sanction of under the Joint Stock Companies Arrangement Act 1870—Execution creditor—Priority—Applying rule in bankruptcy—Companies Act 1862, ss. 85, 87, 163; Bankruptcy Act 1869, s. 87; Judicature Act 1875, s. 10.—The court will not sanction a compromise under the Joint Stock Companies Arrangement Act 1870, when the effect of such an arrangement, if sanctioned, would be to affect a non-assenting creditor, who has a preferential right, which would have been respected if a winding-up order had been made. Where a petition for winding-up has been presented, whether by the company or by creditors thereof, the court will not allow a judgment creditor, who has been induced by the representations and prayers of a company for delay of execution not to issue execution, to be deprived of the benefits which he would otherwise have obtained. The rule in bankruptcy as to an execution creditor under the 67th section of the Bankruptcy Act 1869 is not extended by the 10th section of the Judicature Act 1875 to a company in liquidation. (*Re Richards and Company Limited; Ex parte Crawshaw*.) ... 315

Contributory—Past member—Companies Act 1862, s. 38—Distinct departments—Distinct liability. (*Re The Norwich Provident Insurance Society; Bath's case*.) ... 463

Costs of creditor opposing winding-up petition.—Costs were given to a creditor who opposed a petition by a paid-up shareholder to wind-up an insolvent company. (*Re Carnarvonshire Slate Company, Limited*.) ... 35

Director—Purchase of a vendor's paid-up shares at a discount—Misfeasance of director—Companies Act 1862, s. 165—Admission of new evidence on appeal—Rules of

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- Court 1875, Order LVIII., r. 5. (*Re West Jewell Tin Mining Company; Weston's case.*) ... page 43
- Foreclosure action by mortgagee—Leave to proceed with action.—(*Hamilton's Windsor Iron Works Company.*) ... 569
- Fraud—Vague allegations—Fully paid-up shareholders—Majority of shareholders opposed to a winding-up order.—Where, on a winding-up petition, fraud is alleged, the facts constituting the fraud must be stated, although it is not necessary to state the evidence of the facts alleged. Where there is only a vague allegation of fraud, evidence of the act of fraud is not admissible. *Quere*, whether a winding-up petition can be maintained, where the petitioner, a fully paid-up shareholder, alleges there are no available assets except those to be obtained by the successful prosecution of proceedings against directors and others to get back money they were liable to pay by reason of fraud. (*Re Rica Gold Washing Company.*) ... 531
- Proof—Redeemable annuity—Value of annuity after winding-up—Companies Act 1860, s. 158. (*Re British Nation Life Assurance Association; Ex parte Young and Garratt.*) 83
- Secured creditor—Garnishee order not served till after the commencement of winding-up—Bankruptcy Act 1869, ss. 12, 14.—Companies Act 1862, s. 163—Judicature Act 1875, s. 10—Rules of Court 1875, Order XLV., rr. 1, 2, 3.—A creditor, who before the presentation of a petition for the winding-up of a company obtains a garnishee order *vis* against a debtor to the company, but does not serve the order on the garnishee until after the presentation of the winding-up petition, is not a secured creditor within the meaning of the 12th and 14th sections of the Bankruptcy Act 1869, the provisions of which Act with regard to the respective rights of secured and unsecured creditors are now, by the 10th section of the Judicature Act 1875, made applicable in the winding-up of companies under the Companies Acts 1862 and 1867. (*Re The Stanhope Silkstone Collieries Company, Limited.*) 204
- Rules in bankruptcy—Judicature Act 1875, s. 10—Immovable property in foreign country—Injunction.—Sect. 10 of the Judicature Act 1875 does not make all the rules of bankruptcy apply to a secured debt. There is no mode in a winding-up of applying the bankruptcy rule that a petitioning creditor with a secured debt must either give up or value his security (in the latter case proving for the difference), as there are no means of knowing in the winding-up whether the company is insolvent or not. A secured creditor may present a petition for a winding-up. When a foreign tribunal has seized of a matter respecting immovable property within its jurisdiction, and all the parties are before it, an English court will not interfere. (*Moor v. Anglo-Italian Bank.*) ... 620
- Share capital and unlimited liability—Members—Liability of members not shareholders—Variation of memorandum of association by articles—Rectification of register by inserting name—Companies Act 1862, ss. 23, 35, 38, 98.—When the liability of members of a company is unlimited, and its capital is divided into shares, it does not necessarily follow that the shareholders are the only persons liable as members of the company. There is nothing in the Companies Act 1862 inconsistent with the existence of a company which has both share capital and members who are not shareholders, but have constituted themselves members by agreement. *Semle*, that where a memorandum of association embodies particulars not required by the statute, those particulars may be varied by the articles of association. (*Re The Albion Life Assurance Society; Winstone's case.*) ... 838
- Summoning witnesses deemed capable of giving information as to dealings of company. *Locus standi* of persons so summoned to apply for discharge of order. Discretion of judge. (*Re The Gold Company.*) ... 965
- Trusts (Scotland) Act 1867—Joint-stock company—Winding-up—Resignation of trustee shareholder. (*A. Mitchell v. The City of Glasgow Bank and Liquidators.*) 758
- Unlimited company—Calls—Contributory—Set-off. In the winding-up of a company with unlimited liability a contributory has no right to set off debts due to him by the company against calls made on him by the liquidators. (*Ex parte Branwhite; Re The West of England and South Wales District Bank.*) ... 652
- Voluntary winding-up—Dissolution of company—Companies Act 1862, ss. 142, 143.—When a company has been voluntarily wound-up under the 142nd section of the Companies Act 1862, and has been dissolved under the 143rd section of the Act, the court has no jurisdiction to make a compulsory winding-up order, unless the dissolution can be impeached on the ground of fraud. (*Re The London and Caledonian Marine Insurance Company.*) ... 666
- Exercise of powers of court in compulsory winding-up—Companies Act 1862, ss. 115, 138, 165—Form of order.—A company being in voluntary liquidation, and a petition for a compulsory winding-up having been dismissed, the Court, on the motion of the petitioner, who alleged misfeasance on the part of certain officers of the company, gave liberty to summon such persons for the purpose of giving information as to the alleged misfeasance, but upon the terms that the costs should be reserved, and should be dealt with as the court should think fit. (*Ex parte Carter; Re The Gold Company Limited.*) ... 773
- Voluntary winding-up—Shareholder's petition for compulsory order—Supervision order—Alleged fraudulent allotment—Leave to use liquidator's name—Fraud on public—Allotment of paid-up shares.—A voluntary winding-up is a bar to the making of a compulsory winding-up order on a shareholder's petition, unless there has been fraud in the passing of a resolution for a voluntary winding-up, or the resolution has been passed by the preponderating influence of directors or others whose conduct is alleged to require investigation. (*Re The Gold Company, Limited.*) ... page 5
- CONDITIONS OF SALE.
- Sale under the direction of the court—Conditions misleading—Function of conveying counsel.—The conveying counsel of the court is bound to see that the conditions of sale are proper, in the interest of the persons entitled to the property which is to be sold under the direction of the court; but as between the vendor and the purchaser, any error by him must be treated as the error of the vendor. (*Re Banister; Broad v. Munton.*) 319, 323
- CONTAGIOUS DISEASES (ANIMALS) ACT.
- Sale of goods—Implied warranty—Sale "with all faults"—Breach of statutory duty—The mere fact of exposing for sale in a market animals which are to the knowledge of the vendor suffering from contagious disease will not, in the absence of an express warranty, and of any fraud or concealment on the part of the vendor, create an implied warranty under the statute which would make him liable to the purchaser for damages sustained by him in consequence of the condition of the animals. A breach of a statutory duty does not necessarily give a right of action to the person wronged by such breach. (*Ward v. Hobbs.*) 73
- CONTRACT.
- Acceptance—Letter lost in transmission—Allotment of shares in company.—A contract is binding upon the proposer as soon as a letter of acceptance, properly directed to him, has been posted by any person to whom the proposal has been made, notwithstanding such letter never reaches him, provided that there is no unreasonable delay in accepting the proposal, and that the ordinary and natural mode of transmitting the acceptance is through the post. (*The Household, Fire, and Carriage Accident Insurance Company Limited v. Grant.*) ... 426
- Hiring and letting—Sale on payment of instalments—Expiration of term—Payment—Appropriation. (*The Lancashire Waggon Company, Limited, v. Nuttall and others.*) 291
- Seal—Urban authority—38 & 39 Vict. c. 55, s. 174—Amount exceeding 50*l.*—Public Health Acts.—The surveyor of a local board, by direction of the same, entered into a contract with an architect for the preparation of plans for offices for the board. The plans were prepared and submitted to, and approved by the board, but were ultimately abandoned as involving too large an expenditure. In an action by the architect against the local board the jury assessed the value of the plan at 94*l.* Sect. 174 of the Public Health Act 1875 enacts that "every contract made by an urban authority whereof the value or amount exceeds 50*l.* shall be in writing, and sealed with the common seal of such authority." Held that plaintiff was not entitled to recover for his work and labour in making the plans, as, even if plaintiff had executed the consideration on his part, sect. 174 was not directory merely, but obligatory, so as to render all contracts exceeding in value 50*l.* unenforceable, unless the requirements of the section were complied with. (*Hunt v. Wimbledon Local Board.*) ... 115
- COPYRIGHT.
- Right to use title of a book—Trade mark—Exclusive use of name "Post Office" Directory—Copyright Act 1842 (5 & 6 Vict. c. 45). (*Kelly v. Byles.*) ... 623
- Slander of title—Engraving—Copying in part—Woolwork pattern—Assignment of copyright—Counter-claim for penalties—8 Geo. 2, c. 13.—The copying in the whole or in part of the main design of a copyright engraving by a chromo-printed pattern for woolwork, or by picture worked in wool, is an infringement. A written assignment of the copyright in an engraving is not necessary to establish the right of the assignee to the statutory penalties under 8 Geo. 2, c. 13, for the piracy of such copyright. (*Dicks v. Brooks.*) ... 710
- COSTS.
- Action remitted to County Court—Costs of counter-claim—Alteration of certificate—19 & 20 Vict. c. 108, s. 28.—In an action for freight the plaintiff claimed about 50*l.*, and the defendants counter-claimed about 10*l.* for damage to the cargo, paying the remaining 40*l.* into court. The action was remitted to a County Court under 19 & 20 Vict. c. 108, s. 28, and the registrar certified a verdict for the plaintiff for 16*l.* Held, that the court would alter the certificate by distributing the findings on the issues, so as to enable the defendant to be allowed the costs of his counter-claim. (*Davidson v. Gray.*) ... 192

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Claim and counter-claim—"Action and counter-claim" referred to arbitration—"Costs of the cause and counter-claim to follow the event"—Award in favour of plaintiffs for 371l. of their claim, and of defendants for 375l. of their counter-claim—Award for balance of 4l. to be paid by plaintiffs to the defendants—Proper order as to costs in such a case—Judicature Act 1873, sect. 67—Orders XIX., r. 3; XXII., r. 10; XXX., r. 1; and LV.—County Courts Act 1867 (30 & 31 Vict. c. 148), ss. 5 and 7. (Cole, Marchant, and Co. v. Fifth and another.) ... page 851

Dismissal of action and counter-claim.—Where the plaintiff's action and the defendant's counter-claim were both dismissed with costs: Held, that the general cost of the proceedings were not to be apportioned, but that the plaintiff must pay the general costs of the action, and that the defendant must only pay that sum by which the costs of the proceedings had been increased by the counter-claim. (Saner v. Bilton.) ... 314

Of action where money paid into court and not accepted by plaintiff in satisfaction—Report of official referee—Order LV., r. 1.—Action for damages for breaches of covenant; money paid into court by the defendant without admitting the breaches; plaintiff repiles that the money paid into court is not enough to satisfy his claim. Issue joined, and referred to an official referee, who finds in favour of the defendant as to the sufficiency of the money paid in. Held, that the court, in the exercise of the discretion vested in it by Order LV., r. 1, should in such cases allow the plaintiff his costs of action up to the time of payment into court, and to the defendant his costs of the action subsequent to the payment into court. (Buckton v. Higge.) ... 755

Order that successful party shall not recover costs—Jurisdiction of Divisional Court—Order LV.—A Divisional Court has power under Order LV. to make an order depriving a party, who has been successful in a case tried by a jury, of costs, although no application was made to the judge at the trial. (Myers v. Deffries; Siddons v. Lawrence.) ... 795

Security for—Plaintiff temporarily resident in England. A plaintiff, who is a foreigner, domiciled abroad, and has come to England for the purpose of bringing the action, and intends to leave England as soon as the action is decided, cannot be compelled to give security for costs. (Redondo v. Chaytor and another.) ... 797

Taxation of—Municipal election petition—Counsel's fees—Discretion of master—35 & 36 Vict. c. 60, s. 19, subsect. 2.—The court will not interfere with the master's taxation of counsel's fees, unless there is ground for thinking that he has not exercised a reasonable and fair discretion. (Hargreaves v. Scott and another.) ... 35

## CRIMINAL LAW.

Uttering false and counterfeit coin—Sovereign reduced in weight by filing off the milling—Making a new milling—24 & 25 Vict. c. 99, s. 9. (Reg. v. Hermann.) ... 268

## DAMAGES.

Measure of damages—Costs.—A lessor demised a piece of building land to S., and granted him certain rights of way. He afterwards demised an adjoining piece of land to C., and covenanted with him in the ordinary form for quiet enjoyment. S. claimed to be entitled under his lease to a right of way over part of the land demised to C. The lessor alleged that he had granted no such right of way to S. Thereupon C. brought an action against S. and the lessor, claiming an injunction and damages against S., or, in case the court should hold that S. was entitled to the right of way in question, then damages from the lessor. Held, that, as the plaintiff had not been evicted, he could only recover the damages which he had actually sustained up to the date of the writ in the action, and that, as there was no evidence of actual damage, the amount of the damages ought to be reduced to 40s.; but that the lessor must pay the costs which the plaintiff had been ordered to pay to S., as the action had been caused by his erroneous representation that he had not granted the right of way to S. (Child v. Stenning.) ... 302

Personal injury—Pecuniary loss.—A plaintiff complaining of a personal injury is entitled to compensation for the pain undergone, the effects on the health according to degree and probable duration, the incidental expenses, and the pecuniary loss; and if it appear that a jury must have omitted to take into account any of these heads of damages, and that the verdict is under the circumstances unreasonably small, it is competent to a court to order a new trial at the instance of the plaintiff, although there be no misdirection by the judge, nor mistake or misconduct on the part of the jury. (Phillips v. South-Western Railway Company.) ... 813

## DEBTOR AND CREDITOR.

Mortgage of all grantor's property, present and future—Licence to seize—13 Eliz. c. 5.—A bond *vide* assignment of the whole of a debtor's property, present and future, by way of mortgage to secure an existing debt and future advances to a certain amount, is not void as against the

creditors of the grantor under the 13 Eliz. c. 5, as necessarily tending to defeat or delay them. (*Ex parte Games; Re Bamford.*) ... page 789

## DISCOVERY.

Affidavit of documents—Action of ejectment—Judicature Act 1875, Order XXXI., r. 12.—The defendant in an action of ejectment will not be ordered to make an affidavit of documents unless the court is satisfied, upon the pleadings or upon affidavit, that the plaintiff has some tangible ground of action. (Phillips v. Phillips and others.) ... 815

Interrogatories—Order XXXI., r. 10.—Further answers.—A summons for a further answer to interrogatories must specify the particular interrogatories or parts of interrogatories to which a further answer is required. (Anstey v. North and South Woolwich Subway Company.) ... 393

Petition of right—Petition of Rights Act (23 & 24 Vict. c. 34), s. 7—Order XXXI., r. 12.—By the Petition of Rights Act, sect. 7, statutes and laws in force for the time being for the procuring of evidence shall, so far as the same may be applicable, apply and extend to petitions of right. Held, that Order XXXI., r. 12, applied to enable the Crown to obtain discovery against the suppliant to a petition of right. (Tomlin v. The Queen.) ... 542

Privilege—How claimed in affidavit—Rules of Courts 1875, Order XXXI., r. 13.—It is not enough to state, in answer to an application for production of documents, that certain documents are privileged. The affidavit should also state the grounds upon which privilege is claimed. (Gardner and another v. Irwin and another.) ... 357

## DISTRESS.

Conversion of goods—Rescue—Auctioneer.—The plaintiffs, brewers, were the lessors of a public-house to D., under an agreement which gave them all the rights and remedies of landlords for rent against the effects of the tenant for the recovery of any book-debts for liquors sold by them to him. There being moneys due in respect of such debts, the plaintiffs sent in their bailiff with a written authority to distrain for the amount, who showed his authority to the defendant, an auctioneer then on the premises, took an inventory and made a valuation. The tenant D. and the defendant thereupon proceeded to sell the goods in disregard of such distress—the defendant putting up and knocking down the goods by auction, the tenant handing them to the purchasers. Held, that though the plaintiffs had not such possession as to enable them to sue for conversion, they could maintain an action for a rescue against the defendant, for knowingly assisting in transferring the dominion and property in the goods seized to the respective purchasers. (Iredale v. Kendall.) ... 362

## DIVORCE.

Practice—Dismissal of petition for dissolution by consent—Subsequent petition alleging charges of adultery contained in former petition as well as new matter—Practice.—A petition for dissolution cannot be dismissed on the application of the petitioner without the consent of the respondent and co-respondent. The charges in a petition so dismissed do not therefore amount to *res judicata* (since it is in the power of the respondent and co-respondent to insist upon their determination by the court or a jury), and there is nothing to prevent the petitioner from alleging them in a subsequent petition, together with new matter. (Hall v. Hall and Richardson.) ... 525

## DOCUMENTS.

Order for delivery of documents—Interlocutory application—Rules of Court 1875, Order XXXI., rr. 1, 11—Order LII., r. 6. Where the delivery up of documents is the relief claimed in an action, the court has no jurisdiction on an interlocutory application to make a mandatory order for the delivery up of the documents. It is not an absolute rule that under no circumstances will the court order production of documents before delivery of the statement of claim. (The Republic of Costa Rica v. Strousberg.) ... 401

## EASEMENT.

Right to lateral support of buildings by adjoining soil—Uninterrupted enjoyment for twenty years—Presumption of grant—Prescription Act (2 & 3 Will. 4, c. 71).—The right to lateral support of buildings by the adjoining soil is not a right of property, but is an easement, and can be acquired by express or implied grant. Such right is not within the Prescription Act (2 & 3 Will. 4, c. 71), but after twenty years' uninterrupted enjoyment the presumption of a lost grant applies. (Angus and Co. v. Dalton and The Commissioners of Her Majesty's Works and Public Buildings.) ... 605

## ECCLESIASTICAL COMMISSIONERS.

Limitation of actions—Corporations sole—Statute of Limitations.—Sect. 50 of 3 & 4 Vict. c. 118 enacts, that all the estate and interest of the holder of a deanery in any lands,

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&c., shall be vested absolutely in the Ecclesiastical Commissioners for England for the purposes of the Act; and sect. 57 provides that they shall, for the purpose of obtaining possession of lands, &c., vested in them have all rights, powers, and remedies, which belonged to the holder of the deanery. Held, that with respect to lands vested in the commissioners under sect. 50, their right of entry or action for recovery was barred under sect. 2 of the 3 & 4 Will. 4, c. 27, after twenty years [had elapsed without their having taken possession, and that they were not entitled to enter or recover within sixty years, as the holder of the deanery might have done under sect. 22. (*Ecclesiastical Commissioners of England v. Rowe.*) page 119

## ECCLESIASTICAL LAW.

**Ecclesiastical offence—Duty of bishop.**—"It shall be lawful" A parishioner made a charge under sect. 3 of the Church Discipline Act 1840, to the bishop of his diocese, that the rector of his parish had offended against the laws ecclesiastical. The bishop declined to issue a commission for the purpose of making inquiry as to the grounds of such charge, for the expressed reasons that the repeated failures in legal proceedings of this kind had tended to cover those concerned in them with ridicule, and to bring the Church into contempt; that the rector was of advanced age, and was held in respect and love; and that the charge was made in opposition to the wish of the majority of the parishioners. Held, upon a rule for a mandamus, that the reasons alleged by the bishop did not justify him in declining to exercise his office at the instance of a parishioner under this section; and that the court, in the exercise of its discretion, would compel him to proceed. (*Reg. v. Bishop of Oxford.*) ... 152

## ELECTION LAW.

## PARLIAMENTARY.

**County vote—Description of qualifying property—Power of amendment.**—6 & 7 Vict. c. 18, s. 40—28 & 29 Vict. c. 36, s. 6.—A revising barrister has power to amend the description of a voter's qualifying property by striking out such portions of it as he has parted with, and, if what remains is of sufficient qualifying value to confer the franchise, the voter is entitled to remain on the list. (*Smith v. Woolston.*) ... 198

—Late notice of claim.—Power of overseers to waive irregularity.—6 Vict. c. 18, ss. 4, 5, 37, 40. (*Leonard v. Alloways.*) ... 197

## MUNICIPAL.

**Ballot Act—Offences under criminal information.**—Bad for duplicity.—Officer at polling station.—Secrecy of voting.—Leaving about the means of information.—Not "communicating to any person any information"—35 & 36 Vict. c. 33, s. 4. (*Stannought, app. v. Hazeldine, resp.*) ... 589

## EQUITABLE ASSIGNMENT.

**Priority of assignees.—Notice.**—The rule of *Dearle v. Hall* (3 Russ. 1), that the second assignee of an equitable interest without notice of a former assignment of which the trustees have received no notice, obtains by giving notice to the trustees priority over the first assignee, holds good where the first assignment was made by the person originally entitled, and the second by his executor or administrator, or other person claiming through or under him. (*Re Freshfield's Trusts.*) ... 57

## EVIDENCE.

**Action of trespass.—Declaration against interest of tenant as to boundary of estate.**—Hearsay.—The declarations of a tenant for life in possession as to the boundary of his estate are not evidence against the remainderman. (*How v. Malkin.*) ... 198

**Declaration of deceased person.—Admissibility.**—In an action by an executor to recover a debt due to the estate a parol statement by his testator against his pecuniary interest with reference to such debt is admissible. (*Watson v. Sandford.*) ... 39

**Remoteness.—Connection between principal and evidentiary facts.**—System of fraud.—Series of acts.—Proof of agency.—In an action for the return of money paid by the plaintiff to the defendant through the fraud of the defendant's agent, evidence that by the same false pretences as in the particular case, the defendant's agent had induced other persons to pay money to the defendant is admissible to prove either the agency or the fraud, and defendant's knowledge of it. (*Blake v. The Albion Life Assurance Society.*) ... 211

**Private conversation between solicitor and client.—Privileged communication.**—On the Queen's Proctor's intervention, his counsel will not be permitted to ask the petitioner whether he confessed to his solicitor on a former trial that he had been guilty of adultery. Such a question is inadmissible, the communication being privileged. (*Bransford v. Bransford and Shepherd, and the Queen's Proctor intervening.*) ... 659

**Public document.—Admissibility.—Fact not stated in discharge of a duty.**—A report of a committee appointed by a Government to inquire into the fitness of A. to be given the title of Agent to the Government, was produced as evidence. The report, after stating the character of A. as to fitness, stated his birthplace and age, the facts of his life, and some of his present circumstances. Held, that, as the only duty of the committee was to report upon the fitness of A. for the post, the document could not be received as evidence of his birthplace and age. (*Sturlis v. Freodia; Pollini v. Gray.*) ... page 709, 831  
(See Foreign Action.)

## EXECUTOR ACCORDING TO THE TENOR.

Where a testator bequeathed all his real and personal estate to two persons to apply the same, "after payment of debts," to the payment of "legacies:" Held, that they were executors according to the tenor, and probate granted to them accordingly. (*In the Goods of William Bell.*) ... 659

## EXTINGUISHMENT OF DEBT.

**Husband's debt vested in wife.—Business in chambers.**—A gave a bond to D. to secure repayment of a certain sum by instalments with interest, and made default in payment of the instalments during the life of B. In 1869 B. died, having by her will bequeathed all her property to A.'s wife, who proved the will, and passed the residuary account without including therein the amount of the bond. A., in right of his wife, took possession of the bond and all the other estate of B. In 1871 A. died intestate, and his widow took out administration to his estate, and passed his residuary account without including the amount of the bond. In an action brought by some of A.'s next of kin to administer his estate, his widow and administratrix claimed to prove for the balance of principal and interest due under the bond. Held, that there had been a reduction into possession of the bond by the husband A., and consequently the bond debt was extinguished. *Quere*, whether a question of this importance, and raising so nice a point of law, ought to be dealt with in chambers. (*Re Price; Price v. Price.*) ... 668

## FOREIGN ACTION.

**Examination of witness.—Admissibility of evidence.—Examiner's discretion.**—19 & 20 Vict. c. 113.—By 19 & 20 Vict. c. 113, an examination upon oath of a witness in a foreign action may be ordered, and a judge may give all such directions as to matters connected therewith as may appear reasonable and just; and the order may be enforced in like manner as an order of the same kind in an English action. Held, that the person directed to take such examination ought not to limit the questions by the rules as to admissibility of evidence in this country; but he may exercise his discretion in allowing cross-examination of friendly witnesses, or questions which are totally irrelevant or useful only for illegitimate purposes. (*Desilla v. Fells and Co.*) ... 423

## FRIENDLY SOCIETY.

**Incapacity of a corporate body to be an officer of a friendly society.**—Friendly Societies Act 1875 (38 & 39 Vict. c. 60), s. 15, sub-sect. 7; s. 20, sub sect. 1.—*Semble*, that a corporate body cannot legally be appointed an officer of a friendly society. The committee of management of a friendly society which had power, in certain events, to elect officers of the society, on the happening of one of such events, passed a resolution that a bank which had been registered as an unlimited company under the Companies Acts of 1862 and 1867 should be appointed treasurers of the society. The manager of the bank accepted the office on behalf of the bank, and certain moneys belonging to the society were paid to the bank as treasurers. An order having been made to wind-up the bank: Held, that the society had no preferential right under sect. 15, sub sect. 7, of the Friendly Societies Act 1875, as against other creditors of the bank, to be paid the moneys received by the bank as treasurers. *Quere*, as to the effect of an omission, by an officer of a friendly society, to give security when required by the rules of the society and the 20th section of the Friendly Societies Act 1875. (*Re parts The Swansea Royal and South Wales Union Friendly Society; Re The West of England and South Wales District Bank.*) ... 551

## GUARANTEE.

**Continuing security.—Appropriation.—Liability of guarantor's estate.**—Bank books.—Current account.—In May and Oct. 1868 two guarantees for 1000l. each were signed by the testator in the action and other persons, directors of a company, requesting a bank to accept their agent's bills to that amount. The bills drawn by the company's agent were accordingly accepted, and the money so advanced was debited to the account of the company. Payments in and drawings out were from time to time made by the company, and in Aug. 1871, when the testator died, there

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was a balance of over 1600l. due to the bank. No accounts, other than the bank books, had been rendered. The company went into liquidation, and the testator's co-guarantors were unable to pay. Upon an application by the bank to prove against the testator's estate for the 1600l., on the security of the guarantees: Held, that the guarantees were a continuing security, and that the bank were entitled to prove against the testator's estate for the balance due to them at his death with interest at 4 per cent. from that time. (*Browning v. Baldwin*.) ... page 248

## GUARDIANS.

Election of—Falsely assuming to act—Voting paper—Conviction—14 & 15 Vict. c. 105, s. 3.—The appellant called at the house of a voter for an election of guardians of the poor during his absence from home, asked for his voting paper, placed the voter's initials against two of the candidates' names, signed his own name as witness to the voter's mark, and got another person who was present to make a cross. The voter was not an illiterate person, and had given no permission or authority to the appellant to write upon the paper. Although this voting paper was allowed by the returning officer at the election, it did not appear how it reached him or what the voter knew about it. Held, that these facts were not sufficient to justify a conviction of the appellant under 14 & 15 Vict. c. 105, s. 3, for falsely assuming to act in the name or on the behalf of a person entitled to vote. (*Ball, app. v. Morson, resp.*) ... 128

## HIGHWAY.

Agreement to dedicate to public—No actual dedication—Purchaser for value without notice—Leases—Evidence of dedication—Highway Act (5 & 6 Will. 4, c. 50). (*Attorney-General v. Biphosphated Guano Company, Limited*.) ... 201  
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 Furious driving—Bicycle—5 & 6 Will. 4, c. 50, s. 78.—A bicycle is within the meaning of the words "any sort of carriage" in the 78th section of 5 & 6 Will. 4, c. 50. The appellant was convicted of driving a bicycle furiously on a certain highway so as to endanger the lives and limbs of passengers thereon. Held, that the conviction was right, as the words "any sort of carriage" were wide enough to include a bicycle, although that machine had not been invented at the time the Act was passed. (*Taylor, app., v. Goodwin, resp.*) ... 458

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 Ward of court—Custody of infant—Deed of separation—Agreement by father for infant to remain in mother's custody—Immoral publication by mother—Petition for delivery of infant to father—Infants' Custody Act 1873 (36 & 37 Vict. c. 12), s. 2.—Where the question is simply what is most beneficial for an infant, it is unnecessary to consider whether the father is in any way precluded by his own contract from asking the aid of the court in enforcing his legal power and natural authority. The law will not permit a father to delegate his rights and powers over his infant to the mother; and therefore if the utmost effect were given to the separation deed, it would only place the infant in the position of a fatherless child. It is the settled rule of the court that a fatherless ward must be brought up in the religion of its father, the only exception being that where an infant ward is of sufficient age and intelligence to have received and formed, and has received and formed other religious convictions, strong and apparently fixed, the court will shrink from the conse-

quences of any attempt to disturb them. The court will not allow its female ward to run the risk of being brought up in opposition to the views of mankind generally as to what is moral, decent, and womanly, merely because her mother differs from those views. (*Re Mabel Emily Besant*.) ... page 469

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Act of 1851—Working men's club.—A working men's reform club, which had never been furnished as a dwelling-house or slept in at night, and which was used in the day time as to the upper floor of an auctioneer for the purposes of his business, and as to the rest of the building for club purposes only, from 9 a.m. to 10.30 p.m., was by the commissioners held liable to be assessed for inhabited house duty. Held, on case stated for the opinion of the court, that the premises did not constitute an inhabited dwelling-house, and were not liable to be assessed for the tax. (*Riley, app., v. Read, resp.*) ... 398

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Deceased insolvent debtor—Property acquired after date of final order—Vested reversion falling into possession after death of insolvent—Rights of official assignee—5 & 6 Vict. c. 116, s. 9—7 & 8 Vict. c. 96, ss. 4, 8—Bankruptcy Repeal Act 1839, s. 15. (*Ex parte Welchman; Re Hare*.) ... 45

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## MARINE.

Charter-party—Freight—Deductions for sea-damage—Insurance against loss of freight—Underwriters' liability.—A charter-party provided for payment of freight at a specified rate, and contained a clause that: "If any portion of the cargo be delivered sea-damaged, the freight on such sea-damaged portion to be two-thirds of the above rate." Plaintiffs, the charterers, effected an insurance "To cover only one-third loss of freight in consequence of sea-damage, as per charter-party." A portion of the cargo became sea-damaged, and one-third of the freight payable in respect of that portion was deducted by plaintiffs from the whole freight: Held, that the policy sufficiently described the subject-matter insured, which was the one-third loss in consequence of sea-damage, and not the whole freight; and that plaintiffs were entitled to recover from each underwriter such proportion of the loss of freight as the amount of his subscription bore to the whole sum subscribed. (*Griffiths and others v. Bramley-Moore and others*.) ... 149  
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 Money owing to underwriters by insured—Defence in action by assignee of the policy—31 & 32 Vict. c. 86.—The 31 & 32 Vict. c. 86, which enables assignees of marine policies to sue thereon in their own names, provides that "the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom, or on whose account, the policy had been effected." Held, in an action by the assignees of a policy, that the underwriters were entitled, under this provision, to set up a counter-claim for money owing to them, at the time of the assignment, by the person by whom the policy had been effected. (*Pellas and Company v. Neptune Marine Insurance Company*.) ... 428

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Foreign plaintiff—Residence abroad—Security for costs.—A plaintiff residing abroad will not be ordered to give security for costs unless he is substantially and in fact the plaintiff moving the proceedings. (*Belmonte v. Aynard and another; Gütschow and Ford Claimants*.) ...  
 Sale of horse—Warranty—Order L, r. 2—1 & 2 Will. 4, c. 58—23 & 24 Vict. c. 126, s. 12.—The plaintiff sued the defendant, the proprietor of a horse repository, for breach of warranty of a horse sold by auction, claiming as damages the price paid, and also for injuries sustained by the vice of the horse while in his possession. The defendant had sold the horse for Q, the former owner, who gave the defendant notice not to part with the purchase money paid by the plaintiff. The defendant took out a summons under O der L, r. 2, to obtain an order that the plaintiff

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and Q. should interplead. Held, that the order should not be made. (*Wright v. Freeman*)... ..page 134

## JUSTICE OF THE PEACE.

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Lease of sporting rights—Covenant to keep down rabbits—Trust for tenant, when constituted—Nominal damages. (*West v. Houghton*)... .. 864  
Notice to quit—Offer of a new tenancy.—Defendant was tenant from year to year to the plaintiff. The plaintiff gave defendant six months' notice to quit on the 1st May, and in the same document that contained the notice to quit gave him further notice that if he retained possession after the 1st May the rent would be increased and made payable in advance. Held, that the notice to quit was a good notice, and was not affected by the fact that it was accompanied by the further notice. (*Ahearn v. Bellman*)... 771  
Property tax—Agreement by landlord to repay tax not deducted from rent—Legality of contract—5 & 6 Vict. c. 35, s. 103.—If a landlord agrees with his tenant to repay him property tax at some future time instead of allowing a deduction from the rent of the amount of the tax, such an agreement is not illegal, and the tenant may recover the amounts paid in accordance therewith. (*Lamb v. Brewster and another*)... .. 457, 537

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Assignment of term—Broken quarter—Apportionment between assignor and assignee—Apportionment Act 1870.—Where a trustee in liquidation of a lessee, under a lease for a term of years with covenant to pay rent quarterly, assigns the term to another in the middle of a quarter, he is liable for rent, as accruing due *de die in diem*, from the commencement of the quarter to the time of the assignment over. (*The Swansea Bank Limited v. Bartlett Phelps Thomas*)... .. 559  
Covenant not to carry on any business—Hospital—Injunction.—A covenant in a lease of a house not to carry on any trade, business, or dealing whatsoever, or anything in the nature thereof, held to be broken by the use of the house as a hospital for out-patients suffering from diseases of the throat and chest. (*Bramwell v. Lacy*)... 361  
Lease by charitable corporation—Void or voidable—Stat. 13 Eliz. c. 10—Statute of Limitations.—The appellants were the governors of a charitable hospital founded in 1758, and incorporated by Act of Parliament in 1768. In 1768 the ten governors of the hospital granted a lease of certain lands of the hospital to the respondent's predecessors in title for ninety-nine years at a peppercorn rent. In an action to recover possession of the demised premises. Held, that the appellants being a "hospital" within the meaning of the stat. 13 Eliz. c. 10, as explained by 14 Eliz. c. 14, the lease was void *ab initio* by virtue of sect. 3 of the former Act, and that the Statute of Limitations ran from the execution of the lease, and that the action could not be maintained. (*The Governors of the Magdalen Hospital v. Knotts and others*)... .. 466

## LEGITIMACY DECLARATION ACT 1858.

Citation to see proceeding.—The court will not cite a party so see proceedings under sect. 7 of the Legitimacy Declaration Act 1858, merely because he may have an adverse claim, which it is to the interest of the petitioner to bar by making him a party to the suit. The party it is proposed to cite to see proceedings must be directly interested in disputing the facts it is proposed by the petitioner to set up, otherwise such citation will not be permitted to issue. (*Manuel v. The Attorney-General*)... 367

## LOCAL BOARD OF HEALTH.

Grazing of roads in board's district—Streets—Vesting.—The effect of the word "vest" in sect. 149 of the Public Health Act 1875 is to give an urban authority, with respect to the streets mentioned in the section, the property in so much of the soil and surface as is necessary for all the purposes applicable to a street. (*Coverdale v. Charlton*)... .. 88  
Local authority—Discharge of contract by statute. (*Newington Local Board v. Cottingham Local Board, W. H. Wilkinson, and the Hull Botanic Garden Company, Limited*)... .. 58  
Nuisance—Pollution of stream—Omission to perform statutory duty—Action by individual injured—Mandamus.—Public Health Act 1875. (*Glossop v. The Heston and Isleworth Local Board*)... .. 736  
Power to raise level of street—Right to compensation.—11 & 12 Vict. c. 63, ss. 2, 68, 144. (*Nutter v. Aorington Local Board*)... .. 802

Public Health Act 1848 (11 & 12 Vict. c. 63), ss. 45, 46, 144.—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 16, 308.—Sewer—"Man-hole"—Compensation or purchase.—A "man-hole" or side entrance into a sewer, for the purpose of cleansing it, is part of a "sewer" within the meaning of the 45th section of the Public Health Act 1848, and the 16th section of the Public Health Act 1875, and the local authorities may construct a "man-hole" on any land within their district without first purchasing the land required for the purpose, the landowner being entitled to compensation only. (*Swanston v. The Twickenham Local Board of Health*)... ..page 734

## LOCOMOTIVE.

Highway.—To be in charge of three persons.—One in charge of horse and cart also.—28 & 29 Vict. c. 83, s. 3—41 & 42 Vict. c. 77, s. 29.—A steam locomotive, while in motion on a highway, is to be in charge of three persons, one of whom, by 41 & 42 Vict. c. 77, s. 29, shall precede the locomotive on foot, and "shall in case of need assist horses and carriages drawn by horses passing the same." Held, that the fact that the man proceeding the engine was leading a horse and cart of his own was not sufficient to support a conviction for a breach of the above provision. (*Davis, app., v. Browne, resp.*)... .. 557

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Profanation—§1 Geo. 3, c. 49, ss. 1, 4.—Action for penalties—Covin and collusion.—A judgment recovered in an action by arrangement between the parties in order to protect the offenders against *bond fide* actions for the penalties is covinous and collusive. (*Girdlestone v. The Brighton Aquarium Company*)... .. 473

## LUNACY.

Death of lunatic—Costs of inquisition—Lunacy Regulation Act 1862 (25 & 26 Vict. c. 86), s. 11.—The court has jurisdiction, under the 11th section of the Lunacy Regulation Act 1862, to order costs, which have been properly incurred for the protection of a lunatic and of his property, to be paid out of the lunatic's estate, although the lunatic has died before the appointment of a committee, and there are no funds in court. (*Re Mears*)... .. 111  
Practice—Undesirable lease—Surrender—Appointment of committee of part of estate—Lunacy Regulation Act 1853.—Where a lunatic was entitled to a lease for seven, fourteen, or twenty-one years of a house which it was desirable to surrender at the expiration of the first seven years, and the intended committee's security could not be completed in time for notice to be given in the usual way to determine the tenancy, the Court appointed the lunatic's wife committee of that part of the estate consisting of the house, without security, and authorised her to give notice to determine the tenancy. (*Re Lambert*)... .. 205

## MAGISTRATES' CLERK—FEES.

Liability of persons giving prisoner into custody—5 Geo. 4, c. 83, ss. 4, 6—5 & 6 Will. 4, c. 78, ss. 78, 89.—An inhabitant of a borough, who gives into the custody of a police constable suspected persons, and gives evidence against them before the borough magistrates, is not liable to the clerk of the magistrates for his fees in respect of the conviction of such persons, under the Vagrant Act, as rogues and vagabonds. *Semble*, that the borough fund is liable for such fees. (*Reddish v. Hitchinor*)... .. 65

## MALICIOUS PROSECUTION.

Authority of bank manager—Evidence—Misdirection—Practice—Appellable amount—Interest on judgment.—An authority in an agent to arrest offenders, and to institute criminal proceedings, can only be implied where the duties which he has to perform cannot be efficiently discharged for the benefit of his employer unless he has power promptly to apprehend offenders on the spot. When interest on the amount of a verdict is given, and included in the judgment, such interest must be taken into account in considering whether the amount at issue reaches the limit allowed for an appeal. (*The Bank of New South Wales v. Owston*)... .. 500

## MARKET.

Public market—Liability of lord of market for misfeasance—Frequenting of market not a mere license.—The defendants were the owners of a market which is held for the sale of cattle at D. In the market place defendants had erected spiked railings round a statue which had been placed there. This railing the jury found was dangerous for cattle with a propensity for leaping. A cow which the plaintiff had brought to market attempted to jump the railings, and was killed in so doing. The plaintiff sought to recover from the defendants the value of the cow. Held, that the defendants were liable, as, by erecting the railings, they had done a wrongful act,



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whereby a safe market had been rendered unsafe; and that the plaintiff had not been guilty of contributory negligence, inasmuch as, having paid toll for the use of the market there, he was not a mere licensee placing his cattle at his own risk, but was entitled to a safe standing place for them. (*Lax v. The Mayor and Corporation of Darlington.*) ... page 64

## MARRIAGE SETTLEMENT.

Trust for persons entitled if married woman had died without having been married. The ultimate trust of funds comprised in a marriage settlement was for such person as under the Statutes of Distributions would have been entitled thereto at the decease of the wife if she had died possessed thereof intestate and without having been married. The wife died intestate, leaving her husband and one child surviving. Held, that the child was entitled to the funds. (*Re Ball's Trust.*) ... 880

## MARRIED WOMAN.

Administratrix—Intestate's estate.—Where a married woman was the administratrix of a deceased person's estate, and was also entitled beneficially to twenty-seven seventy-fifth parts thereof, and the whole of the intestate's estate was allowed to be received and managed by an agent: Held, that the receipt by the agent was a change of the property, and a reduction thereof into the possession of the husband. Held, also, that the fact of the wife being entitled to an undivided share only made no difference. (*Re Barber's Estate; Dardier v. Chapman.*) ... 649

Judgment against separate estate—Costs.—In an action brought against a married woman, having separate property, and her husband, the judge at the trial gave judgment declaring that all the property vested in her at that time, or in any other person in trust for her, was chargeable with the payment of the debt and costs claimed, and directing inquiries as to her separate estate. The master having certified in answer that she was entitled for her separate use to an annuity vested in a trustee (who was not a party to the action). Held, on a summons for leave to sign judgment for the debt and costs, that the plaintiff's costs when taxed and the amount of the debt with interest on that sum at 4 per cent. must be declared to be a charge upon the annuity without prejudice to the claims of the trustee, and that the plaintiff must pay the costs of the defendant husband and add them to his own debt. (*Collett v. Dickenson.*) ... 394

Living apart from husband—Right to bring action of trespass—Remedy for protection of property—Married Women's Property Act 1870 (33 & 34 Vict. c. 93), s. 11.—A married woman living apart from her husband can maintain ejectment for the recovery of property purchased with her own earnings. (*Moore v. Robinson.*) ... 99

## METROPOLIS MANAGEMENT ACT.

Rating—Exemption of property of a particular nature from the full rate levied—Particular parts of the parish to be described by metes and bounds—Equal pound rate. (*Reg. on the prosecution of The Guardians of the Poor of the Parish of Lewisham v. The London, Brighton, and South Coast Railway Company.*) ... 716

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Agent—Certified manager—Conviction—Mines Regulation Act 1872 (35 & 36 Vict. c. 76), sect. 51. (*Wynne v. Forester.*) ... 524

Water—Use of property—Water discharged from neighbouring mine—Negligence—Ordinary course of working—Damages—Injunction.—The mere fact of temporarily intercepting the water did not amount to an appropriation of, or give the defendants command over, the water as a thing which they could control, in the sense of being ever afterwards prevented from restoring it to its former flow from their own to their neighbours' land and to the condition in which it was before their operations. Every one is entitled to deal with water on his own land so long as, when dealt with, he does not cause it to go on his neighbour's land in such a way as to affect such land in any other manner than it had been previously affected, and impose an additional burden. (*West Cumberland Iron and Steel Company v. Kenyon.*) ... 708

## MONTH.

Time, mode of computation—Calendar month—Expiration of sentence.—A sentence of one calendar month's imprisonment expires on the day preceeding that day which corresponds numerically in the next succeeding month with the day on which the sentence was passed. If there is no such corresponding day in the next month, then the sentence expires on the last day of that month. Where a prisoner was sentenced to one calendar month's imprisonment on the 31st Oct.: Held, that the month expired on the 30th Nov. (*Migotti v. Colville.*) ... 522, 747

## MORTGAGE.

Bill imputing fraud in dealing with mortgage securities—Rights of mortgagees—Interest—Costs.—A mortgagee who denies his character as such, and claims as owner, will not, if defeated, be allowed to claim the benefits attached to the character of a mortgagee. (*The National Bank of Australasia v. The United Hand-in-Hand and Bank of Hope Company and Lakeland (consolidated appeals.)*) page 697

Equity of redemption barred by the Statute of Limitations—Mortgage in form of trust for sale—Express trust of surplus purchase moneys—Second mortgage by assignment of surplus purchase moneys. (*Re Alison; Johnson v. Mounsey.*) ... 234

Foreclosure—Non-appearance of defendant mortgagor.—In an action for foreclosure where the mortgagor entered no appearance, and the statement of claim was filed, the Court, after consideration, gave the usual judgment against him for foreclosure *vis only*, and declined to give judgment for immediate foreclosure absolute. (*Patey v. Flint and Ridge.*) ... 651

Foreclosure action by one of several joint mortgagees—Misjoinder of parties—Rules of Court 1875, Order XVI., r. 13.—One of several joint mortgagees can maintain an action to foreclose the mortgage, making his co-mortgagees defendants if they are unwilling to be joined as co-plaintiffs, or have by some act precluded themselves from being made plaintiffs, and even (semble) if they are opposed to the foreclosure. The act of a majority of trustees cannot bind the trust estate; in order to bind the trust estate it must be the act of all the trustees. (*Luke v. South Kensington Hotel Company.*) ... 633

Further advances—Further security—Running account—Primary security—Looker King's Act (17 & 18 Vict. c. 115). (*Leonino v. Leonino.*) ... 359

Law of New South Wales—Real Property Act—Mortgages and mortgagor—Notice—Excessive demand—Tender—Practice—Costs. (*Campbell v. The Commercial Banking Company of Sydney; The Commercial Banking Company of Sydney v. Campbell.*) ... 137

Priority—Not communicated to mortgagees—Subsequent ratification—Rectal—Estoppel—37 Eliz. c. 4.—Consolidation—Scandalous affidavit—Person not injured—Prolifer affidavits—Costs—Additional Rules of Court 1875, Order VI., r. 18. (*Cracknell v. Janson.*) ... 640

Reversionary interest—Expectant heirs—Unconscionable bargain—Security only for sums actually advanced—Arrears of interest—3 & 4 Will. 4, c. 27, s. 42.—Fund in court—Jurisdiction under petition. (*Re Slater's Trusts.*) ... 114

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## MUNICIPAL CORPORATION.

Municipal Corporations Act 1835 (5 & 6 Will. 4, c. 76), s. 92.—Application of borough fund—Opposing Bill in Parliament.—A municipal corporation is justified in using the borough fund for the purpose of opposing a Bill in Parliament whereby its existence, property, or privileges are sought to be impeded or diminished, both by virtue of the 92nd section of the Municipal Corporations Act 1835, by which the employment of the borough fund is authorised in payment of "all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act," and by virtue of the general law by which the owners of property in trust are authorised to be reimbursed out of the trust estate for any expenses necessarily incurred for its protection or otherwise. (*Attorney-General v. Mayor, &c. of Brecon.*) ... 52

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Metropolitan Asylum District—Erection of smallpox hospital—Injury to adjoining property—Liability of Managers of Asylum District—Poor Law and Local Government Boards—Metropolitan Poor Act 1867 (30 & 31 Vict. c. 6)—Injunction. (*Hill v. The Managers of the Metropolitan Asylum District.*) ... 491

## PARENT AND CHILD.

Widowed mother—Advancement—Loan or gift.—There is no such legal presumption that money advanced by a widowed mother to her child is intended as a gift and not as a loan as there is in the case of a father; as there is no such legal obligation upon her to maintain and provide for her children. The question is one of evidence in each case. Where a widowed mother mortgaged her jointure and insured her life in order to make an advance to her son, and the son paid the interest on the sum borrowed, and the premiums on the policy: Held, that a loan was intended and not a gift. (*Bennet v. Bennet.*) ... 378

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Owners of small part of property desiring a sale—Offer by others to purchase—*Partidon Act 1868* (31 & 32 Vict. c. 40), ss. 3, 4 & 5. (*Gilbert v. Smith.*) ... page 635

## PARTNERSHIP.

Dissolution of—Power of expelling partner—Valuation of assets—Goodwill of business. (*Stewart v. Gladstone.*) ... 145  
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## PARTY WALL.

*Metropolitan Building Act 1855* (18 & 19 Vict. c. 122), ss. 3 and 88.—On one side of and against a wall within the boundary of his land, the plaintiff had constructed certain closets. On the other side of and against the same wall, the defendant, whose land adjoined that of the plaintiff, had constructed a shed. Held, that the wall was a party wall within the *Metropolitan Building Act 1855*, so far as the structures of the plaintiff and defendant were co-terminous. (*Knight v. Purcell.*) ... 391

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## PHARMACY ACT 1878.

Sale of poisons by corporation—Corporation liable to penalty—"Person" to include corporation.—Any corporation whereof the members are not all duly registered pharmaceutical chemists or chemists or druggists, which shall sell or keep open shop for the retailing, dispensing, or compounding poisons, is liable to the penalties imposed by the *Pharmacy Act of 1868*, although such business is managed by a duly registered chemist, who is a member of the corporation. (*The Pharmaceutical Society of Great Britain v. The London and Provincial Supply Association Limited.*) ... 585

## POOR LAW.

Settlement by residence—Child living apart from parent—39 & 40 Vict. c. 61, s. 34.—A pauper child, born in 1870, a bastard, was placed by her mother, when about a fortnight old, in charge of a person, who resided with the child for eight years in the appellants' union. Afterwards the child and the person having charge of her removed to the respondents' union, and there, in about seven months, became chargeable to the poor rates. The mother's settlement and residence were not known. Held, that the pauper's settlement by residence under 39 & 40 Vict. c. 61, s. 34, was in the appellants' union; and that the order of removal thereto was rightly made. (*Leeds Union, app., v. Tadcaster Union, resp.*) ... 521

Child under sixteen—*Poor Law Amendment Act 1870* (39 & 40 Vict. c. 61), s. 35.—A pauper was born in the H. Union in 1840, but had never acquired a settlement in her own right. Her father was born in the L. Union, but had acquired no settlement except his birth settlement. Held, that under these circumstances, the pauper was not settled in the H. Union, but must be deemed to have derived her father's birth settlement. (*The Guardians of the Poor of the Hereford Union app., v. The Guardians of the Poor of the Warwick Union, resp.*) ... 588

## POOR RATE.

Objection to valuation list—Time for appealing—*Union Assessment Committee Amendment Act 1864* (27 & 28 Vict. c. 39), s. 1—25 & 26 Vict. c. 103.—Where a valuation list has been objected to before the assessment committee, and subsequently a rate has been made based upon such list, it is not a condition precedent to an appeal that the list should again be objected to before the committee after the making of the rate. (*Reg. v. the Justices of Wiltshire.*) ... 681

## PATENT.

Patent action—Admission of evidence in reply—Particulars of objection—Injunction against master of a ship using pumps, an infringement of patent, as well as against manufacturers—Costs—Action claiming an injunction against the master of a ship in which a set of pumps, alleged to be an infringement, was used, as well as against the makers. Plaintiff brought evidence at the trial in support of the case raised by his pleadings and particulars of infringement, and to meet the case raised by defendants on their pleadings and particulars of objections. The defendants went into evidence on a much

wider issue than that raised by the pleadings, &c. The plaintiff applied to adduce evidence in reply by adducing instances of infringement other than those mentioned in the particulars of infringement, and held, that under the circumstances he was entitled to bring in this evidence. Injunction granted against the master of the ship, as well as against the manufacturers, the manufacturers being ordered to pay the costs. (*Adair v. Young and others* ... page 61, 598

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Abandoned motion—Motion for new trial—Appeal—Security for costs—Special circumstances—*Rules of Court 1875*, Order XXXIX., r. 1; Order XL., r. 10. (*Wardle v. Blocker.*) ... 286

Action for the recovery of land—Joiner with other causes of action—Application after service of writ—*Rules of Court 1875*—Order XVII., r. 2; Order LVII., r. 6.—The leave of the court to join another cause of action with an action for the recovery of land under Order XVII., r. 2, must be obtained before the writ is served. Order LVII., r. 6, which enables the court to enlarge or abridge the time appointed for doing any act or taking any proceeding, has no application where one act is ordered by the rules to be done before another act. (*Ex Filcher, deceased; Filcher v. Hinds.*) ... 832

Pleading—Defendant's equitable title—Order XIX., rr. 4, 15—Judgment reserving defendant's rights—Evidence—Privilege.—In an action for the recovery of land the defendant, if he relies upon an equitable title, must in his statement of defence allege the nature of the deeds and documents upon which he relies, and it is not sufficient to allege that "by virtue of divers meane acts and meane assurances in the land all the estate and interest of the plaintiff's predecessor in title" is now vested in the defendant. Where the defendant in such an action has failed on account of his pleading being defective as aforesaid, and leave to amend has been refused, judgment may be given "without prejudice to the rights, if any, of the defendant." Issues between the defendant or his solicitor and the solicitors of his predecessors in title admitted as secondary evidence of contents of deeds in the possession of the defendant, and which he refused to produce. (*Drafts v. James.*) ... 875

Receiver—Occupation rent—Interlocutory application—*Judicature Act 1873*, sect. 25, sub-sect. 5.—The defendant brought an action against B. for redemption. The plaintiffs brought the present action against the defendants for the recovery of the land, which was the subject-matter of the redemption action. The plaintiffs in the present action were then added as defendants in the redemption action by the plaintiffs in that action, who obtained an order staying the present action until the redemption action should be ready for trial. The defence in the present action was that the plaintiffs were only sub-mortgagees. The plaintiffs in the present action moved for a receiver, and that the defendants, who were in the occupation of the property, should attach tenants to the plaintiffs. The uncontradicted evidence in support of the motion showed that the property was wasting, and was an insufficient security for the mortgage under which B. was alleged to hold. Held, that it was "just and convenient" to appoint a receiver; and that such appointment must be made unless the defendant within a certain time elected to pay into court an occupation rent, the amount of which was to be settled in chambers. (*Real and Personal Advance Company v. McCarthy and Smith.*) ... 879

Appeal—Case stated by arbitrator—*Lands Clauses Consolidation Act 1845*, s. 25—*Common Law Procedure Act 1854*, ss. 5, 32—*Judicature Act 1866*, s. 19.—An appeal lies from the decision of a Divisional Court on a special case stated by an arbitrator appointed under sect. 25 of the *Lands Clauses Consolidation Act 1845*, to settle a question of disputed compensation. (*Biddar and others v. The North Staffordshire Railway Company.*) ... 801

Abandonment of appeal—Second notice of appeal.—Final judgment was given in an action in July 1878, and passed and entered on the 4th Dec. On the 5th the defendants served notice of appeal for the 19th, but owing to an oversight of their solicitor, did not set it down till the 19th. Shortly afterwards the plaintiff's solicitor informed the defendants' solicitor that the entry of the appeal was irregular, and that they should not waive any objection. A fresh notice of appeal was then sent to the plaintiff's solicitors, accompanied by an offer to pay the costs occasioned by the first notice, and asking them to consent to the first entry being struck out. This request was refused, and the second notice was returned. The defendants' solicitor thereupon set down the second notice of appeal, and applied to have the first entry struck out, and to have the second notice treated as regular and valid. Held, that the second notice was regular, and that the appeal must proceed upon it. As the plaintiff ought not to have objected to the course proposed to be taken by the defendants, the costs of the application would be made costs in the appeal, no costs of the motion being given to the plaintiff. (*Norton v. The London and North-Western Railway Company.*) ... 597



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Appeal—Discretion—Interpleader—Sale of horse—Warranty—Order L., r. 2. (*Wright v. Freeman*) ... page 358

Party not served—Rules of Court 1875, Order LVIII., rr. 2, 3—Short-hand notes of evidence—Costs.—The cost of shorthand notes of the evidence in the court below will not be allowed upon an appeal as a matter of course, but only when a case is made out for allowing them. (*Re Duchess of Westminster Silver Lead Ore Company*) ... 300

Setting down—Rules of Court 1875, Order LVIII., r. 8.—In an administration action, an order had been made on further consideration, on the 3rd April 1878; on the 23rd April the defendant gave notice of appeal for the 30th. The appeal was not set down till the 29th June. The order under appeal was not drawn up till shortly before that day. A preliminary objection to the hearing of the appeal having been taken by the plaintiff on the ground that it was not set down before the 30th April: Held, that the notice of appeal was given earlier than was necessary. The appeal could not be set down without producing an office copy of the order (under rule 8 of Order LVIII.), which could not be done till the order was drawn up, and the plaintiffs who had the carriage of the order ought not to be allowed to take advantage of their own delay. (*Re Harker; Goodharts v. Fothergill*) ... 408

Time—Finding of facts—Interlocutory order—Action in Chancery Division—Trial by judge without a jury—Rules of Court 1875, Order XXXIX., r. 1; Order LVIII., r. 15.—In an action in the Chancery Division, tried by a judge without a jury, an appeal may be presented, at any time within a year, from the judge's finding of fact as well as from the judgment on the whole case, unless definite issues of fact have been settled at the commencement of the trial. But, if definite issues of fact are so settled, the finding of fact, whether delivered separately, or as part of the whole case, is an interlocutory order, from which an appeal must be brought within twenty-one days. (*Lowe v. Lowe*) ... 237

Appeals from orders at chambers—Time for appealing—Order LIV., r. 6—Order LVII., rr. 5 and 6.—An appeal from the order of a judge at chambers, although made in vacation when no divisional court is sitting, must be brought within eight days under Order LIV., r. 6, and if brought after the eight days to the first divisional court sitting after vacation, the appeal is out of time. (*Runts v. Sheffield*) ... 589

Counter-claim—Connection which must exist with original cause of action—Counter-claim for prior slander in action for slander—Irrelevancy.—In an action for oral slander the defendant delivered a defence and counter-claim, claiming damages from the plaintiff on account of slanderous words alleged to have been spoken on a distinct and prior occasion to that on which the words of which the plaintiff complained were uttered. On motion to strike out the counter-claim on the ground that the slander alleged in it was not connected in any way with the original cause of action: Held, that the slander alleged in the counter-claim was properly made the subject of the counter-claim. One paragraph of the counter-claim alleged that frequent quarrels had taken place between the wives of the plaintiff and the defendant. Held, that this paragraph should be struck out as irrelevant and embarrassing. (*Quin v. Hession*) ... 70

Death of sole defendant—Appointment of receiver without order as to adding parties or continuing action—Order L.—Where the sole defendant, the executrix of the testator whose estate was being administered in an action, died after an order for administration therein had been made, and there was evidence that certain persons claiming a lien threatened to sell certain machines, which formed the largest and most valuable part of the estate: Held, on motion as to the plaintiff, a creditor, that a receiver might be appointed (without first obtaining an order under Order L., to add new parties or to continue the action) until after a personal representative of the testator had been appointed. (*Re Parker's Estate; Cash v. Parker*) ... 878

Discontinuance—Findings by arbitrator in special case—Discretion—Rules of Court 1875, Order XXXIII., r. 1.—After an arbitrator has found the facts in favour of the defendant on all material points which are in issue between the parties to an action, the court will not, in the exercise of its discretion, allow the plaintiff to discontinue the action, under Order XXXIII. of the Rules of Court 1875. (*Stahlschmidt v. Walford*) ... 194

Discretion of judge—Rules of Court, Order XIX., r. 3; Order XXII., r. 9. (*Huggons v. Tweed*) ... 284

Final judgment. See Principal and Agent.

House of Lords, Order of—How made an order of the High Court of Justice—The application to make an order of the House of Lords in an appeal an order of the High Court of Justice may be made *ex parte*. (*British Dynamite Company v. Krebs*) ... 514

Mode of trial—Judge or judge and jury—Issue of fact and questions of law—Rules of Court 1875—Order XXXVI., rr. 3 and 23. (*Spratt's Patent v. Ward and Co.*) ... 250

Judge or judge and jury—Issues of fact and questions of law mixed—Discretion—Rules of Court 1875, Order XXXVI., rr. 3, 26. (*The Singer Manufacturing Company v. Loog*) ... 647

Trial of issues of fact before judge and jury—Reasons for order—Order XXXVI., rr. 3, 26, 28a.—Notice of motion

by a defendant given within four days after a plaintiff has given notice of trial, for a direction that issues of fact may be tried before a judge and jury, is a sufficient notice within Order XXXVI., r. 3, that a defendant wishes to have the issues so tried. A notice of such a desire ought not to state the particular issues to be tried, but, generally, that the defendant desires to have the issues of fact tried before a judge and jury. Where a defendant gave notice of motion for a direction that certain specified issues should be tried before a judge and jury: Held, that the notice of motion was an expression of desire that particular issues should be tried, and, though not the proper or necessary form of giving notice required by rule 3, satisfied the requirements of the rule and went beyond it, and that an order must be made, referring it to chambers to settle proper issues of fact, and directing those issues to be tried before a judge and jury at the particular assizes. (*Powell v. Williams*) ... page 673

Mode of trial—Company—Promoter's secret profits—Allowances to promoter for money actually expended. (*Emma Silver Mining Company Limited v. Grant*) ... 801

New trial—Action remitted to County Court—Trial by County Court judge without a jury—Order XXXIX., r. 1—19 and 20 Vict. c. 108, s. 20.—Rule 1 of Order XXXIX. does not apply to motions for new trials in actions remitted to the County Court under the provisions of 19 & 20 Vict. c. 108, s. 20, so that when such an action has been tried by a County Court judge without a jury application for a new trial must be made, in accordance with the old practice, to the divisional court. (*Davis v. Godbehere*) ... 378

Order XIV., r. 1a.—The making of the affidavit required by rule 1a of Order XIV. is not a condition precedent to the issue of the summons for leave to sign final judgment. So that, where the plaintiff made a defective affidavit, then obtained his summons, and afterwards swore a fresh and good affidavit, it was held that the issue of the summons was good, and leave to sign final judgment might be given. (*Begg v. Cooper*) ... 20

Parties—Cesser of a defendant's interest—Name of defendant not specified struck out—Revivor—Costs—Rules of Court 1875, Order XVI., rr. 13, 14.—Where an order is made, giving leave to strike out the name of one defendant, and also general liberty to amend, the plaintiff is not entitled to strike out the name of another defendant, though that defendant's interest in the action has ceased. A defendant whose interest in the subject-matter of the action has ceased, but whose costs have not been previously taxed, cannot obtain payment of their costs. (*Wymer v. Dobbs*) ... 420

Substituting plaintiff—Order XVI., r. 2. (*Val de Travers Asphaltic Company v. London Tramways Company*) ... 133

Pleading—Allegations in statement of claim generally denied, how far allowable—"Puffer," meaning of—How the fulfilment of conditions precedent should be stated—Irish Judicature Act, schedule, rr. 23, 25 (Eng. Order XIX., rr. 4, 20); Order XVIII., rr. 10, 14, 19 (Eng. Order XIX., rr. 17, 22, 28); Appendix C, forms 11, 14, 19 (Eng. App. C, forms 15, 20, 8).—The plaintiff by his statement of claim set out facts upon which he relied to show that the defendant had purchased certain premises at an auction. The first paragraph of the defendant's statement of defence was, "The defendant denies all and every the allegations in the several paragraphs of the statement of claim respectively contained." The only other paragraph of the defence relied upon the auction not having been *bond fide*, because some of the biddings had been made by a "puffer." On motion by the plaintiff to strike out both paragraphs: Held, that the first should be struck out as being a general denial instead of dealing with the facts which the defendant desired to traverse specifically; and that the second should be struck out, inasmuch as the word "puffer" was inessential, there being nothing to show that it was used as deemed in sect. 3 of 30 & 31 Vict. c. 48 for the purposes of that Act. The averment that all conditions were performed is still material and proper in the same form as before the Judicature Acts. (*Jones v. Quinn*) ... 125

Amendment—Adding a plaintiff—Consent—Indemnity—Defendant's right to object—Order XVI., r. 2.—An order was made at chambers, at the plaintiff's instance, to add a person's name as co-plaintiff, under Order XVI., r. 2, without the consent of the latter, and without any condition of indemnity in his favour. Held, upon appeal, that the new plaintiff had not been added upon such terms as seemed just, and that it was competent to the defendant to make the objection. (*Turquand v. Fearon*) ... 191

Agreement imperfectly alleged—Substantive cause of action—Amendment, when to be allowed—Order XXVII., r. 1. (*Noad v. Murrow and another*) ... 100

Embarrassing—Statement of claim—Action under Bills of Exchange Act—Joinder of parties—Joinder of causes of action—Judicature Act 1875, Order XXVII., r. 1; Order XVI., r. 1; Order XVII., r. 1.—A statement of claim alleged that the plaintiff, F., had sold goods to the defendant, for part of the price of which a bill of exchange was drawn by F., accepted by the defendant, and indorsed to the plaintiffs, S and G.; that the bill had become due, and that the defendant had not paid it, nor had he paid for the goods, for the price of which the bill was drawn and accepted. Held, that the statement of

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- claim was embarrassing and must be struck out. After the issue of the writ, F. had been joined as a plaintiff, by leave of a master, under Order XVI., r. 1. *Semble*, that such leave should not have been given. (*Smith, Gale, and French v. Richardson*.) ... page 257
- Pleading—Embarrassing plea—Striking out—*Statute of Frauds*—Order XIX., rr. 16, 18, 23; XXVII., l. 1.—To a claim for goods sold and delivered and for work and labour, the defendant pleaded that there was no balance due to the plaintiff, and also the following paragraph: "The defendant will further avail himself, if necessary, as an answer to this action, of the provisions of the *Statute of Frauds*." Held, that this paragraph was calculated to embarrass the plaintiff, and order made to strike it out accordingly. (*Fallen v. Snelus*.) ... 363
- Libel—Malicious prosecution—Statement of claim—*Dennur*—Judicature Act 1873, Order XIX., rr. 24.—There is nothing in the Judicature Acts to alter the old rule of pleading, that in actions for libel the very words of the libel must be set out in the statement of claim, and in actions for malicious prosecution the statement of claim must show prosecution instituted and determined. (*Harris v. Ware*.) ... 429
- Pleading agreement—Order XIX., rr. 4, 24, 27.—In an action upon a guarantee, a paragraph of the statement of claim alleged that it was agreed between defendant and W. and Co. who were bankers, that in consideration that W. and Co. would discount the acceptances as therein mentioned of one D., the defendant would guarantee and be responsible to plaintiffs for payment of the acceptances. Defendant obtained production of the alleged guarantee, which proved to be one in favour of D. and not of W. and Co., through whom plaintiffs claimed. The Court of Appeal refused to strike out the paragraph, as not complying with the provisions of Order XIX., r. 4. *Semble*, it is not sufficient, when an agreement is relied upon, for the party pleading it to state generally that "it was agreed, &c." He should also, in order to comply with Order XIX., state whether the agreement was in writing or not, and generally the facts which support the allegation of an agreement. (*Turquand and others v. Pearson*.) ... 513
- Scandal—Relevancy—Order XXVII., r. 1.—Next friend—Costs.—The plaintiff, a married woman, commenced an action by her next friend against her husband and the trustees of a settlement made by him upon the marriage, claiming to have certain alleged promises by the husband to settle an income upon the plaintiff from the date of the marriage fulfilled, and for an injunction to restrain the husband from interfering with the property of the plaintiff or otherwise molesting her. The statement of claim alleged that the husband had, immediately after the marriage, taken the plaintiff out of England and deserted her, that she had returned to England and had refused to return to him, "having heard, as the fact is, that a verdict was obtained against the husband for an assault upon a girl under the age of fourteen years." The husband moved, under Order XXVII., r. 1, to strike out the words "having heard," &c., as scandalous. Held, that the words were scandalous and irrelevant, and must be struck out with costs of the objectant, as between solicitor and client, to be paid by the next friend personally. (*Coyle v. Cumming*.) ... 453
- Staying proceedings pending appeal—Infringement of patent—Account of profit—Costs—Order LVIII., rr. 16, 17.—In an action claiming an injunction for an alleged infringement of letters patent for the manufacture of ship's pumps an injunction was granted in the terms asked for by the plaintiff, and an account of profits directed against the defendants, who were pump manufacturers. Notice of appeal having been given, and the appeal set down for hearing, the defendants then applied that all proceedings under the judgment might be stayed till the hearing of the appeal. Held, that as by means of the account the plaintiff would be enabled to commence proceedings against the customers of the defendants, and there was danger that the defendants, if ultimately successful, might find that in the meantime their business had been ruined, the right course was to advance the appeal and stay all proceedings under the account until the hearing. As the plaintiff obtained a benefit by the advancement of the appeal, the costs of the application would be costs in the appeal, notwithstanding the general rule in *Erry v. Nickalls* (27 L. T. Rep. N. S. 12 L. Rep. N. S. 8 Ch. App. 205) and *Cooper v. Cooper* (45 L. T. 687, Ch. App. 205). (*Adair v. Young*.) ... 598
- Third parties—Counter-claim—Alternative claim—Joining defendant to counter-claim—Judicature Act 1873, sect. 24, sub-sect. 3, Order XXII., r. 5—Order XVI., rr. 17 and 18. In answer to a claim by the plaintiff company for money lent, defendant set up a counter-claim against the company and one T., stating that T. agreed to purchase a business from defendant on the terms that T. should obtain for defendant an indemnity from certain creditors who had charges upon the goodwill and effects, and also should pay certain of defendant's debts for him, and should pay defendant a share of profits and an annuity; that the business was accordingly transferred to T., who, after performing a small part only of the consideration, formed the plaintiff company, almost all the shares being held by T. and his relatives; that the company took over the business, and adopted the agreement, but, although they performed part, they failed to perform all the terms of it. Defendant claimed damages against the company for their breach; that they might be ordered to obtain an indemnity and discharge from the creditors; payment by them of the unpaid portion of the annuity; and, in the alternative damages against T. for his breach of the agreement. Held that T. could not be joined as a defendant to the counter-claim under sub-sect. 3 of sect. 24 of the Judicature Act 1873, and Order XXII., r. 5; because the remedy overclaimed against him was in the event of the original defendant being liable to the company; and therefore that T. could only be brought in under Order XVI., r. 17, to abide the event of the original action. (*The Central African Trading Company Limited v. Grove*.) page 540
- Transfer of action—Rules of Court 1873, Order L.I., r. 2a.—After an order for compulsorily winding-up a company, an order was made *ex parte* for transferring an action begun at the Rolls to the Vice-Chancellor's Court. *Re Landore Siemens Steel Company, Limited*.) ... 35
- Transfer—Order I.I., r. 2a.—Action brought against executor while administration action pending—Transfer to Chancery Division.—A judge of the Chancery Division in whose court an administration action is pending can order the transfer to himself of such actions only, brought in other divisions against the executor of the person whose estate is being administered, as are brought against him *quid executor*. (*Chapman v. Mason*.) ... 678
- Trial by jury—Action in Chancery Division—Alleged fraud—Discretion of judge of first instance—Judicature Act 1873, ss. 34, 42—Rules of Court 1873, Order XXXVI., rr. 3, 26.—In an action to have an agreement set aside on the ground of fraud, the plaintiff gave notice, under Rules of Court 1873, Order XXXVI., r. 3, of trial by a judge and jury. The defendant gave notice of motion to have the action tried without a jury, and the Vice-Chancellor to whose court the action was attached ordered accordingly. Held, on appeal, that the Vice-Chancellor had exercised a sound discretion, and that the case was more fit for a judge than a jury. Order XXXVI., r. 26, gives the court a discretion in all cases of fraud, or such as raise questions which, before the Judicature Acts came into force, were properly within the jurisdiction of the Court of Chancery, to order them to be tried without a jury, and the court is not bound in such a case to allow a jury at the instance of the plaintiffs. The Court of Appeal will only interfere with the discretion of a primary judge as to how a case before him ought to be tried, when it differs from his opinion upon a point of law affecting the exercise of that discretion. (*Euston v. Tebbin*.) ... 111
- Writ—Service out of the jurisdiction—Rules of Court 1873, Order XI., rr. 1, 1a.—An action was brought to carry out the trusts of a marriage settlement which had been executed in Scotland in the Scotch form, the property being in that country, and the trustees being all Scotchmen residing in Scotland. The plaintiff was an infant (by his father as next friend) who was the sole issue of the marriage. The father was an Englishman, the mother (now deceased) was a Scotchwoman. Immediately after the marriage the father and mother went to England and continued to reside there until the mother's death, and when the action was commenced the infant was still residing with his father in England. A writ having been issued, asking that the trusts of the settlement might be carried into execution by and under the decree of the court, *Malins, V.C.* authorised service of the writ out of the jurisdiction. Held, that there having been no breach within the jurisdiction, of the trusts of the settlement, the court had no authority to order service out of the jurisdiction. (*Cresswell v. Parker*.) ... 599

## PRINCIPAL AND AGENT.

- Foreign principal—Contract signed by defendant in his own name without qualification—Words "on behalf of A. B." in the body of contract—Effect of contract. (*Ogden v. Hall*.) ... 751
- Limited authority—Manager of public-house—Liability of licensed owner for acts of—Practice—Entering judgment on motion for a new trial—Judicature Act 1873, Order XL., r. 10—Appellate Jurisdiction Act 1876—Rules of Dec. 1876.—The licensed owner of a public house is not liable for spirits supplied to the person whom he has left in possession of the premises to manage the business for him, and to whom he has entrusted the custody of the licence, although the invoices are made out in his name, if he has only authorised such manager to deal with particular persons, and the spirits were not supplied by one of them. In such a case there is no evidence of liability on the part of the owner to be left to the jury. The rules of Dec. 1876 have not altered Order XL., r. 10, Judicature Act 1873, and therefore, on a motion for a new trial, where the court has the necessary materials before it, it may still give final judgment. (*Deun v. Simmins*.) ... 553
- Sale of goods—Lunacy of principal—Revocation of agent's authority—Rights of third parties dealt with by agent.—The lunacy of a principal, if so great as to render him incapable of contracting for himself, puts an end to his authority to contract for him previously given to his agent. Where a principal holds out an agent as having

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authority to contract for him, and afterwards becomes lunatic, he is liable on contracts made by the agent after the lunacy with a person to whom the authority has been so held out, and who had no notice of the lunacy. (*Drew v. Nunn*.) ... page 671

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Banker and customer—Securities held by principal creditor—Bill of exchange—General security given by acceptor to banker—Bill discounted by banker for indorser—Rights of indorser to security—Co-surety—Contribution. (*Duncan, Fox, and Co. v. The North and South Wales Bank*.) ... 371

## PUBLIC HEALTH.

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 Offensive trades—Nuisance—Injury to health. (*Malton Urban Sanitary Authority, app., v. Malton Farmers' Manure and Trading Company, resps.*) ... 735  
 Public Health Act 1848 (11 & 12 Vict. c. 63), ss. 2, 45, 46, 84, 144; Public Health Act 1875 (38 & 39 Vict. c. 53), ss. 4, 16, 175, 308—Local board of health—Power to make "side entrances" or man-holes to sewers—"Street"—"Sewer."—Where part of a man's land has been so dedicated to the public as to form a "street" within the meaning of the Public Health Act 1848, but not so as to deprive him of the ownership of the soil, Held, that the defendants had no power under the Act to construct in such street a shaft called a "side entrance" or man-hole communicating with their drains, without first purchasing the land required for the purpose, or obtaining the consent of the owner of the land: Held, also, that their powers with respect to the construction of such works were not enlarged by the Public Health Act 1875. (*Swanston v. The Twickenham Local Board of Health*.) ... 308  
 Sanitary authority—Expenses of sewerage and levelling street—Owner at time of completion of work—11 & 13 Vict. c. 63, s. 69—31 & 32 Vict. c. 96, s. 2—38 & 39 Vict. c. 55, ss. 150 and 257. (*Hinton, app., v. Swindon New Town Local Board, resps.*) ... 484

## QUARRIES AND MINES.

Property tax—Rules under schedule (A.), No. 3, of 5 & 6 Vict. c. 35.—Where a slate quarry, originally worked in the open, had for some years been worked by means of levels driven straight into the mountain to a distance of 250 or 300 yards, and the whole process of quarrying was carried on underground, the commissioners held that the concern was a mine, and came within the 2nd rule of schedule (A.), No. 3. Held, on case stated for the opinion of the court (reversing the decision of the commissioners), that the concern was a quarry, and therefore within the 1st rule of schedule (A.), No. 3. (*Jones, app., v. The Cwmamorthin Slate Company Limited, resps.*) ... 461

## RAILWAY COMPANY.

Grant of right of way through arch underneath station—Right of railway company to use arch as warehouse for goods—Interference with user of right of way—Injunction. (*Mulliner v. Midland Railway Company*.) ... 121  
 Lands Clauses Consolidation Act 1845—Power of railway company to grant building rights over the crown of their tunnel—Meaning of "land."—A railway company, having acquired land under their special Acts (which contained no provision as to the sale of superfluous lands, but with which special Acts the Lands Clauses Consolidation Act 1845 was incorporated), excavated the land to the surface, constructed their line in the excavation, and then covered it over with an arch and girders, and replaced the soil. Held, that they had no power to grant building rights over, or building leases upon, the crown of the tunnel so formed. The meaning of "land" defined as used in the Lands Clauses Consolidation Act 1845. (*The Metropolitan District Railway Company and Coah.*) ... 462  
 Passenger—Travelling without ticket—Absence of fraud—Penalty—Fare for whole distance—Bye-laws—Repugnant to general—Unreasonable. (*London, Brighton, and South Coast Railway v. Watson*.) ... 183  
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 Season ticket—Conditions on purchase of—Deposit—Non-return of ticket on expiry—Reasonable time—Forfeiture of deposit—Condition precedent to return of deposit—"Penalty or liquidated damages"—Construction of contract—Where, on the purchase of a season ticket on a line of railway, the purchaser, in addition to the sum paid by him for the ticket, deposits with the railway company the sum of 10s., and agrees to and signs several conditions,

amongst which are the following, viz., that "the ticket is to be considered as the property of the company, to be delivered up on the day after expiry or on forfeiture," and also "that the ticket and all benefit and advantage thereof, including the deposit, shall be absolutely forfeited to the company if it shall be lost, or in case of any breach of any of the above conditions," the observance and fulfilment by the purchaser of each and every one of the conditions is a condition precedent to his right to a return of the deposit on the expiry of the ticket; and therefore, if he fails to return the ticket "on the day after its expiry," the company are entitled to retain the deposit as forfeited; and although he returns the ticket a few days afterwards, and no damage be shown to have accrued to the company through the delay in returning it, he cannot maintain an action against them for the recovery of the deposit, which is to be treated as liquidated damages and not as a penalty. (*Cooper v. The London, Brighton, and South Coast Railway Company*.) ... page 324

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 Tourist ticket "not transferable"—Intention to avoid payment of fare—Railways Clauses Consolidation Act 1845 (8 Vict. c. 20, s. 103).—If A. attempts to travel with a "not transferable" tourist or return ticket purchased from B., the original holder who has partially used the same, he, A., may be convicted under the Railway Clauses Consolidation Act for travelling without having previously paid his fare, and with intent to avoid payment thereof. (*Langdon v. Howells*.) ... 890  
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Borough vote—Payment of rates by landlord—Allowance of deductions—Notice in writing—Condition precedent—Waiver—38 & 39 Vict. c. 41, ss. 3, 4, 7—30 & 31 Vict. c. 102, s. 3. (*Bennett v. Atkins*.) ... 66  
 Borough—Town council—Local Acts—Public Health Act 1873—Sanitary Law Amendment Act 1874—Public Health Act 1875. (*Reg. on the prosecution of The London and North-Western Railway Company v. The Overseers of the Township of the Foreign of Walsall and others*.) ... 47  
 Valuation list—Increased value of hereditaments—Supplemental list—38 & 39 Vict. c. 67, ss. 43-47.—The second Metropolitan quinquennial valuation list under the Valuation (Metropolis) Act 1869, s. 43, came into force in April 1876. During the year following some new houses were built, to which the appellants mains in existence before the beginning of the year were connected by means of service pipes belonging to the owners of the houses. Held, upon a case stated, that the increased rents thereby receivable by the appellants constituted an alteration which had taken place in the matters stated in the valuation list within sect. 46, so as to increase the valuation list for the following year. (*New River Company app., v. Islington Assessment Committee, resps.*) ... 322

## REFORMATORY SCHOOL.

Liability to provide proper clothing for juvenile offenders—Prison authorities—Reformatory Schools Act 1866—Prison Acts (28 & 29 Vict. c. 126; 40 & 41 Vict. c. 21, s. 4). (*The Prison Commissioners v. Mayor, &c., of Liverpool*.) ... 690

## RIGHT OF WAY.

Appendant or appurtenant—Two ways—Way of necessity—Right of election—Convenient way. (*Bolton v. The School Board for London*.) ... 568  
 Obstruction by erection of building—Mandatory injunction—Damages under Lord Cairns' Act (30 & 31 Vict. c. 27, s. 2).—Where a defendant, after action brought to restrain the erection of a building on land over which the plaintiff had a right of way, continued the erection of and completed the building. Held, that the plaintiff was entitled to a mandatory injunction, and that the court had no power under Lord Cairns' Act to compel him to accept damages instead of the injunction. (*Krahl v. Burrell*.) ... 637

## SALE OF FOOD AND DRUGS ACT.

Adulteration—Quality—Prejudice of purchaser—Sale to inspector—38 & 39 Vict. c. 63, s. 6.—The offences created by sect. 6 of the Sale of Food and Drugs Act 1875, viz., the sale of an article which is not of the nature, substance, and quality of the article demanded by the purchaser, does not depend upon any pecuniary or personal prejudice

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to the purchaser, but is committed in the case of a sale to an inspector appointed under sect. 13 to carry out the provisions of the Act, if an ordinary customer would have been prejudiced by such a sale to him. (*Hoyle, app. v. Hitchman, resp.*)... ..page 253

## SALE OF GOODS.

Divisible contract—Shipment "per vessel or vessels"—Rescission. (*Reuter, Hufeland, and Co. v. Sala and Co.*) 476  
Sale of meat—Caveat emptor—Implied warranty—Latent defect—Opportunity of inspection.—A salesman who sells in a public market meat which has no defect discoverable by an ordinary inspection, but which is afterwards found to be unfit for human food, to a purchaser who selects it himself, does not impliedly warrant that the meat is good, and is not liable to refund the price to the purchaser. (*Smith v. Baker, Son, and Death*)... .. 281  
Tender—Appropriation of goods to contract—Election. (*Borrowman, Phillips, and Co. v. Free and Hollis*)... .. 25

## SCHOOL BOARD.

Bye-laws—Attendance of children employed in factories—Factory Act 1844, s. 31—Elementary Education Act 1870, s. 74.—The respondent was summoned for breach of a bye-law made by a school board requiring all children to attend school twenty-seven hours a week, his child being employed and duly attending school under the Factory Acts. Held, that the school board was not entitled to enforce their bye-law in respect of children who, although not obeying such bye-law, were fulfilling and observing the conditions of the Factory Acts; and that the justices were right in refusing to convict the respondent. (*Mellor, app., v. Denham, resp.*)... .. 385

## SEA BANK.

Natural barrier—Right of subject owner to destroy—Prerogative of the Crown.—There exists in the Crown a prerogative, a right, and a duty to protect the lands of the realm from the inundation of the sea for the benefit of the commonwealth; and such prerogative, right, and duty import a right in a subject who is the owner of land protected from the sea by a natural barrier (which right, though not enforceable against the Crown, is enforceable against a subject who is the owner of land on which such natural barrier exists) to have such barrier preserved from destruction by the owner of land on which it exists. (*The Attorney-General v. Tomline*)... .. 775

## SETTLED ESTATES ACT 1877.

Petition for sale of settled estate together with estate to which the testator was absolutely entitled—Opposition of contingent remainderman.—Where in the opinion of the court it would be more advantageous to sell a settled estate together with property of the testator to which he was absolutely entitled as one estate, the interest of a person opposing who was interested only in the event of four children all dying under the age of twenty-one years without having issue living at their death, held to be too remote for consideration. (*Re Spurway's Settled Estates*)... .. 377

## SETTLEMENT.

Variation of settlement—23 & 23 Vict. c. 61, s. 5—41 Vict. c. 19 (Matrimonial Causes Act 1878), s. 3.—The Matrimonial Causes Act 1878 has not a retrospective operation; therefore the 3rd section of that Act, which extends the provisions of the 5th section of 21 & 23 Vict. c. 61, with regard to the power of the court to vary settlements in cases of dissolution, does not apply to any case where a marriage has been dissolved by decree absolute previous to the 27th May 1878. (*Yglesias v. Yglesias and Selby*)... .. 37

## SEWER.

Nuisance—Consent of occupier—Stoppage—38 & 39 Vict. c. 55, ss. 94 and 96.—(*Riddell, app., v. Spear, resp.*)... .. 130

## SHIP AND SHIPPING.

Bill of lading—Ship—Liabilities of owners—Brokers' signatures—Stowage, loss caused by negligence in—Excepted perils. (*Hayn, Roman, and Co., v. Culliford and Clark*)... .. 536  
Charter-party—Action for delay in discharging—Duty of charterer—Reasonable time—Circumstances at port of discharge.—Where the time to be allowed for unloading is not named in a charter-party, the charterer is bound to provide at the port of discharge sufficient appliances of the kind ordinarily in use at the port for the purpose of unloading, and it is no answer to a claim for damages for delay in unloading to show that the delay was caused by the crowded state of the port. (*Wright v. the New Zealand Shipping Company*)... .. 414  
— Bill of lading—Consignee of goods—Implied contract to take delivery within a reasonable time—Bills of Lading Act 1865 (19 & 19 Vict. c. 111), s. 1. (*Fowler v. Knoop*)... .. 180  
— Construction of—Demurrage—Charterer's liability—Due diligence. (*Postlethwaite v. Freeland*)... .. 601

Steamship—Collision—Limitation of liability—Both vessels to blame—Merchant Shipping Act 1854, s. 514—Merchant Shipping Amendment Act 1862, s. 54. (*Chapman v. Royal Netherlands Steam Navigation Company*)... ..page 433  
Thames Conservators' Bye-Laws.—Construction of—Vessels towed by steam—"Six vessels and no more... .. in a single line"—Bye-laws of July 1877, No. 2, 3, 4.—No. 4 of the Bye-laws of the Thames Conservators July 1877, is as follows: "Above and to the westward of Albert Bridge at Chelsea, six vessels and no more may be towed together in a single line at one time, and the distance between any two of the vessels shall not exceed fifty feet. Held, that the towing of eight barges by a steam-tug, the first four being in a single line, and the last four two abreast, but lashed closely together, was an infringement of the bye-law. (*Gadney, app., v. Rough, resp.*)... .. 258

## SOLICITOR.

Authority to receive money for client—Possession of mortgage deed executed by client—Debt due from client to solicitor and from solicitor to mortgagee—Bankruptcy—Jurisdiction—Time for raising objection—Bankruptcy Act 1869, s. 72.—The mere fact that a solicitor is in possession of a mortgage deed executed by his client does not authorise him to receive the mortgage money for the client. If the client has not received the money the mortgagee cannot maintain the validity of the mortgage deed by showing that he paid the money to the solicitor unless he can show that the solicitor was expressly authorised by the client to receive it. A solicitor having been instructed by a client, who owed him 2011., to raise 400l. for him by a mortgage of certain houses, prepared a mortgage deed and induced the client to execute it, without receiving the money, and afterwards handed it, deed over to the mortgagee as security for a debt of 300l. due by him (the solicitor) to the mortgagee, whom he told that he had himself made advances to the mortgagee. The solicitor soon afterwards absconded. It was not proved that the mortgagee had expressly authorised him to receive the mortgage money. Held, that the mortgage deed was void as against the trustee in the bankruptcy of the mortgagee, inasmuch as the mortgagee could not prove that the solicitor was expressly authorised by the mortgagee to receive the mortgage money. In a case in which the Court of Bankruptcy has jurisdiction but would, as a general rule, decline to exercise it and would leave the parties to their ordinary remedy, the objection to the jurisdiction must be taken at the earliest opportunity, and will not be entertained after the objecting party has taken the chance of a decision in his favour on the merits. (*Ex parte Swinbanks; Re Shanks*)... .. 825  
Charge upon property recovered or preserved—Costs not taxed—Threatened compromise—Injunction—23 & 24 Vict. c. 127, s. 28. (*Lloyd v. Jones*)... .. 514  
Contempt by solicitor in nonpayment of money into court—Commitment of solicitor to prison for—Detention in custody beyond twelve months—Action against gaoler for false imprisonment—Warrant of commitment—Nature of contempt not disclosed on face of—Duty and Liability of gaoler—Debtors Act 1869 (32 & 33 Vict. c. 62), s. 4. (*Greaves v. Keane*)... .. 213  
Lien.—A solicitor's lien for costs is not by title paramount; and when his client has been successful in an action, and recovered costs from, but is adjudged to be indebted in a sum of money to the other party, the lien does not deprive that other party of the right to set-off the sum owing to him against the costs due from him to his adversary. (*Pringle v. Glog*)... .. 512  
Money paid to solicitor on account of alimony ordered by court—Lien for costs—Rule 94.—A solicitor has no lien for costs upon moneys received by him on behalf of his client solely on account of alimony. (*Leete v. Leete*)... .. 788  
— Mortgage deed—Mortgage by client to solicitor. (*Sheffield v. Eden*)... .. 283  
Retainer—Costs—Joint or several liability of defendants signing retainer—Taxation. (*Re Allen; Davies v. Chatwood*)... .. 187

## STATUTE OF FRAUDS.

Agreement not to be performed within the space of one year—Verbal agreement not to carry on business within a certain distance of a particular place. (*Davy v. Shannon*)... .. 623  
— Hiring for a year to commence on a future day.—Sect. 4 of the Statute of Frauds does not render parol agreements which come within its terms void for all purposes, but only prevents their being enforced by action. (*Brittain v. Rossmiter*)... .. 240  
Equitable assignment—Interest in land—Parol agreement for loan on security of future rent—Written authority to tenant to pay rent to lender—Bankruptcy of landlord—Statute of Frauds, sect. 4.—A man who subsequently became bankrupt obtained a loan of £200 from his bankers upon a verbal agreement that it should be repaid out of the Michaelmas rent of a farm belonging to him, and he gave the bankers a letter addressed to the tenant of the farm, authorising and requesting him when his Michaelmas rent became due to pay the bankers 200l. He was adjudicated bankrupt before the rent became due. Held, that the trustee in the bankruptcy was entitled to the rent, the

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letter to the tenant being a mere revocable authority, and the parol agreement to charge the loan upon the rent being inadmissible in evidence by virtue of the 4th section of the Statute of Frauds. (*Ex parte Hall; Re Whitting.*) ... page 179

## STOPPAGE IN TRANSITU.

Contract to deliver goods free on board—Ship chartered by purchaser—Ultimate destination not stated.—Delivery of goods by a vendor on board a ship chartered by the purchaser is only constructive, and not actual, delivery to the purchaser, inasmuch as the contract with the master of the ship to carry the goods does not make him the agent of the purchaser, and so long as the goods remain in the hands of the master of the ship as carrier, the vendor's right of stoppage in transitu continues.—Till the goods are actually delivered to the purchaser or his agent the transitu is not at an end, and it makes no difference that the ultimate destination of the goods has not been communicated by the purchaser to the vendor. (*Ex parte Rosevear China Clay Company; Re Cook.*) ... 780

End of transitu—Constructive delivery.—Delivery of part of cargo—Master's lien for unpaid freight.—Where goods are placed in the possession of a carrier to be carried for the vendor to be delivered to the purchaser, the transitu is not at an end so long as the carrier continues to hold the goods as a carrier, and it is not at an end until the carrier, by agreement between himself and the consignee, agrees to hold for the consignee not as carrier but as his agent. The same principle applies to goods placed in the possession of a warehouseman or wharfinger. (*Ex parte Cooper; Re McLaren.*) ... 105

## SUCCESSION DUTY.

Power of appointment—Successor—Succession Duty Act 1853 (16 & 17 Vict. c. 51), ss. 2, 4. (*Charlton and another v. The Attorney-General.*) ... 760

## TENDER.

To clerk in solicitor's office—"No instructions." (*Finch v. Boring.*) ... 484

## TRADE MARK.

Imitation—Name given by purchasers—Deception of ultimate purchasers—Onus of proof.—Where one trader has adopted a trade mark, a part of which has given a particular name to his goods, another trader will be restrained from using a trade mark which is calculated to cause his goods to be known by the same name. Where one trader has taken a substantial part of another's trade mark, the onus of proving that purchasers would not be deceived rests upon the former. (*Orr Ewing and Co. v. Johnston and Co.*) ... 307

Registration—Name of a firm in Arabic characters—Regulations by Commissioners of Patents—Direction to registrar to refuse registration—*Ultra vires*—Trade Marks Registration Act 1875—Trade Marks Registration Amendment Act 1876—Form of order.—The owner of a device in Arabic characters (which, before the passing of the Trade Marks Registration Act 1875, would have been a trade mark), which was impressed or printed on watches manufactured for the Eastern markets, applied for registration of this device. Registration was refused by the direction of the Commissioners of Patents on the ground that the symbol not being in English the commissioners had no means of verifying the applicant's statements that the symbols meant any particular word in any given language, and that they ought to know what it was they presented to the British public as a trade mark. On motion under sect. 5 of the Trade Marks Registration Act 1875, to rectify the registrar: Held, that the applicant was entitled to have his device registered as a trade mark, and that the directions to the registrar by the Commissioners of Patents were *ultra vires*. (*Re Rotherham and Sons' Trade Mark.*) ... 367

## TROVER AND CONVERSION.

Anctioneer—Wrongful sale of goods—Plaintiff by agreement let some oats on hire to P., who took them to defendant, an auctioneer, and obtained from him an advance upon them. Defendant, by P.'s instructions, and without any notice of plaintiff's property in the goods, subsequently sold them by auction, and having recouped himself for his advance, commission, and expenses, handed over the balance to P. Held, that plaintiff was entitled to recover damages from defendant for a conversion of the goods. (*Cochrane v. Bymill.*) ... 744

## TRUST DEED.

Trust investment association—Unregistered company—Trust deed—Redemption by drawings—Lottery Acts—Action to administer trusts—Demurrer—Companies Act 1862 sect. 1. (*Sykes v. Bosdon.*) ... 243

## TRUST FOR SALE.

Election to take property in its actual state—Reconversion. (*Re Davidson; Martin v. Trimmer; Davidson v. Trimmer.*) ... page 726

## TRUSTEE RELIEF ACT.

Appointment of new trustees—Vesting order.—Last surviving trustee lunatic and out of jurisdiction.—A petition for the appointment of new trustees and for a vesting order, when the last surviving trustee is a lunatic and also out of the jurisdiction, need not, on the true construction of sects. 3 and 9 of the Trustee Act 1850, be presented in lunacy as well as in Chancery. (*Re Gardner's Trusts.*) ... 53

Lunacy—Vesting order.—The surviving trustee of a settlement having become of unsound mind, the persons beneficially entitled to a sum of consols comprised in the settlement presented a petition in lunacy for an order vesting in them the right to transfer the stock and receive the dividends. Held, that the order could not be made, as it was the settled rule not to administer trusts in lunacy; but that, on the petition being amended and intitled in the Chancery Division as well as in Lunacy, and affidavits of fitness being produced, an order would be made appointing the petitioners trustees of the settlement, and vesting in them, as such, the right to transfer the stock and receive the dividends. (*Re Currie.*) ... 110

Payment into court—Address of party entitled unknown—Chancery Funds (Amended) Orders 1874, r. 5.—Where, on payment into court under the Trustee Relief Act, the address of the person interested in the fund was not known, the court declined to give any direction as to how the notice required by the Chancery Funds (Amended) Orders 1874, r. 5, should be given, holding that the party paying in the fund ought to take that responsibility upon himself. Suggestions as to what would probably be considered sufficient notice of the payment in. (*Re Hardley's Trusts.*) ... 400

Person of unsound mind not so found—Jurisdiction of Chancery Division to order payment out.—Where a married woman was entitled under the trusts of a will to a fund in court, and her husband was of unsound mind, not so found by inquisition; the fund was ordered to be paid to her on her separate receipt, she undertaking to apply the same towards the maintenance of her husband and herself. (*Re Dixon's Trusts.*) ... 208

Stop-order—Cons. Ord. 26, s. 26—Costs.—It is the duty of a trustee paying money into court under the Trustee Relief Act to mention in the affidavit on which the money is paid in, or, if that has been already filed, by a supplemental affidavit, all claims on the fund of which he receives notice. Where a trustee who had filed an affidavit before transferring funds into court, subsequently, but before the money was paid in, became aware that an assignee of some of the funds had placed a distinction thereon, omitted to mention the claim of such assignee in his subsequent affidavit, and the assignee, in order to prevent the funds being transferred out, obtained a stop-order: Held, that the trustee was personally liable for the costs thereof. (*Re Allen's Settlement.*) ... 456

## TURNPIKE.

Tollhouse—Purposes of the road—Used as a dwelling-house—Encroachment—3 Geo. 4, c. 126, ss. 89, 118—4 Geo. 4, c. 86, s. 57.—A tollhouse had been used for the residence of a man employed to keep the road in repair ever since the tolls had ceased to be collected there, twelve years ago. The adjoining landowner applied for a mandamus to compel the road trustees to pull down the house, under 4 Geo. 4, c. 86, s. 57, in order that he might purchase the site, under 3 Geo. 4, c. 126, s. 89. Held, that the house, being situated within forbidden distance from the centre of the road for a dwelling-house (under 3 Geo. 4, c. 126, s. 118), it was, under the circumstances, no longer required for the purposes of the road; and that the applicant was entitled to this remedy. (*Reg. v. Greenlaw Turnpike Trustees.*) ... 555

Turnpike Act, construction of—"Town"—Definition of—Turnpike gate in the town—Exemption of inhabitants of town from toll—Question of fact for the determination of the magistrates—Omission to demand toll for forty years—No right to exemption established thereby. (*Deards v. Goldsmith and Wife.*) ... 398

## VENDOR AND PURCHASER.

Bankruptcy of purchaser before delivery—Right of vendor to resell—Proof in bankruptcy for deficiency—Rights of trustee in bankruptcy and sub-purchaser.—A vendor of goods has, in the event of the bankruptcy of the purchaser before delivery of the goods, the right to resell them and to prove in the bankruptcy for the deficiency on the resale, unless the trustee in the bankruptcy elects, within a reasonable time, to fulfil the contract and tenders the contract price in cash. A sub-purchaser from the original purchaser would have the same right as the trustee in the bankruptcy of electing to fulfil the contract, on tendering the price in cash within a reasonable time. (*Ex parte Stapleton; Re Nathan.*) ... 14

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- Power of attorney—Voluntary settlement—Contract for sale of part of the land in settlement under power of attorney—Defective title—Recovery of purchaser's deposit—Conveyancing costs by way of damages. (General Meat Supply Assoc., Lim., v. Bouffier.) ...page 126
- Requisitions on title—Inquiry as to incumbrances not disclosed on abstract.—A requisition on title in these words: "Is there, to the knowledge of the vendors or their solicitors, any settlement, deed, fact, omission, or any incumbrance affecting the property, not disclosed by the abstract?" Held, to be an improper requisition. (Re Ford and Hill.) ... 41
- Sale of land—Agreement to pay outgoings—Outgoing, what is. (Midgley and another v. Coppock.) ... 870
- Sale of underlease as lease—Knowledge of purchaser—Form of judgment when contract disputed—Costs.—A contract for the sale of a "lease" is for the sale of the leasehold interest created by the lease. A purchaser, who is aware at the time of entering into a contract for the purchase of a lease that the vendor's interest in the property is only under an underlease, is bound by the contract notwithstanding the misdescription. When, in consequence of the contract itself having been disputed, an action for specific performance is heard before there has been a reference as to the title, judgment will at once be given for specific performance, and an inquiry ordered whether a good title can be made. A vendor who seeks a specific performance should come prepared with his title; he ought to have it ready before he carries his estate to market. If he will sell it with a confused title he must be at the expense of clearing it. (Flood v. Pritchard.) ... 873
- Superfluous lands—Stipulation as to title—Condition precluding inquiry into—Action for return of deposit—Rescission of contract—Forfeiture of deposit. (Hammond v. Best.) ... 769
- VESTRY.**
- Churchwarden acting as vestryman after ceasing to be a member of the vestry—Penalty—Metropolis Local Management Act 1855. (Leftly v. Monnington.) ... 869
- Duty of to remove rubbish—"Rubbish" and "refuse," what—Tots—Construction of contract—Metropolis Local Management Act (18 & 19 Vict. c. 120), sects. 125-127.—A vestry is only bound under sects. 125 to 127 of the Metropolis Local Management Act to remove such things as are or might be injurious to the health of the inhabitants. The vestry of P. sold to the plaintiff "all the breeze, dust, cinders, ashes, dirt, offal, garbage, filth, and refuse, which shall be collected and received by them within the parish of P. during one year" to be collected by the vestry and delivered to plaintiff. During the collection the servants of the vestry appropriated various articles called "tots" which had been thrown into the dust-ine by the owners, in order to be got rid of. The plaintiff now claimed damages under his contract for the value of the tots so appropriated. Held, that the plaintiff could not recover, as the terms of the contract applied only to such refuse as the vestry were bound to remove under the Act. That there was no duty cast upon the vestry to remove "tots," but only such things as might be injurious to health. (Collins v. The Vestry of Paddington.) ... 843
- Summoning authority—Hour of meeting—Right of parishioner—The vicar and churchwardens of a parish declined to enter upon the notice paper of a vestry meeting a notice of motion by a parishioner that future meetings should be held in the evening. Held, upon a rule for a mandamus to compel them to do so, that the summoning authority had power to fix the time of each vestry meeting; and that there was no duty to allow notice of a motion which could not have any effect. (Reg. v. Vicar and Churchwardens of Tottenham.) ... 255
- WARD OF COURT.**
- Lunacy—Infant—Jurisdiction.—An application having been made to the Vice-Chancellor of the county palatine of Lancaster for directions as to the custody and treatment of an infant ward of court, who was alleged to be of unsound mind, though not found so by inquisition, the Vice-Chancellor held that he had no jurisdiction to entertain the application. On appeal, held, that the jurisdiction of the Palatine Court over its ward, which was founded on the infancy, was not ousted by the fact that the ward had become of unsound mind. The case was, therefore, remitted to the Vice-Chancellor to be dealt with on the merits. (Re Edwards; M'Neile v. Chambers.) ... 113
- WILL.**
- Administration "with the will annexed"—Deed of gift—Document partly ambiguous and partly clearly testamen- tary—Executor "according to the tenor."—Where the deceased had on the day before his death executed a document which purported to be a deed of gift, but which bore neither seal nor stamp, and contained (*inter alia*) a direction to the widow to receive "all moneys forthcoming, including stock and funeral moneys, my said wife to pay all dues and demands," and a number of specific gifts of bank shares, moneys, &c., to various relatives: Held (in spite of declarations made by the deceased of his intention to dispose of his property *inter vivos*, and not to make a will), that the document, although ambiguous, was testamentary, and the Court accordingly granted administration "with the will annexed" to the widow as "executrix according to the tenor." (In the Goods of John Walshaw, deceased; Fielding v. Walshaw.) ...page 103
- Apportionment—Apportionment Act 1870 (33 & 34 Vict. c. 35)—Will executed before, and codicil confirming the will executed after, the passing of the Act. (Constable v. Constable.) ... 516
- Construction—Annuity—Direction to set apart investments to produce annuity—Deficiency of income—Claim of annuitant to have deficiency made up out of corpus. (Gee v. Mahood.) ... 663
- "Effect"—Direction to "take a house"—Gift of residue—Failure of purpose for which legacy to be applied.—A gift by will of "my household furniture and effects of all kinds," followed by a gift for another purpose of "all my other real and personal estate," Held to include only effects *quodam generis*. A direction by a testator to his executors "to take a suitable house for my three daughters to reside in with their governesses," Held to entitle the daughters to the sums which ought to have been expended in taking a house for such a purpose during their minorities. A gift by will of "all my other real and personal estate," upon certain trusts, followed by two specific gifts: Held to include all property not previously or subsequently specifically given by the same will. A testator gave his residuary estate to his executors "upon trust out of the rent or produce of my said real estate, and other moneys on loan or otherwise to form a fund, the same to be applied in establishing my three sons in their several professions in such proportions as my executors deem fit." One of the sons had been entered in a profession by his father, but neither of the other two sons had adopted a profession or expressed an intention of doing so. Held, that notwithstanding the testator's purpose had failed, the sons were entitled to the whole residue in equal shares for their own benefit. (Hutchinson v. Bough.) ... 289
- Legacies charged on real estate—Mixed fund—No direction to trustees to sell—Exoneration of realty—"Residue." (Wells v. Row.) ... 715
- Life estate by implication—Gift to heir-at-law and a stranger after wife's death—"Descendants"—Parent's share. (Ralph v. Carrick.) ... 505
- Life interest determinable on bankruptcy—Words of futurity in clause of forfeiture—Bankruptcy of annuitant Annulment of bankruptcy. (Ancoona v. Waddell.) ... 31
- Next of kin—Time when class to be ascertained. (Mortimore v. Mortimore.) ... 696
- Personalty directed to be invested in land—Intestacy—Real or personal estate.—Where a testator directs his residuary personal estate to be laid out in land, to be held on trusts which ultimately fail, land purchased before the failure of the trusts is taken by the next of kin as real estate. (Curtels v. Wormald.) ... 108
- Time of vesting—Tenants in common or joint tenants. (Crosthwaite v. Dean.) ... 837
- Discretion of trustees—Maintenance—Control of the court. (Re Boper's Trust.) ... 97
- Direction to pay debts out of a mixed fund—17 & 18 Vict. c. 113 (Looke King's Act)—30 & 31 Vict. 3. 69—Legacies payable out of mixed fund. (Elliott v. Dearnley.) ... 519
- Gift to heir—*Persona designata*. (Re Grayson's Will.) ... 18
- Mortmain—43 Geo. 3. c. 108—Pure and impure personality Construction—Invalid gift—Particular residue—General residue. (Champney v. Davy.) ... 189
- Perpetuity—Gift of money to trustees of a mechanics' institution—To be applied towards the building fund connected therewith—Charity—Mortmain Act (9 Geo. 2. c. 36)—Literary and Scientific Institutions Act 1854 (17 & 18 Vict. c. 112), ss. 30, 33—Void bequest—Construction. (Re Dutton; Ex parte Peake and another.) ... 470
- Separate gifts of surface and mines—Produce of mines set aside.—A testatrix, having a general power of appointment over land, appointed the surface one way and the mines under it another. At her death there was a sum of money, which had arisen from rents of the mines set aside in accordance with the Settled Estates Acts: Held, that the money so set aside passed under the will to the appointee of the surface. (Re Scarth.) ... 181

THE

# LAW TIMES REPORTS:

COMPRISING

All the Cases Argued and Decided

IN THE

HOUSE OF LORDS, THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,  
THE SUPREME COURT OF JUDICATURE, IN BANKRUPTCY, AT  
NISI PRIUS, THE CRIMINAL COURTS, IN IRELAND, &c.

FROM MARCH TO AUGUST 1879.

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PRIV. CO.]      THE MELBOURNE BANKING CORPORATION (LIMITED) v. BROUGHAM.      [PRIV. CO.]

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## Judicial Committee of the Privy Council.

Dec. 6, 7, and 10, 1878; Jan. 25, 1879.

(Present: The Right Hons. Sir JAS. W. COLVILLE,  
Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and  
Sir ROBERT COLLIER.)

THE MELBOURNE BANKING CORPORATION (LIMITED)  
v. BROUGHAM. (a)

ON APPEAL FROM THE SUPREME COURT OF THE COLONY  
OF VICTORIA.

*Official assignee—Insolvency—Mortgage—Equity of redemption — Release — Colonial Insolvency Statute, 1865, sects. 27, 40, 66, 71, 78, 81—Executory contract not under seal—Part performance—Consideration.*

*The general powers of an official assignee in bankruptcy give him a right to release the equity of redemption in mortgaged property vested in him to the mortgagee, in the absence of any statutory provision to the contrary.*

*Held (reversing the judgment of the court below) that the Insolvency Statute 1865 of Victoria (Stat. 28 Vict. No. 273) contains no provisions restraining the assignee from granting such release.*

*The statute does not require that such release should be made by direction of the creditors, or that a notice thereof should be published in the Gazette.*

*In a case in which the bankrupt was indebted to a corporation in an amount greater than the value of property mortgaged to them, and the corporation, by its duly authorised agent, agreed verbally with the assignee that in consideration of a release to them of the equity of redemption, the corporation would not prove any debt upon the estate:*

*Held (reversing the judgment of the court below) that after the assignee had performed his part of the agreement, the corporation was precluded from proving the balance of its debt, though the agree-*

*ment was not under seal, and that, therefore, the consideration for the release had not failed.*

This was an appeal from a judgment of the Supreme Court of Victoria (Stawell, C.J. and Fellows, J.) affirming an order of the primary judge in equity (Molesworth, J.)

The facts of the case appear fully from the judgment of their Lordships, where the plea of the appellant company upon which the question arose, and the sections of the Act of Parliament are set out.

H. Davey, Q.C. and J. D. Wood appeared for the appellants, and argued that the respondent, though the original mortgagor, was now only in the position of the purchaser of the rights of the assignee; and the assignee having already released the equity of redemption to the appellants, the respondent could derive no title from him as against them. There is nothing in the Act of Parliament to prevent an assignee from releasing the equity of redemption to a mortgage creditor in satisfaction of the debt due to such creditor; in fact, sect. 27 expressly contemplates such a release being made and executed. There is no allegation of collusion, fraud, or *mala fides*.

Benjamin, Q.C. and Everitt, for the respondent, contended that the agreement relied on by the appellants was void for want of consideration. There was no mutuality. A corporation cannot be bound by the verbal agreement of its officer. Specific performance could not have been enforced against them. Further, the agreement was *ultra vires*. An assignee has no power under the Act to release an equity of redemption to a mortgagee in consideration of his abstaining from proof of any part of his debt. He has no power to recognise any person as a creditor who has not proved his debt as required by sects. 78 and 81. Sect. 27 has not the effect contended for.

The following cases were referred to in the arguments in addition to those cited in the judgment:

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.  
Vol. XL, N. S., 1007.



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*New Westminster Brewery Company v. Hannah*,  
1 Ch. Div. 278;  
*Ex parte King*, L. Rep. 20 Eq. 273; 32 L. T. Rep.  
N. S. 505;  
*Froser v. Edmonds*, 1 Y. & Coll. Exch. 481;  
*Ryall v. Bowles*, 2 White & Tud. Lead. Cas. 729, 5th  
edit;  
*Parkinson v. Hanbury*, 1 Dr. & Sm. 143.

*Davey*, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Jan. 25, 1879.—Their Lordships gave judgment as follows:—This is an appeal from a judgment of the Supreme Court of Victoria, affirming an order of Molesworth, J., which overruled a plea filed by the appellants, the Melbourne Banking Company, in bar to a bill brought against them, as mortgagees in possession of certain sheep runs and other property. The bill prayed that an alleged sale by the bank might be set aside, and also for an account of all moneys received under the mortgage upon sales or otherwise. The facts alleged in the bill, so far as they are material to the question in the appeal, may be shortly stated. The plaintiff, John Brougham, on the 20th May 1867, conveyed the property to the bank by way of mortgage to secure the payment of certain moneys, with power to sell in case of default. The bank, upon default being made, and under an arrangement with the mortgagor, entered into possession. Some time afterwards the estate of Brougham was placed under sequestration upon his own petition, and became vested in John Goodman as official assignee, by virtue of the Colonial Insolvency Statute 1865. The bill sets out the title of Brougham derived from the official assignee (which it may be observed is subsequent in date to the release of the equity of redemption alleged in the plea); it states that, on the 18th Dec. 1873, John Kennedy, as agent of Brougham, who had then received a certificate of conformity, purchased from Goodman, "for a valuable consideration," the whole of the right, title, and interest of Goodman as official assignee in the sequestrated estate. The bill further states that Goodman and John Kennedy having died, Jacob, who had been appointed official assignee of Brougham's estate, and William Kennedy, the surviving executor under John Kennedy's will, joined in conveying to Brougham, by a deed of the 2nd March 1877, the whole of the sequestrated estate. The bill charges that the bank pretended that Goodman released the equity of redemption to it, and submits he had no power to make such a release, and prays for relief on the footing of the mortgage being still open. It is to be observed that Brougham is suing not on his original right as mortgagor, but on a title derived by purchase from the official assignee. The plea commences by setting out a verbal agreement between Goodman as official assignee and the manager of the bank, who is alleged to be its duly authorised agent, as follows: "That after the sequestration of the estate of the plaintiff as in the bill alleged, and on a day the exact date whereof the defendant is unable to state, but shortly before the date of the indenture hereinafter set out, it was verbally agreed between this defendant by Walter Robert Johnson, its manager and duly authorised agent, and John Goodman, in the bill mentioned, the official assignee, in whom the estate of the plaintiff was then vested, that the said John Goodman should execute to this

defendant a release of the equity of redemption in the property, subject to the security created by the indenture of the 18th May 1867 in the bill mentioned, and that in consideration thereof this defendant should not prove any debt upon the said estate." It then sets out a deed, dated the 30th May 1870 (which, it is alleged, was indorsed on the deed of mortgage), by which Goodman conveyed the equity of redemption, and all interest in the property, to the bank. The plea states that in this deed it is recited "that there was due and owing to this defendant the sum of 18,900*l.*, or thereabouts, on the security of the indenture of the 18th May 1867, in the now stating indenture referred to as the within written indenture, and that the whole of the sheep runs or stations, chattels, and premises, which were comprised in and described in or subject to the within written indenture, were valued by this defendant at the sum of 15,000*l.*, or thereabouts; and that the said John Goodman, being satisfied that the aforesaid sum of 18,900*l.*, or thereabouts, was due and owing to this defendant, as aforesaid, and that the then value of the property, described and comprised in or then subject to the within written indenture did not exceed the sum of 15,000*l.*, had elected and agreed to execute the assignment to this defendant which was thereafter contained." It appears to their Lordships that the word "agreed" in the above recital may properly be held to refer to the antecedent agreement, if it was made as in the plea alleged. In the operative part of the deed the conveyance is expressed to be "in pursuance of the said agreement and in consideration of the premises, and of the sum of 18,900*l.*, or thereabouts, so due and owing to the said corporation as aforesaid." The plea then alleges that the bank never proved, or attempted to prove, the mortgage debt under Brougham's sequestration. An answer filed in support of the plea denies the pretences alleged in the bill. In discussing the validity of this plea, it must, their Lordships think, be assumed—and the grounds of the decisions in the court below do not seem to be inconsistent with such an assumption—that the agreement and release stated in the plea were the result of a fair and honest accounting and bargain, not impeachable on the grounds of mistake or flagrant error, or of fraud upon the official assignee, or collusion between him and the bank to cheat the creditors. If these assumptions are not warranted by the facts of the case, they may be questioned by proceedings proper for that purpose. The main ground on which the decisions below, and the argument at their Lordships' bar in support of them, has been placed is, that, having reference to the provisions of the Colonial Insolvency Statute, the release of the equity of redemption was *ultra vires* of the official assignee. On the other hand, the counsel for the bank contended that there was nothing in the statute to limit the power of the assignee to convey and release an equity of redemption; and that the 27th section of the statute contemplated the exercise of such power, and gave full protection to any person taking such a release from him. That section is as follows: "All deeds which shall be executed by the official assignee for the time being of any insolvent estate, or by the assignee for the time being elected by the creditors and confirmed by the court as aforesaid and by the official assignee for the time being, purporting to convey,



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assign, release, or assure any part of the real or personal property of an insolvent to any purchaser or purchasers, mortgagees or mortgagees, or other person or persons in fee simple, or for other less estate or interest, shall be from the time of the date or execution thereof valid and effectual, both at law and in equity, for conveying, assigning, releasing, and assuring such real and personal property in fee simple, or for other less estate and interest in such deed mentioned or expressed, to be conveyed, assigned, released, or assured to the purchaser or purchasers, mortgagees or mortgagees, or other person or persons; and such purchaser or purchasers, mortgagees or mortgagees, or other person or persons, and every person or persons, claiming under him or them, shall be relieved from inquiring or ascertaining whether the advertisements have been inserted, and meetings of creditors called, or direction of creditors obtained as in this Act provided, notwithstanding the same shall not have been inserted, called, or obtained; and any person who shall deal or contract with, or take any conveyance or other assurance from, any assignee or assignees for the time being of any insolvent estate shall not be bound to inquire into or ascertain the power or authority of such assignee or assignees with respect to such dealing, contracting, conveyance, or assurance as aforesaid; but such assignee or assignees shall for the purpose aforesaid, and as between him or them, and such person or persons, as aforesaid, be deemed and considered as beneficial owners of the real and personal property of the insolvent. But nothing in this part of this Act contained shall be construed to exonerate any such official assignee, confirmed assignee, or assignee for the time being, as aforesaid, from any liability for the non-observance or non-performance of his duty as such assignee as aforesaid." It was contended by the learned counsel for the plaintiff that this section was not an enabling, but a protecting enactment. It is unnecessary in their Lordships' view to define its precise character. It, however, clearly contemplates that the official assignee may release the mortgaged property to the mortgagee. The right to do so would be vested in him by his general powers as assignee, unless controlled by some restraining provisions in the statute. In the absence of any such restriction there seems to be no reason why such a release should not be within his authority. Under former English statutes of bankruptcy it has been a recognised practice for assignees, when a foreclosure suit has been brought or threatened, and the equity of redemption was valueless, to disclaim any interest; and questions have arisen whether, when such a disclaimer has not been made before suit, but by answer, the assignee was entitled to his costs. If such a disclaimer may be made, there seems to be no reason why the assignee, in the case of the equity being worthless, should not release it to the mortgagee before any costs are incurred. In one case where the assignees had not disclaimed until their answer, they put their application to be allowed their costs on the ground "that they would have released the equity of redemption if any application for that purpose had been made to them;" and no doubt seems to have been thrown on their power to make such a release: (*Collins v. Shirley*, 1 Russ. & My. 638.) The principal argument on the part of the plaintiff was

based on the contention that the bank was bound to prove its debt, and value the mortgage security in the manner provided by sect. 81 of the Insolvency Statute, and that no release of the equity of redemption could be made by the assignee until that had been done. Their Lordships, however, are of opinion that this section is applicable only to mortgagees who elect to come upon the general estate of the insolvent. A mortgagee may stand aloof, if he so pleases, and pursue his remedies under his mortgage. He is in no way bound to come upon the general estate, and his election to do so, in the case of a debt exceeding the value of the security, would of course be a burden on, and not a benefit to it. It is to be observed that the 81st section only requires the creditor to put a value on his security "upon oath" in case "any dispute shall arise about the value of such security," so that even under this section the assignee and the mortgagee might agree upon the value. Mr. Benjamin sought support for his argument from the words of the 78th section:—"Every creditor shall prove his debt by affidavit or otherwise." But this again obviously means no more than that all creditors who come in shall prove in the prescribed manner. A creditor who abstains from proving his debt does so at the peril of losing it, and it is he, and not the estate, who suffers from his inaction. It was further contended for the plaintiff that the release was invalid, inasmuch as as it did not appear upon the plea that it had been made by the direction of the creditors, and after notice in the *Gazette* as required by sect. 71. This section enacts as follows:—"The assignee shall (subject to the directions of the creditors given in the manner herein provided) forthwith proceed to make sale of the property belonging to the estate, real and personal, giving due notice thereof in the *Government Gazette*, and also such other notice as he shall think fit." This enactment no doubt requires that the directions of the creditors should be followed where such directions have been given; but it does not provide that in all cases such directions must be given. The words in the parenthesis of sect. 71 seem to have reference to the provision in the 40th section relating to the business to be done at the first meeting of creditors, wherein it is said that the majority "shall also give to the assignee such directions as to the management of the estate as to them shall seem meet." The creditors at their meeting may think fit to give no specific directions, and may leave the time and manner of dealing with the property to the assignee. The enactment in sect. 66 enabling the assignee to call a meeting of creditors, and to require their direction concerning the collection or sale of any part of the estate, has for its object to relieve the assignee from the responsibility of acting on his own judgment when he desires to be so relieved. However prudent and proper it may be for the assignee to obtain the sanction of the creditors, it does not seem to be made obligatory on him to call the meeting. Moreover, their Lordships think that it ought not to be presumed that in releasing the equity the assignee acted in opposition to any directions given by the creditors, or without directions from them, if directions were necessary. The 27th section *prima facie* at least affords protection to the transaction. With regard to the want of notice in the *Gazette*, their Lordships are disposed to think that a transaction of this kind is not such

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a sale as requires that notice. In one sense it may be regarded as a sale, but they are inclined to agree with the counsel for the plaintiff, who argued that it was not a sale in the proper sense of the term, and, therefore, that it is not within the scope and meaning of the section in question. Such a transaction as that in question could from its nature only take place between the assignee and the mortgagee, and be the subject of arrangement and bargain between them only. If, therefore, it was competent for the assignee in other respects to enter into it, their Lordships are not prepared to hold that it could be successfully impeached for want of notice in the *Gazette*, even if it could be rightly presumed on these pleadings that no such notice was, in fact, given. But, however this may be, the 27th section would *prima facie* protect the release against this objection. Their Lordships, having dealt with the authority of the assignee to release the equity of redemption, will now proceed to consider the further objection that the release in question is on the face of the plea invalid for want of consideration. It was not disputed at the bar that, assuming the statement in the recitals of the release, viz., that the amount of the debt was about 18,000*l.*, and the value of the mortgaged property about 15,000*l.*, to be correct, there would be sufficient consideration for the bargain, if the bank had been bound not to prove the balance of the debt; but it was denied that the bank was so bound. It must be taken in considering this objection that the parties in good faith estimated the value of the security and the amount of the debt as stated in the recitals referred to. The question to be decided is, whether enough appears in the plea to show that the bank is legally bound to perform its part of the bargain. The agreement between the bank and Goodman, stated in the plea, is to the effect that Goodman should execute to the bank a release of the equity of redemption, and that, in consideration thereof, the bank should not prove any debt upon the estate. The agreement is verbal, but is alleged to have been entered into on the part of the bank by Johnson, who is stated to be "its manager and duly authorised agent." It must, therefore, be taken that Johnson was clothed with the proper and necessary authority from the bank (whatever the form of it might be) to make the agreement on its behalf. This agreement having been made, Goodman performed his part of it by executing a conveyance and release of the property and the equity of redemption to the bank, as stated in the plea. This release was indorsed on the original mortgage, which was presumably in the bank's possession; and it is averred that the bank never proved its debt upon the estate. If these averments be true, it cannot be doubted that both parties have, in point of fact, acted on and had the benefit of the agreement. But it was objected that, the agreement not being under the seal of the bank, it was not legally binding upon it. Assuming this might be so, whilst the agreement remained executory, it was contended in answer that after Goodman had performed his part of it by the conveyance and release of the property, the bank was precluded from proving the balance of its debt, and therefore that the consideration had not failed. Their Lordships think that the authorities support this contention. If, when the other party had performed his part of the agreement, and the corpora-

tion had taken the benefit, it should seek to repudiate its own part of the agreement, and to prove its debt, such attempted repudiation would amount to a fraud, which a court of equity would not suffer to prevail: (See *Wilson v. The West Hartlepool Railway*, 2 De G., J. & S. 475; 11 L. T. Rep. N. S. 327, 692; *Crook v. Corporation of Seaford*, L. Rep. 6 Ch. 551; 25 L. T. Rep. N. S. 1.) In the case cited at the bar (*The Mayor of Kidderminster v. Hardwick* (L. Rep. 9 Ex. 13; 29 L. T. Rep. N. S. 611), where the corporation sued the defendant for refusing to take a lease of certain tolls under an agreement entered into with the corporation, but not under its seal, Kelly, C.B. affirmed the principle of the above decisions. He said: "I will observe that if it appeared in the present case, as in that case (referring to *Ecclesiastical Commissioners v. Merral*, L. Rep. 4 Ex. 162), that the contract had been performed and carried into effect by both parties, and that the plaintiff had had the benefit of that performance, the defendant would, no doubt, have been entitled to file his bill for specific performance." The learned Chief Baron obviously could not have contemplated an entire performance by both parties, but a partial performance only, for otherwise no necessity for a bill for specific performance could arise. But, whilst affirming the principle referred to, the Chief Baron held that, in the particular case, no part performance had been shown before the happening of the breach complained of. In the present case the official assignee had completely performed his part of the contract by executing the release. That conveyance vested the equitable property in the bank, which not only did not repudiate the conveyance, but accepted it, by allowing it to be indorsed on the original mortgage, and abstaining from proving the balance of its debt, and is now estopped from repudiating it by asserting a title under it on record. (See *The Mayor of Thetford's case*, 1 Salk. 192.) The observations which have been already made meet most of the reasons advanced in the judgments of the learned judges below. It is true, as Molesworth, J. observes, that the deed contains no release or covenant not to prove the debt, but that was provided for in the previous agreement, and the combined effect of this agreement and the conveyance was, in their Lordships' view, under the circumstances already detailed, to preclude the bank from proving. The learned Chief Justice, in his judgment on appeal, remarks that, to constitute a valid sale, a price should be fixed by the parties, and that that condition was not complied with because the value of the equity of redemption is virtually made to depend on the amount of the dividend which may chance to be paid. This reasoning is scarcely applicable to the present case, because upon the figures on which the parties dealt, and which for the present purpose must be assumed to have been honestly arrived at, the equity of redemption was, *ex hypothesi*, of no value. Their Lordships agree with what the Chief Justice has said respecting the protective effect of the 27th section, but they consider, for the reasons already given, that the release in question is not, *prima facie*, beyond the scope of the assignee's authority. Other points have been argued at the bar. On the part of the bank it was contended that the plaintiff could not disaffirm the transaction, even if the official assignee might have done so; and, further,

that the transaction being at most voidable, some distinct act or proceedings should have been taken to impeach it. The decision, however, at which their Lordships have arrived renders it unnecessary at this stage of the suit to consider these points. Their Lordships are fully sensible of the inconvenience of determining the rights of the parties upon a plea which is somewhat bare in its averments, and is itself supported by an answer. Possibly the conveyance and release may be affected by extraneous facts. Whilst, therefore, they are of opinion, for the reasons above given, that the plea ought not to be overruled, they think the proper order to be made is, that the benefit of the plea be saved to the hearing of the cause, the parties being at liberty to make such additions to and amendments of their pleadings, not inconsistent with the rules and practice of the court below, as they may be advised. Their Lordships will, therefore, humbly advise Her Majesty to reverse the orders appealed from, and to direct that in lieu thereof an order be made as above stated. They think that the costs occasioned by the hearing of the plea in the courts below should be costs in the cause. The appellant will have the costs of the appeal to Her Majesty.

Solicitors for the appellants, *Murray, Hutchins, and Stirling.*

Solicitors for the respondent, *Keen and Rogers*

## Supreme Court of Judicature.

### COURT OF APPEAL

#### SITTINGS AT LINCOLN'S INN.

Jan. 17, 18, and 20.

(Before JAMES, BAGGALLAY, and BRAMWELL, L.JJ.)

Re THE GOLD COMPANY (LIMITED). (a)

*Company—Winding-up—Voluntary winding-up—Shareholder's petition for compulsory order—Supervision order—Alleged fraudulent allotment—Leave to use liquidator's name—Fraud on public—Allotment of paid-up shares.*

*A voluntary winding-up is a bar to the making of a compulsory winding-up order on a shareholder's petition, unless there has been fraud in the passing of the resolution for a voluntary winding-up, or the resolution has been passed by the preponderating influence of directors or others whose conduct is alleged to require investigation.*

*A company was incorporated in 1873, with a registered capital of 100,000l. in 1l. shares, for acquiring and working a mine. One of the articles of association provided that the directors might allot and issue shares on such terms as they should think fit, and that if at any time it should appear to them that the capital of the company for the time being subscribed would be sufficient for the purposes of the company, they might allot any shares which then remained unallotted to and among the then shareholders, in proportion to the number of shares respectively held by them, and such shares might be so allotted as fully or partially paid-up shares, although no moneys might be received by the company in respect of such shares from any allottee thereof.*

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

*Within two months after the incorporation of the company, when 25,000 shares had been allotted, some for cash and others for various alleged considerations, a contract was signed between the company and all persons who were then holders of shares, by which it was agreed that all the remaining 75,000 shares should be divided between the existing shareholders in proportion to their holdings, and allotted to them as fully paid-up shares. This contract was registered, and the allotments were made accordingly, without any payment being made in respect of the shares so allotted. In May 1877 resolutions were duly passed for a voluntary winding-up of the company, and appointing the secretary of the company liquidator.*

*After the voluntary winding-up had gone on for several months, a shareholder who had bought 100 shares in the company, at 1l. 0s. 9d. per share, from one of the subscribers of the memorandum of association, who was also one of the allottees of the freely allotted shares, believing 1l. to have been paid on each share, presented a petition for the compulsory winding-up of the company, on the ground that the allotment of the 75,000 shares was fraudulent and required investigation, and that the directors and their friends ought to be made to account for the profit made by the sale of those shares.*

*Held (reversing the decision of Malins, V.C.), that the petitioner was precluded by the voluntary winding-up from obtaining a compulsory winding-up order.*

*Held also, that, objectionable as was the clause in the articles of association empowering the directors to allot the shares as fully paid-up, the case did not entitle the petitioner to a supervision order, or to leave to use the liquidator's name in prosecuting proceedings against the directors, or to any remedy under the Companies Acts, but that his remedy was by action against the person of whom he had bought the shares.*

THIS was an appeal from an order of Malins, V.C. for the compulsory winding-up of the above-named company.

The facts of the case are sufficiently stated in the following judgment which was delivered on the 6th April 1878, by

MALINS, V.C.—This is a petition presented by Mr. Carter asking for a compulsory order to wind-up this company, which is called the Gold Company (Limited). The transactions of the company have been of a most extraordinary and unusual character even for the proceedings of joint-stock companies, for it appears that the company was formed in the year 1873, duly registered on the 26th Nov. in that year, with a nominal capital of 100,000l. in 100,000 shares of 1l. each, and in the articles and memorandum of association there is contained a power, in the 11th section, which I have never seen before, and I hope I shall never see again, and which certainly ought not to be found in any articles of association. This is it: "The directors may allot and issue shares in the present capital other than the shares mentioned in clause 7 hereof, to such persons, upon such terms, and at such times as they may think fit. If at any time it shall appear to the directors that the capital of the company for the time being subscribed will be sufficient for the purposes of the company, they may allot any shares which

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then remain unallotted to and among the then shareholders in proportion to the number of shares respectively held by them, and such shares may be so allotted as fully or partially paid-up shares, although no moneys may be received by the company in respect of such shares from any allottee thereof." It is not for me to say, nor do I express any opinion, whether this clause was inserted with a fraudulent intent, but all I know is, it is a clause which may very well be turned to fraudulent purposes; and I am by no means satisfied it was not so turned in this case, although I give no positive opinion upon the subject. The course taken was this. According to the statements of the directors of this company, 25,000l. only was taken up in shares, this company being formed in November 1873, and in the following month of January it was positively impossible for them, after the expiration of about six weeks, to form any opinion as to what capital would be necessary to work the mine. But this, at all events, is perfectly clear, that if they had come to this reasonable and satisfactory conclusion that the money they had already raised on the shares issued was sufficient to work the mine, the proper course was to resolve not to issue any more shares until they were wanted, but to keep them in reserve if they should be wanted. But instead of that they hold a meeting and they allot to every man who held shares, in round numbers, I believe three shares for every share which was then held, so that I find in the comparative statement which is in evidence, taking Mr. Aspinall first, he held 500 shares—whether he had paid for them I think is exceedingly doubtful, and on the evidence before me I should say he had not. Having 500 shares, part of the 25,000, they allot to him on the 15th Jan. 1500 more shares. To Mr. Attenborough, the chairman of the company, who held 575 shares, they allot 1725 shares, making up 2300, and so I might go through the whole list; to every man who held any of the 25,000 shares in round numbers, three free shares were issued to him for every share he then held. Now, could there be any fair object in this? The only fair way of carrying on the business of the company is that which I pointed out—if they had capital enough not to issue any more; and no man of business will venture to say that he could be justified in expressing an opinion in January, as to a company formed in the previous November to work a mine, how much capital would be required. What then could have been the object of this operation? Could it have been fair? Could it have been straightforward? It is impossible, on the only explanation I have given, to come to the conclusion that nothing but straightforward and honourable dealing was intended. How did it work? Every one of these men—some of them were wealthy men, I suppose, and some were poor men—but every man who had one share would have three more, and if he had 100 he had 300 more put into his power, which he was at liberty to go into the market with; and in this wretched concern I am sorry to find, amongst various attempts which could only have been founded on fraud, was an attempt to obtain a settling day on the Stock Exchange. To obtain such a settling day could only have been done by fraud; but it appears by this petition, and the evidence in support of it, that the committee of the Stock Exchange on this

occasion were not imposed upon, for, having discovered the state of affairs, they refused a settling day, and therefore the shares have never been in any official list; but, nevertheless, it appears they have been extensively sold on the Stock Exchange. I repeat, therefore, straightforward and honest dealing could not have dictated the course which was adopted; to have shares which were really of no value, but to give an opportunity of going into the market and saying they were of value, and getting money upon them, certainly afforded an opportunity which in fair dealings and mercantile transactions could not be right. Now the petition of Mr. Carter says, that in June 1875, in consequence of the representations made of the flourishing condition of this company, he was induced to buy of Mr. Edward Vickers, one of the persons who signed the memorandum of association. Having 600 shares, he had 1800 free shares allotted to him, and what was the effect of this? Mr. Vickers, who knew the affairs of the company, had thus put into his power, if he was inclined to exercise the power, a very great instrument of fraud; because he had no less than 1800 shares for which he had not paid a single farthing, with which he had the opportunity of going on to the market and saying, "These are fine things, they are paid-up shares, I will sell them at 1l. per share." On the 2nd June 1875, at a time when it is evident by the banking book of the company that it was an utter failure, this Mr. Vickers who sold these shares, and the directors who were managing the affairs of the company, and, indeed, everybody who had the slightest knowledge of the affairs, must have been perfectly convinced that the thing was an utter failure, which ought to have been wound-up at that time, and nothing could justify the selling of shares by any person who had any knowledge of the company. Mr. Vickers goes into the market, and, unfortunately for himself, Mr. Carter goes there too, and is induced to buy these shares at a small premium of 9d. He buys these 1l. shares at 1l. 0s. 9d. when they were not worth a farthing, when he might as well have thrown his money into the Thames. They were utterly worthless, he finds himself imposed upon, and therefore I cannot wonder that he desires to have these transactions looked into. The only thing that surprises me is, that Mr. Carter, having lost only 103l. by this transaction, would not rather submit to the loss than embark in a litigation such as he has had on this petition, where he has been met by every kind of opposition. But now what is the subsequent course adopted? In 1875 it appears by the banking account they were in a state of utter exhaustion, for it is evident by the pass-book that the balance against them on the 5th June 1875 was 122l. I find during the succeeding half-year their total receipts were 124l., and the balance against them was 4l. 12s. 4d. In 1876 the total receipts seem to have been 199l., and it ended with a balance against them of 75l. 12s. 4d. In May 1877 they began their year with a balance in hand of 35l., they receive 30l. in the month of May 1877, that is, their total receipts were 65l., and that is all paid away, leaving a balance against them of 14l. 2s. 4d.; and it was in this state of things that in the month of May they resolved to wind-up voluntarily. It seems that they got a meeting composed of seventeen persons, of whom four, for what reason I do not know, I

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suppose from some timidity of character, would not vote one way or the other. That left thirteen persons present, of whom eleven voted for a voluntary winding-up, and two voted against it. Therefore, so far as the requisite majority was required, they had it, because it requires a majority of three-fourths. Those who declined to vote I must consider as if they had not been present, and therefore I can only treat the thirteen persons for the purpose of the Act as having been present, and of course the eleven is more than three-fourths of thirteen, and they had therefore the requisite majority. But how was this composed? It turns out that the persons who held the meeting were, the majority of them, as I collect, persons who had been engaged in the original transaction, who had adopted this most improper course of allotting to themselves three free shares for every one share which had been taken. What was their object therefore in meeting thus? To screen themselves, to protect themselves, and to blind the public so far as the public had had to deal with them in these transactions, and accordingly they appoint their own secretary, who has been their servant from the beginning, who has aided and abetted them in all these transactions—they appoint him liquidator, and no wonder therefore they are very desirous that the management of the liquidation of this company should remain in his hands, a person who is perfectly friendly to them, and who it is perfectly plain never intends to take a single step which shall be disagreeable to a single director of the company, and certainly to do nothing for the benefit of the creditors. Amongst the extraordinary things I have heard is a letter written by a creditor of the company in June 1877. "Is there any hope of my being paid?" It was only an accountant who had been employed, and the amount was only 35l. "Is there any hope of my being paid?" "Oh, yes, there will be plenty to pay you," is the reply. However, he does not get his money; he writes shortly afterwards and gets an answer, "There will not be a single farthing for any creditor, and all the assets of the company are 250l." That is the substance of it. And one of the most extraordinary things in this case is, that I have actually had counsel appearing for creditors opposing this petition, a thing I have never seen before—creditors opposing a petition which, if acceded to, may give them something, and cannot cost them anything, because the creditors are not liable to pay the expenses of the winding-up. What conclusion can I come to, but that the directors who have been guilty of these practices are very desirous to keep the winding-up in the hands of their friend, the secretary, and thus escape all investigation of the transactions which appear to me eminently to call for investigation. I give no opinion what the result may be, but it does seem to me it is a case in which it is proper that the transactions of this company and the accounts of this company should be investigated, for I am not at all satisfied that the money which is represented to have been paid has been paid. Of this, at all events, I am satisfied, that the present liquidator will never investigate it, and I am satisfied that if I appoint a liquidator he will investigate that, and will see whether all the money stated to have been paid by the persons for their shares has in fact been paid, or whether

they are not liable to pay something more for the shares they admit they took, even if the issue of the free shares is valid. The petition has been opposed on various grounds; amongst others, that I have no authority to make a compulsory order to wind-up after a voluntary winding-up. I confess I am much inclined to look at that meeting which resolved upon the winding-up as a delusive meeting, having no good faith in it; held, in my opinion, as it appears to me at present, mainly for the purpose of screening the directors, smothering the transactions of this company, and keeping them from any investigation. But, however, I am told by Mr. Deane (who in the absence of his leader, Mr. Bristowe, argued this case extremely well, and in a manner entirely satisfactory to me) that I cannot do this in the face of the 145th section of the Companies Act 1862, which is in these words: "The voluntary winding-up of a company shall not be a bar to the right of any creditor of such company to have the same wound-up by the court, if the court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding-up." It was fairly argued by Mr. Deane, that if a voluntary winding-up of a company shall not be a bar to the right of any creditor of such company, that fairly means that it is a bar to the right of any other person than a creditor, and therefore it is a bar to the right of a shareholder. But Mr. Higgins has drawn my attention to the authorities collected upon that section in Mr. Buckley's book, at page 267-8, from which it appears, and particularly by the case of *Re Littlehampton Steamship Company* (11 L. T. Rep. N. S. 725; 34 Beav. 256; and, on appeal, 12 L. T. Rep. N. S. 8; 2 De G. J. & S. 521), that it has not been the practice of the court to consider that as an absolute bar, but to look at all the surrounding circumstances, and if it sees that the resolution to wind-up voluntarily has been obtained under such circumstances as to require further investigation, the court will make a compulsory order. Then another point was, that it was unnecessary to make such an order, because the remedy may be obtained under the 138th section. It was argued by Mr. Wilkinson that, whatever they could get under a compulsory winding-up, could be obtained under that section, which is, that "where a company is being wound-up voluntarily, the liquidators, or any contributory of the company, may apply to the court in England, Ireland, or Scotland, or to the Lord Ordinary on the Bills in Scotland in the time of vacation, to determine any question arising in the matter of such winding-up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the court might exercise if the company were being wound-up by the court; and the Court or Lord Ordinary, in the case aforesaid, if satisfied that the determination of such question, or the required exercise of power, will be just and beneficial, may accede, wholly or partially, to such application on such terms," and so forth. I am satisfied that practically it will be impossible to have a proper investigation on any application under that section, and it would be utterly impossible, in my opinion, that any proper investigation of the transactions of this company could take place while the friendly liquidator remained in office, the servant of the men who had been guilty of these practices of which so much complaint has been made. This

case illustrates very forcibly the rule which I have, by the advice of my chief clerks, founded on their experience, directed them to adopt, in no case whatever to appoint any official of the company liquidator. They are always under some improper influences, and you cannot get as fair an investigation in an impartial and proper manner from a secretary, or even a co-director, as from a person who would be indifferent in the matter. Therefore my great object in making the compulsory order which I intend to make in this case is, that I may have an impartial and indifferent liquidator, and I shall take care to select some man fully competent to do it, to investigate the affairs of this company, and to see whether the moneys which are alleged to have been paid by these directors have been paid, and to bring before the court in the proper manner the question of the liability on these transactions, which are, in my opinion, of the most blameable character. Whether the directors have incurred a liability or not, these are proceedings which no court can approve. They are, in my opinion, so improper from the beginning to the end, that, if they were not fraudulent, they were calculated to be the means of fraud, as I am perfectly clear that they have been the means of fraud when I find that they have been the means of selling these shares at a premium, at a time when everybody connected with the company perfectly well knew that the company was in the last stage of decay and ruin. On all these grounds therefore I make the usual order to wind-up compulsorily.

From this decision the company appealed.

*J. Pearson, Q.C.* (who, with *J. Wilkinson*, appeared for the company), being absent through illness, the appeal was opened by

*Bristow, Q.C.* (who, with *Deane*, appeared for shareholders in the same interest).—The order for a compulsory winding-up was wrongly made. The petitioner is a paid-up shareholder, and is subject to no liability in respect of his shares. Then it is well settled that a shareholder cannot obtain a compulsory winding-up order after a voluntary winding-up has commenced. The 145th section of the Companies Act 1862 is really conclusive on this point, for a provision that the voluntary winding-up of a company shall not be a bar to the right of any creditor of such company to have the same wound-up by the court leads to the necessary inference that it is intended to be a bar to any one other than a creditor. *Turner, L.J.* says, in *Re The Bank of Gibraltar and Malta* (13 L. T. Rep. N. S. 387; L. Rep. 1 Ch. 74): "The 145th section seems to give the right to such an order to creditors only, and, as it seems to me, not without reason, for the contributories must be bound by the resolution to wind-up voluntarily, and it would be strange if any of them should afterwards be allowed to destroy that resolution by obtaining such an order." In *Re Beaujoulais Wine Company* (17 L. T. Rep. N. S. 399; L. Rep. 3 Ch. 15), *Rolt, L.J.* held that the court will not, in general, at the instance of a contributory, interfere with a voluntary winding-up, even by ordering it to continue under supervision, unless there has been fraud or undue influence in passing the resolution; and no such case is made out here. In *Re Littlehampton Steamship Company* (11 L. T. Rep. N. S. 725; 34 Beav. 256) the petition was presented before the resolution for a voluntary winding-up was passed, and that distinguishes it

from the present case. In *Re London Flour Company* (17 L. T. Rep. N. S. 636) *Stuart, V.C.* made a compulsory winding-up order on a contributory's petition, but the order was discharged on appeal: (19 L. T. Rep. N. S. 136.) Here the charge of fraud completely fails. The acts of the directors were perfectly fair, and were justified by the articles of association, and the petitioner acquired his shares with full knowledge, or means of full knowledge, of all the transactions.

*J. Wilkinson*, for the company, followed and supported the same contentions, arguing that the petitioner must be taken to have known the articles of association under which the free allotment of shares was made.

*Higgins, Q.C.* and *Oswald* for the petitioner.—The issue of the 75,000 shares without consideration was a clear contravention of the provisions of the Companies Acts 1862 and 1867, and the directors are liable to account for the shares freely given away by them, notwithstanding the 11th clause of the articles. No clause in articles of association can empower directors to give away shares, which must be paid for either in money or in money's worth. The 25th section of the Companies Act 1867 does not make a bad transaction good if the contract is registered, but makes a good transaction bad unless the contract is registered. The allottees of the free shares are also liable because they have paid nothing for them:

*Re Baglan Hall Colliery Company*, 23 L. T. Rep. N. S. 60; L. Rep. 5 Ch. 346;  
*The Society for the Illustration of Practical Knowledge v. Abbott*, 2 Beav. 559;  
*New Sombbrero Company v. Erlanger*, 36 L. T. Rep. N. S. 222; L. Rep. 5 Ch. Div. 73;  
*Phosphate Sewage Company v. Hartmont*, 37 L. T. Rep. N. S. 9; L. Rep. 5 Ch. Div. 394.

[*JAMES, L.J.*—Those decisions all appear to rest upon the fiduciary position of the persons held liable. Here the property of the company has not come into the hands of any person in a fiduciary position.] At all events, the transactions require investigation, which is hopeless under a voluntary winding-up. [*JAMES, L.J.*—The question is whether, a voluntary winding-up having commenced, the Act gives us jurisdiction to order a compulsory winding-up where no petition has been presented before the voluntary winding-up. *BAGGALLAY, L.J.*—Is there any case where such an order has been made except where fraud was proved?] That was the case in *Re Fire Annihilator Company* (8 L. T. Rep. N. S. 412; 32 Beav. 561). *Re London Flour Company* (*ubi sup.*) and *Re The West Surrey Tanning Company* (L. Rep. 2 Eq. 737) are in our favour. *Re The Littlehampton Steamship Company* (11 L. T. Rep. N. S. 725; 12 L. T. Rep. N. S. 8) is a case directly in our favour. As for the observations of *Turner, L.J.* in *Re The Bank of Gibraltar and Malta* (*ubi sup.*), they are mere *obiter dicta*. It makes no difference whether the shareholder presents his petition before or after the resolution for a voluntary winding-up. The Act makes no such difference. At all events, the court has clear jurisdiction under sect. 147 of the Companies Act 1862 to make a supervision order. At the very least, we have made a sufficient case for obtaining leave to prosecute proceedings against the directors in the liquidator's name.



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Buckley for shareholders in the same interest.

No reply.

JAMES, L.J.—The first question raised on this appeal is a very important general question, far beyond the mere question involved in the case before us, that is, whether the petitioner, being a shareholder, has a right to what is called a compulsory order for winding-up, after there has been a voluntary winding-up resolved on by the company. If the question were what we call *res integra*, I myself should have come to the conclusion, upon the true construction of the Act of Parliament, that the voluntary winding-up is a bar, or, to use Mr. Napier Higgins's expression, is an insuperable bar to the making of a compulsory order for winding-up. There is a clause in the Act which provides that a voluntary winding-up shall be no bar to an application by a creditor for a compulsory winding-up. *Expressio unius, generally speaking, est exclusio alterius*. Beyond that, the Act does appear to contain a great number of provisions intended, and, it seems to me, calculated to prevent any mischief which might otherwise arise from any wrong done to a shareholder by the voluntary winding-up. Now there have been several cases in the courts in which, notwithstanding that language in the Act, a contributory has obtained an order for winding-up after a voluntary winding-up. The leading case, in my view of the subject, and the one which seems to me to establish the principle, is that of *Re West Surrey Tanning Company* (L. Rep. 2 Eq. 737), where the court in fact came to the conclusion that the voluntary winding-up, or the resolution to wind-up voluntarily, was under the circumstances a sham. There was one man whose conduct was impeached, whose dealings and transactions with the company required investigation, and he himself had a complete majority of votes, so that he could by his own votes have determined that no proceedings should be taken against himself, and that there should be no investigation into his dealings. I can conceive a case in which that might apply to the majority of the shareholders, that is to say, where the majority of the existing shareholders were so mixed up with the matters complained of, and the matters requiring investigation, that the resolution of a general meeting would be a decision by an interested judge, if I may use the expression, by persons incompetent to decide by reason of their personal interest in the matter. I am of opinion, that to enable the court to make such an order as the Vice-Chancellor has made, the case must at all events be brought up to a case of that kind, that is to say, to a case in which, from the circumstances, the court sees that the shareholders cannot be trusted to determine the matter for themselves. But I cannot find anything like that case made out or even alleged in the present case, because, although all the shareholders at one time were parties to the transactions complained of, which I shall consider afterwards, the case of the petitioner is that there were dealings in the shares on the Stock Exchange, and there were transfers of shares, the result of which was that there are now several hundreds of shareholders, over 300, holding 40,000 or 50,000 shares in the company, all of whom are in the same interest with the petitioner, and acquired their shares in the same manner, and have exactly the same ground of

complaint as the petitioner. I cannot find anything in this case to satisfy the court, or to entitle the court to say that it can deprive those shareholders—for they are the persons interested—of the right which belongs ordinarily, and, except under very exceptional circumstances, to the shareholders of every joint-stock company or corporation of this kind, of determining amongst themselves for themselves by a majority according to their view of what is most for their interest, and what ought to be done or ought not to be done, either in the disposal of the property of the company, or in making any claims against any supposed debtors to or persons liable to the company. I am of opinion, therefore, that in this case there was no ground for a compulsory order to wind-up. That, however, does not dispose of the case, because it was suggested, and, I think, properly suggested, by Mr. Napier Higgins that, although we could not grant for those reasons the order for a compulsory winding-up, there might be, and ought to be, another less order. The petitioner asks, no doubt, for a compulsory winding-up, but he says he is entitled, at all events, to have what is called a supervision order, that is to say, an order for placing the matter under the supervision of the court, which would enable the court to do justice as between the different classes of shareholders, or some other order that he may use the name of the company in instituting proceedings to obtain relief. Therefore it is necessary to consider whether the petitioner is in this case entitled to any relief. Now, for the purpose of this petition it seems to me that the material facts are few and undisputed. The deed of settlement contains certainly a most extraordinary provision, a provision which the Vice-Chancellor has denounced in very strong terms, and I am not prepared to differ from him with respect to it; but still it was one of the clauses, one of the terms of the constitution of the company, and the petitioner became a shareholder in a company of which that was one of the terms and conditions. First of all it was intended to issue 25,000 shares, and that clause was one enabling the directors, if they thought fit, if they came to the conclusion that they did not want any more money, to issue 75,000 amongst the holders of the 25,000 shares. However, there is that provision, and it was made by an instrument duly registered within the provisions of the Companies Act 1867, so as not to be obnoxious to the special provision in sect. 25, which requires that all shares shall be issued for money, and not otherwise, unless by an agreement duly registered. By that instrument, all the persons then interested in the company being parties to it, 25,000 shares were allotted for that which all the then shareholders considered to be a sufficient consideration. 25,000 shares were allotted, partly for money, partly for services rendered, partly for debts or sums said to have been advanced to the company. At all events, the 25,000 shares were allotted to the then shareholders, and immediately afterwards the directors, in pursuance of the clause I have mentioned, allotted 75,000 shares between the holders of the 25,000 shares, that being with the assent of the holders of the 25,000 shares, who accepted the allotment. The fact of that allotment, and the circumstances under which it was made, were also registered so as to escape the provisions of the Companies Act. Whether it

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complied with the spirit of the Act it is not for me to say. However, that was done. What was the legal result of what was so done? All the persons interested in the company by this transaction in effect divided the property between themselves in fractions, of which the common denominator was 100,000 $\frac{1}{2}$ , or was called 100,000 $\frac{1}{2}$ . Of course where the shares are all paid up, and nothing remains to be called, all the company has got is its property. Therefore they divided the whole property between themselves, as I have said, into fractions of which the denominator was 100,000. One can see a motive for it, of course, which I shall afterwards mention. However, that was the result. Now upon whom was that a fraud, or to whom was it a wrong? It could not be a fraud upon or a wrong to the existing shareholders, because every one of them was a party to the transaction. It could not be a fraud upon or a wrong to future shareholders—I mean in the sense of allottees of shares—because the very essence of the transaction was that no shares were to be or could be issued thereafter. It was no fraud upon or wrong to the existing creditors, if existing creditors there were, because it appears that, if there were any existing creditors, they either were satisfied or paid, or they acquiesced in what was done; and *volenti non fit injuria*. It was no legal wrong to any future creditors, because by the transaction the most distinct notice was given to any person not a shareholder that he had no uncalled capital to look to, that there were no shares remaining to be issued, that there was to be no money to be derived either by the issue of shares, or by calls on existing shareholders; and if anybody chose to give credit under the circumstances to such a company, he was giving credit to the property of the company, whatever it was, just in the same way as I give credit to the Bank of England when I take a 5 $\frac{1}{2}$  note, or as anybody gives credit to any other corporation which has all its capital paid up. Then what is the fraud upon or wrong to persons like the petitioner who went and bought shares in the market? The petitioner got exactly what was offered to him. He got for the 100 $\frac{1}{2}$  which he gave the thousandth part of the mine, as it stood. He derived his title in fact from and through the very transactions which are complained of, the shares being paid-up shares, most of which were obtained in that way. He obtained the shares from a person who was a party to the transaction which I have described, and he obtained them with full notice in point of law that every other shareholder in the company was in exactly the same position as himself, that is to say, that no shareholder was to pay anything, and that there were no shares to be issued, and therefore, in that sense, there was no wrong done to him. And, in truth, when his case, as alleged and proved by him, comes to be looked at, it is a case, as it seems to me, wholly outside the provisions for winding-up companies. His case is, that by this mode of creating shares, by this mode of dealing with the shares, and by subsequent devices and practices—I will not say on the Stock Exchange, because the Stock Exchange refused to allow a settling day—but by devices and practices in the stock market he was deluded into giving 100 $\frac{1}{2}$  for that which was not worth 100 farthings in the world. The Vice-Chancellor used strong language, but I cannot help thinking that he did not use too strong

language, in describing what was done, as against some of the persons connected with it. I cannot help thinking that it was intended by some persons or other connected with this transaction to call the capital 100,000 $\frac{1}{2}$  with a view of giving it a false reputation in the market, and inducing persons to think they were getting something of value when they were getting in fact that which was utterly valueless. But then that is a wrong done to each individual purchaser. Anybody who has, as this petition says he has, been deluded into giving money for that which was an utter sham, or nearly so, has good ground of complaint that he was deluded into giving money in that way, but his complaint is an individual complaint, it is a wrong done to him personally; it is not a wrong done by the company or to the company. It is not a wrong done by persons in a fiduciary character towards the company for whom they were trustees, but it was a wrong done by the individual, whoever he was, who deluded him into making the purchase. It was a wrong done to him by those persons who enabled that fraud to be practised, who assisted in perpetrating the fraud upon him, and against whom, therefore, he may have the relief which the law entitles him to have. But, I repeat, that has nothing at all to do with winding-up, either compulsorily or otherwise. It is not the function of a winding-up order to give remedies for wrongs connected with the dealing in shares, or to give relief or redress to the man to whom the wrong is done in his being induced to become a shareholder—a wrong not done to him in his character of shareholder—not done to anybody whose shares he takes, but done to him in his character of a purchaser of shares in the market. Now that wrong is one for which, as I have said, he may have redress. There may be circumstances which might possibly have induced the public authorities to intervene in the matter; but it is not, according to my view, within the functions of the Winding-up Act, it is not within the province of this court, to give relief under this Act, for the purpose of enabling such a complainant to get redress, or for the purpose of enabling him to investigate the books and documents or transactions of the company by way of discovery to assist him in making out his case against the persons against whom he has a case. In my opinion, therefore, this court cannot give him any relief whatever upon those principles. I say nothing about the neglect, the length of time which elapsed before the petitioner presented his petition, though that would, of itself, have been a very important matter to consider. I do not wish to weaken what I have said on the general principle by laying any stress upon the delay; but it would have been, I think, a very serious impediment in the way of his obtaining any relief on this petition, that he allowed the voluntary winding-up to go on for months with full notice of what had been done, and allowed it to be completed before he took the proceeding which he has done. I therefore say that, in my opinion, the petition has failed, and that the order of the Vice-Chancellor ought to be discharged with costs. Although all the persons are not before us, I do not feel any hesitation in expressing my opinion, but I cannot help agreeing with the Vice-Chancellor that I hope such a clause as that to which I have referred will never again be in-



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serted in a deed, and that no such transaction will again be resorted to; because, if there was not actual fraud proved—and I do not like to say there was actual fraud in anybody connected with this transaction—if there was not actual fraud proved, the transaction was such as the Vice-Chancellor truly says was very likely to lead to fraud. I agree with the Vice-Chancellor in expressing my strong disapprobation of such machinery having been resorted to, which, at all events, might have been the means, and not improbably was the means, of fraud on those unwary persons who might have been induced to buy in the market such things as they did buy in this case, for large sums of money.

BAGGALLAY, L.J.—The petitioner in this case is the holder of 100 shares, all fully paid-up, in the company which he now seeks to have wound-up under the order of the court. There are one or two circumstances in the case which are not at all in dispute, which I will allude to, because I think they will have a material bearing on the ultimate disposal of the case. This company was incorporated in Nov. 1873. In June 1875 the present petitioner acquired his shares by purchase, having bought them in March and completed the purchase in June 1875. The resolution for a voluntary winding-up was passed in May 1877, and it was not till some time in the year 1878 that he presented this petition. Certainly, whether he had or had not an opportunity of seeing the balance-sheets which were from time to time published by the company, at any rate he must have had full opportunity of seeing that which was made in 1876, which was published and issued prior to the time when the voluntary winding-up was resolved upon. Now he comes before the court, alleging irregularities in the formation of the company, irregularities in the conduct of its business by the directors, and irregularities as far as regards the obtaining of the resolution for the voluntary winding-up. He says with regard to this, that he has not sufficient protection under the provisions of the 138th section of the Companies Act 1862, and he asks relief by the terms of his petition in the form of a compulsory order for winding-up; but, at the bar, it has been urged upon us that he may be entitled either to a compulsory order, or, if not to a compulsory order, to a continuation of the voluntary winding-up under supervision, and if to neither of those two, that he is entitled to that which was granted in the case of *Re Imperial Bank of China, India, and Japan* (14 L. T. Rep. N. S. 211; L. Rep. 1 Ch. 339), by the Lords Justices, namely, leave to use the name of the voluntary liquidator, indemnifying him, for the purpose of prosecuting such proceedings as he may be advised against the directors. Now the petition is opposed on three grounds: first, that he is a paid-up shareholder, all the shares he holds having been paid up in full; secondly, that being a contributory he was not at liberty to present a petition for an order for compulsory winding-up, or for a continuation of the winding-up under supervision; and thirdly, on the general merits of the case. The first ground of opposition, that he was the holder of fully paid-up shares, was taken as a preliminary objection and disposed of. Though no doubt a shareholder who has paid up in full may, under certain circumstances, present a peti-

tion and obtain a winding-up order from the court, there must be very special circumstances shown for that purpose, as, for instance, that by the course which is suggested there may possibly be something to be returned to the shareholder, or to him and to other shareholders. As regards the second ground of objection, namely, that the petitioner being a contributory, and there being a voluntary winding-up, that voluntary winding-up is a bar to his presenting a petition for a compulsory winding-up, I entirely agree with what the Lord Justice has just now said, that, if the matter were *res integra*, I should be very much disposed to consider that it was a bar to him as a contributory. I do not, however, think that there is authority for saying that it is not a bar. In the case of *Re The Bank of Gibraltar and Malta* (13 L. T. Rep. N. S. 386; L. Rep. 1 Ch. 69), Turner, L.J. expressed a very strong opinion that it was not within the jurisdiction of the court to entertain a petition presented by a contributory after there had been a voluntary winding-up. A variety of cases have been cited, and in fact I think every important case on the subject is cited in Mr. Buckley's very able and very useful book, of which I am very happy to find there is a new edition, bringing it down to the present time (see 3rd edit., pp. 267-8). I think the result of the cases is this, that the court will not entertain a petition from a contributory after there has been a voluntary winding-up, unless it is shown that there has been fraud. There may be special circumstances, perhaps not amounting to fraud in the ordinary and every-day meaning of the word, but which are yet almost equivalent to fraud, and show that there ought to be a compulsory order. That was the case, I think, in *Re The Fire Annihilator Company* (8 L. T. Rep. N. S. 412; 32 Beav. 561). There there had been a voluntary winding-up; it had been going on for five years and nothing had been done satisfactorily under it, and therefore the court treated it as if there had been no voluntary winding-up at all, and made a compulsory order. The case that was relied upon by the Vice-Chancellor as one which supported his decision in granting the winding-up order on the present application was that of *Re The Littlehampton Steamship Company* (11 L. T. Rep. N. S. 725; 34 Beav. 256; and on appeal, 12 L. T. Rep. N. S. 8; 2 De G. J. & S. 521); but in that case the petition was presented before even the preliminary steps had been taken for obtaining a voluntary winding-up. No doubt a resolution for the voluntary winding-up was passed before the compulsory order was made; but the compulsory order had been already applied for. If I am right in my dates, the petition for a compulsory winding-up was presented on the 4th Jan., and it was not till the 12th or the 13th that even the notice was given for the holding of the first meetings at which the resolution to wind-up voluntarily was passed, and therefore, in point of fact, there had been a commencement of the exercise of the jurisdiction of the court at the time the petition was presented, and had been answered before any voluntary resolution had been passed. Again, in the case of *Re The West Surrey Tanning Company* (L. Rep. 2 Eq. 737), I have looked into the facts of the case, and I find that there had been no complete voluntary winding-up resolved upon. A petition was presented in the interval

of time between the first resolution and the meeting at which that resolution was confirmed, and therefore the court, again, had obtained jurisdiction over the case, as it appears to me, before there had been any complete voluntary winding-up. But even in that case there were special circumstances which, I think, almost justified the interference of the court, namely, that, in the opinion of the court, the voluntary winding-up had been obtained, if not, as I said just now, by fraudulent means within the ordinary intent and meaning of the word, still it was obtained by an overpowering majority of shareholders, all under the influence of a single person. But I think the answer to any argument based upon *Re The West Surrey Tanning Company* is this, that the court had commenced its jurisdiction in the matter before there had been a complete voluntary winding-up resolution. A suggestion was made by James, L.J., in the course of the argument, which I think is one of considerable weight, namely, that if you make a compulsory order for winding-up after a voluntary winding-up, you have this difficulty, which no doubt is a difficulty you might have to deal with on a creditor's petition, namely, that you have a different period for the commencement of the winding-up. The voluntary winding-up dates from the time the first resolution is passed; but the compulsory winding-up dates from the time when the petition is presented, which certainly is an inconvenience not rashly to be incurred. Therefore, though I do not think it necessary to express any decided opinion on the present occasion as to whether a contributory, after a voluntary winding-up has been resolved upon, can present a petition for a compulsory winding-up of the same company, I still desire to intimate a very strong bias in my own mind at the present time in favour of the view that no such petition can properly be presented. But I think there is quite sufficient to dispose of this case without relying on that objection. I think, also, that the objections are equally great to a contributory obtaining a supervision order, and they have been so treated from time to time. After there has been a resolution for a voluntary winding-up, it has been held that a contributory must prove some very special circumstances before he can obtain an order for a compulsory winding-up. Now, no doubt, there are some cases in which a petition by a contributory for a compulsory order, after a voluntary winding-up, has been listened to and acted upon by the court, but those have been cases in which creditors have appeared, and have supported the petition for the winding-up; and, of course, for the purpose, possibly, even of saving the necessity of dismissing one and causing another to be presented immediately afterwards, the court has in those cases more than once made an order for a compulsory winding-up where a petition has been supported by a creditor, although that creditor has not concurred in the petition. In this case, Mr. Buckley, suggesting that he appeared for a creditor, asked us to consider that this petition was supported by a creditor; but we can only deal with the order under appeal, and on the face of that order Mr. Buckley is only entered as appearing for shareholders supporting the petition, and not on behalf of any creditor. Then this brings us to a consideration of the merits. I do not consider it necessary, after what has been said by the Lord Justice, to go through the cir-

cumstances of this case. I have already pointed out that the petitioner certainly was for three years a shareholder in this company before he thought it right to present the present petition. He did not present the petition until nearly a twelvemonth after the time when the resolution for a voluntary winding-up was passed. No doubt a creditor had presented a previous petition, and that had been disposed of in the way that has been suggested, possibly by the creditor being bought off, and he did not think it was necessary to present his petition until that was disposed of; but there, again, there was ample time between that petition being dismissed and the present one being presented. But he had been a shareholder in this company from June or March 1875, when he purchased his shares, down to May 1877, when the resolution to wind-up voluntarily was passed. As I have already mentioned, he had the fullest opportunity then of knowing what had been the whole of the circumstances of the company. He chooses to purchase 100 shares in the company; he does not think it necessary to look at the articles of association for the purpose of seeing what powers the directors had, and what they might have done under those powers. I do not think he has pledged his oath to the fact that he did not know of all these facts; but, on the assumption that he was ignorant, he was only ignorant by reason of his own carelessness. Then, is he the person to come here and complain of this sort of thing? I cannot think that he is in any way whatever. Assume that there was the fullest power and jurisdiction to come here, and to ask either for a compulsory order, or for a supervision order, it seems to me that he is barred by his own laches, and by his own conduct with regard to the whole matter, from coming forward to raise these questions, assuming the irregularities charged by him to have been substantiated. With regard to those irregularities, he says that the resolution for a voluntary winding-up ought not to stand in his way, because it was obtained by fraud. Well, if the resolution for a voluntary winding-up had been obtained by fraud, and if that fraud had been clearly proved, I am by no means certain this would not be a case in which the court would entertain his petition and grant relief. But what are the facts? He first of all endeavoured to establish a technical objection that the requisite majority of three-fourths had not been obtained. However, he was precluded by the terms of the section of the Act of Parliament, which says that where a poll is not demanded, there the decision of the chairman that the resolution has been carried is to be quite sufficient without any proof of the number of voters or the proportion of their votes. Had a poll been demanded, the voting would have been by a numerical calculation of the votes held by the various shareholders. Possibly there was a very sufficient reason why at that meeting no poll was demanded, apart from the question that it requires five shareholders to demand a poll, and he could not succeed in finding as many as five to support his views. Now, we must also bear in mind that there were only seventeen shareholders present at this meeting, and there were over 300 shareholders in the company, who for some reason or other did not think it necessary to attend the meeting. They knew what the meeting was

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summoned for, because the Companies Act 1862 requires that when a meeting is convened for the purpose of winding-up a company, that must be expressly stated in the notice summoning the meeting. They all knew, therefore, what the object was, and from their staying away I think we may fairly assume that they were indifferent to what was to be done. I think it would be impossible to say that those who attended were all friends of the directors, for probably there were some who were not friends, the shares originally held by the directors having been to a great extent parted with before the resolution for a voluntary winding-up was passed. I think, therefore, that any allegation to the effect that there were irregularities with respect to obtaining the winding-up resolution is entirely displaced by the evidence. There is only one other matter to which I would refer. It was suggested that, if the petitioner was not entitled to a compulsory order, or to a winding-up under supervision, he was at least entitled to have leave to prosecute proceedings against the directors, giving an indemnity, and to use the name of the liquidator for the purpose. I think that this court would grant relief of this kind when a proper case was made for it. A proper case was considered to be made for it in the case of *The Bank of China, India, and Japan* (14 L. T. Rep. N.S. 211; L. Rep. 1 Ch. 339). But where are the circumstances in this case to authorise any such proceedings being taken? In all probability it was an afterthought of counsel, after this petition was presented, and after it was brought on in court to make that suggestion. I do not know that such a course is now open to the petitioner; still, if he is able to satisfy the Vice-Chancellor by an application under the 138th section of the Act, he may still obtain leave to do that, if any proper case be made for it; at present there does not appear to me to be any case made for it at all. I have only to make one observation as far as regards the irregularities alleged to have been committed. As far as regards the formation of this company, and the conduct of the directors with reference to it, I do not think it is material to the decision of this question whether those irregularities are established or not. For the reasons already assigned by the Lord Justice, and for those assigned by myself, I do not think that the present petitioner is the person to complain of them. But I do agree with the observations which were made by the Vice-Chancellor in this case to the effect that he did not desire to express any opinion whether clause 11 was inserted in the articles of association with any fraudulent intent, adding, "All I know is, it is a clause which may be very well turned to a fraudulent purpose, and I am by no means satisfied that it was not so turned in this case, although I give no positive opinion on the subject." Apart from what the object or the purpose of the frame of that clause may have been, I must confess it appears to me to be an attempt to evade the provisions of the Companies Act 1867 with regard to the reduction of capital. It may have been such an evasion as keeps within the law, but if at any proper time the question had been raised whether that clause was *ultra vires* or not, I must confess there would have been strong reasons for holding that it was.

BRAMWELL, L.J.—I am of the same opinion. I

so entirely agree with all that has been said by my brethren that I shall say nothing except on one matter which has come before us, as to which I desire to say a few words, because I do not like simply to say that I assent to the blame which has been passed on these people without giving a reason for it. I think that clause 11 of the articles of association was a most improper clause, and, although one speaks with hesitation, inasmuch as we have got neither the whole of the particulars, nor the parties before us to be heard in their defence, it seems to me almost impossible to think that it was not put into the deed for a fraudulent purpose. Let us see what it is. 25,000*l.* are subscribed in one way or another, that is to say, taking into account 2500 shares which are given to one of the Aspinalls. By virtue of clause 11, and the resolution come to by the directors immediately after they were appointed, and before they could really *bond fide* have known whether they would want more money or not—at least one would think so—by virtue of that clause 11, the apparent subscribed capital of the company, although 25,000*l.* only had been subscribed, is made 100,000*l.* and every man who was formerly a holder of one *l.* share became a holder of four *l.* paid-up shares. Well, now, as far as the company is concerned that did it no injury. Each man who held a share beforehand held one twenty-five-thousandth part of the subscribed capital of the company, and the effect of what was done was simply to alter the denominator from 25,000*l.* into 100,000*l.*, and to make each holder of a share the holder of four one-hundred-thousandth parts of the capital of the company, which is the same thing; and, therefore, as far as the company was concerned, no harm was done to it at all. No harm was done to it, although they chose to call these four *l.* paid-up shares instead of calling them four *5s.* paid-up shares, which would have been the very truth. But the mischief that was done was done, not to the company, or to any then shareholder in the company, for they were all parties to it, and one got as much benefit as the others did, or rather no benefit at all. If they had kept their shares it would have been utterly unimportant; but the mischief that was done was this, that they could, with these, what I must call pretended shares, go into the market, and of course any man having a *l.* share offered to him for sale—though if he had inquired he would no doubt have found out that in reality it was only a *5s.* share; but it is very well known that people do not do that—and any man having a *l.* share offered to him for sale might think it was worth *l.*, or perhaps *l.* with *1s.* or *2s.*, or perhaps *5s.* premium; but if he had been told the truth, that it represented *5s.* only in money paid, it is not to be conceived that he would have given *l.*, which would have been putting it at a premium of 300 per cent. Therefore the effect of what was done was this, that people who did not know the truth of the transaction, and who supposed they were really buying a share which represented *l.* paid, or for which value had been given, were in truth buying shares for which only *5s.* value had been given. I have not the slightest doubt in the world that many people were deluded—I will not say defrauded, because I do not like at the present moment to say that there was any intention to defraud in the matter—but many people

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were deluded into buying these shares upon the footing that they were buying that which represented a payment or value of 1l. having been given by the original allottee, which is a most mischievous thing. Now, as I have said before—one speaks with some reserve—I am perfectly certain that all the shareholders were not fraudulent persons, for two reasons, both entirely satisfactory to my mind: one is, that amongst them are the names of persons who, I am certain, are incapable of fraud; and another is, that they did not all sell these shares, but kept them—many of them kept them—and therefore made no profit out of this thing. Speaking with reserve and admitting the force of that observation, while there were some persons who were perfectly free—I will not say from blame in the matter, but who had been no doubt accepting what was done by others—I have not the slightest doubt whatever that somebody, by this clause and what was done under it, intended the delusion upon the public which has been practised to the extent of about 50,000 shares in this case. The reason I make this remark is, that I am by no means clear that a remedy might not be had against them if anyone could prove it. And I suppose there would be some public announcement of this thing: the company would be announced as having a capital of 100,000l. paid up, and the shares would purport to be the same thing, which is untrue. If anybody could prove that he had been deceived by that, he could maintain an action against the fraudulent persons who had been guilty of it and caused damage to him. Another thing which it may be as well for gentlemen to bear in mind who have such schemes as this in their heads is, that I am by no means clear that, if they were indicted for a conspiracy, they could not be very properly convicted, and suffer punishment for it; for it is perfectly certain that in this case a false impression must have been created. It is impossible to suppose that these shares would have been sold at an average premium of 8s. 9d., that is at 1l. 8s. 9d. per share, if the public had known that 5s. only had been paid. [*Bristowe, Q.C.*—No, my Lord. The average price was 8s. 9d. *Higgins, Q.C.*—That is uncertain; the exact amount is in dispute.] I do not believe that they would have sold at a premium of 8s. 9d., which is 75 per cent. premium, if the truth had been known. I have thought it right to express this opinion with a view to save others from repeating practices which are here so objectionable.

*Appeal accordingly allowed with costs.*

Solicitors for the appellants, *Stevens, Wilkinson, and Harries; Morley and Shirreff.*

Solicitors for the respondent, *Wild, Barber, and Browne.*

*Thursday, Feb. 6.*

(Before *JESSEL, M.R., and JAMES and BRAMWELL, L.JJ.*)

*Ex parte STAPLETON ; Re NATHAN. (a)*

*Contract for sale of goods—Bankruptcy of purchaser before delivery—Right of vendor to resell—Proof in bankruptcy for deficiency—Rights of trustee in bankruptcy and sub-purchaser.*

*A vendor of goods has, in the event of the bank-*

*ruptcy of the purchaser before delivery of the goods, the right to resell them and to prove in the bankruptcy for the deficiency on the resale, unless the trustee in the bankruptcy elects, within a reasonable time, to fulfil the contract and tenders the contract price in cash.*

*A sub-purchaser from the original purchaser would have the same right as the trustee in the bankruptcy of electing to fulfil the contract, on tendering the price in cash within a reasonable time.*

This was an appeal from a decision of Mr. Registrar Hazlitt sitting as Chief Judge in Bankruptcy.

The facts of the case were briefly as follows:

On the 10th Dec. 1877 the appellant Stapleton contracted to sell to the debtor Nathan a cargo of maize, to be shipped from Baltimore to England, and to be paid for by the purchaser's acceptances to the vendor's drafts.

On the 19th Jan. 1878, the cargo being then at sea, and the bill of lading being in possession of the vendor to whose order it had been made out, Nathan filed a petition for the liquidation of his affairs by arrangement.

Under the liquidation petition a receiver was appointed on the same 19th Jan., and he gave immediate notice of his appointment to Stapleton.

On the 6th Feb. 1878 Stapleton entered into a contract for the sale of the cargo to a third person for a sum considerably less than the original contract price.

The evidence showed that the market was then falling, and continued to fall afterwards, and that the vendor obtained the best possible price on the resale.

On the 8th Feb. Stapleton tendered the cargo to the trustee in the liquidation, who refused to accept the tender as a fulfilment of the contract with the debtor, and did not offer to pay the price in cash.

The loss on the resale, or the difference between the original contract price and that obtained on the resale, amounted to 688l., for which Stapleton claimed to prove in the liquidation.

The registrar, having rejected the proof, Stapleton appealed from his decision.

*Finlay Knight*, for the appellant. — Though mere insolvency would not put an end to the contract, yet, when the trustee in the liquidation gave notice of his appointment, and did not elect to fulfil the contract by paying the purchase money, that amounted to a breach of the contract:

*Ex parte Chalmers; Re Edwards*, 28 L. T. Rep. N. S. 325; L. Rep. 8 Ch. 289.

In *Morgan v. Bain* (31 L. T. Rep. N. S. 616; L. Rep. 10 C. P. 15), Brett, J. thus explains that case: "I think the effect of the judgment of Mellish, L.J. in the case of *Ex parte Chalmers* is not that insolvency puts an end to the contract, or alters it, but that, when one contracting party gives notice to the other that he is insolvent, and does nothing more, the other party has a right to assume that he intends to abandon the contract." We did the best thing possible in selling when we did, and the difference between the price we obtained and the contract price is the amount of the damage done to us, and for that we are entitled to prove. He also cited

*Ex parte Mirabita; Re Dale*, 33 L. T. Rep. N. S. 60; L. Rep. 1 Ch. Div. 87.

(a) Reported by H. FRAT, Esq., Barrister-at-Law.

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*R. Vaughan Williams* for the respondent.—*Ex parte* *Chalmers* and *Morgan v. Bain* only establish that when one of the parties to a contract proposes to bring an action upon it, he must first perform his part of the contract. This is a contract which the trustee might have disclaimed under the 23rd section of the Bankruptcy Act 1869, but till he did so the vendor had no right to treat the contract as at an end. He also referred to

The Bankruptcy Act 1869, s. 31.

No reply.

JESSEL, M.R.—The real question in this case is, first, whether there was a breach of the contract; and if there was, secondly, when it occurred. The filing of the liquidation petition having been known and announced to the vendor before the arrival of the cargo, it would be absurd to suppose that he was bound to part with the cargo in exchange for the purchaser's acceptances, which were worthless, or nearly so. But if the debtor gives notice that he has divested himself of his property, and is consequently unable to pay for the cargo, is not that equivalent to a disclaimer of the contract to purchase the cargo? Of course that would not affect the right of the trustee to elect within a reasonable time to fulfil the contract on paying the contract price in cash. But, if he does not elect within a reasonable time, the vendor is entitled to treat the contract as broken, without the necessity of making any tender to the trustee. The vendor resold the cargo in a falling market, and the measure of damages is plainly the difference between the contract price and the price obtained on the re-sale. The appellant must therefore be admitted to prove for the amount of the difference between the two prices. [After consultation with James and Bramwell, L.JJ., his Lordship added:] I should add that a sub-purchaser from the debtor would have had the same right of electing to fulfil the contract, on tendering the price in cash within a reasonable time.

JAMES and BRAMWELL, L.JJ. concurred.

*Appeal accordingly allowed with costs.*

Solicitors for the appellant, *Williamson, Hill, and Co.*

Solicitors for the respondent, *Simpson and Cullingford.*

Thursday, Feb. 6.

(Before JESSEL, M.R., and JAMES and BRAMWELL, L.JJ.)

*Ex parte* SHEFFIELD; *Re* AUSTIN. (a)

*Bankruptcy—Interest of bankrupt in possible surplus of estate—Mortgage of such surplus—Examination of alleged creditor—Bankruptcy Act 1869, s. 20—Bankruptcy Rules 1870, r. 166.*

A person to whom a bankrupt has assigned the possible surplus of his estate, after paying all creditors in full, to secure advances made to him since the commencement of the bankruptcy, does not by such assignment acquire any right to interfere in the administration of the estate, and has no right, under rule 166 of the Bankruptcy Rules 1870, to have an alleged creditor examined with reference to his proof.

THIS was an appeal from a decision of Mr. Registrar Pepps sitting as Chief Judge in Bankruptcy.

In a case of *Ex parte Austin* (35 L. T. Rep. N.S.

529; L. Rep. 4 Ch. Div. 13) the Court of Appeal, in Nov. 1876, gave leave to Austin, the bankrupt in the present case, to summon one Gibbon for examination with reference to a proof for a large sum which he had tendered against the bankrupt's estate, and the result of the admission of which would have been that the bankrupt's estate would not suffice to pay the creditors in full, while, if it was rejected, there would probably be a surplus after paying all the creditors in full.

This order of the Court of Appeal was not acted upon, and in July 1878 one Sheffield applied to the Court of Bankruptcy to appoint a private sitting for the examination of Gibbon with reference to his proof, alleging as the ground of his application that the bankrupt had agreed to assign to him the surplus of his estate by way of security for advances made to the bankrupt since the commencement of the bankruptcy. He also alleged that the order giving the bankrupt leave to summon Gibbon for examination had been abandoned by agreement between the bankrupt and Gibbon, the latter having notice of Sheffield's security on the surplus.

The bankrupt had not obtained his discharge.

The registrar having refused the application, Sheffield appealed.

*Benjamin, Q.C.* and *Whitehorne*, for the appellant.—The appellant has such an interest in the surplus as entitles him to the order asked for in order that he may be able to ascertain the amount of the surplus. They referred to

*Ex parte Austin*, 35 L. T. Rep. N. S. 529; L. Rep. 4 Ch. Div. 13;

Bankruptcy Act 1869, s. 20;

Bankruptcy Rules 1870, r. 166.

*Hemming, Q.C.* and *Yate Les*, for the respondent, the trustee, were not called upon.

JESSEL, M.R.—The trustee is not a trustee of the surplus for the bankrupt. The bankrupt has no property in the surplus of his estate beyond a mere possibility; he has nothing more than a hope or expectation that there will remain a surplus after his creditors have been paid in full. He cannot by an agreement of this kind give anyone a right to come and interfere in the administration of his estate in bankruptcy. The appellant does not come within the terms of rule 166 of the Bankruptcy Rules 1870, and the registrar was quite right in refusing his application. The appeal must, therefore, be dismissed with costs.

JAMES and BRAMWELL, L.JJ. concurred.

*Appeal accordingly dismissed with costs.*

Solicitor for the appellant, *C. A. Powell.*

Solicitors for the respondent, *Tilley and Soames.*

Thursday, Feb. 6.

(Before JESSEL, M.R. and JAMES and BRAMWELL, L.JJ.)

*Ex parte* WINGFIELD; *Re* FLORENCE. (a)

*Reputed ownership—Order and disposition—Goods sent on sale or return—Well-known custom of trade—Bankruptcy Act 1869, s. 15, sub-sect. 5.*

Goods which have been sent to a dealer on sale or return, in accordance with a well-known custom of trade, and which are, at the commencement of the bankruptcy, in the possession of the bankrupt, do not pass to the trustee as being goods of

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which the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner within the meaning of sect. 15, sub-sect. 5, of the Bankruptcy Act 1869.

A horse was sent to a dealer on sale or return, in accordance with a well-known custom of the horse-dealing trade, and the debtor was soon afterwards adjudicated a bankrupt, the horse being in his possession at the date of the adjudication:

Held, that the custom of the trade excluded the reputation of ownership, that the bankrupt had not taken upon himself the sale or disposition of the horse as owner, and that the horse must be delivered up to the true owner.

THIS was an appeal from a decision of Mr. Registrar Pepys, sitting as Chief Judge in Bankruptcy.

At the date of his adjudication of bankruptcy, Florence, a horse dealer, had in his possession a horse which had been sent to him a week before on sale or return by another horse dealer, named Sewell.

The trustee refused to deliver up the horse to Sewell, claiming to be entitled to it under sect. 15, sub-sect. 5 of the Bankruptcy Act 1869, as being in the reputed ownership of the bankrupt at the commencement of the bankruptcy with the consent of the true owner.

Sewell applied to the Court of Bankruptcy for an order that the trustee should deliver up the horse to him.

Evidence was adduced in support of the application that it was a well-known custom in the horse-dealing trade to send horses in this way on sale or return.

The Registrar held that the custom was sufficient to exclude the operation of the reputed ownership clause, and he ordered the trustee to deliver up the horse to Sewell.

From this order the trustee appealed.

*De Gez*, Q.C. and *W. H. Clay* for the appellant.—There is not sufficient evidence of the alleged custom being so widely known as to exclude the reputation of ownership. In the old case of *Livesey v. Hood* (2 Camp. 83) it was held that goods in the hands of a retail dealer upon sale or return passed under a commission of bankruptcy against him by the then Act. In *Whitfield v. Brand* (16 M. & W. 282), where books deposited by the owner with a bookseller to be sold on commission were held not to pass on his bankruptcy to the bookseller's assignees, the judgment proceeded on the ground that booksellers were well known to act in the capacity of factors. The question of reputed ownership is really one of fact:

*Hamilton v. Bell*, 10 Ex. 545;

*Ex parte Clarke*; *Re Bell*, 37 L. T. Rep. N. S. 509.

But, independently of any reputation of ownership, we say that we are entitled to the horse under the 15th section of the Bankruptcy Act 1869, which provides that the property of the bankrupt divisible amongst his creditors is to include goods and chattels in his possession, order, or disposition at the commencement of the bankruptcy, by the consent of the true owner, "of which goods and chattels the bankrupt is reputed owner." If we do not come within that, we clearly come within the other alternative, "or of which he has taken upon himself the sale or disposition as owner." That alternative clearly applies to goods sent on sale or return.

*Winslow*, Q.C. and *Creed*, for the respondent, were not called upon.

JESSEL, M.R.—This is an attempt, in the year 1879, to induce the court to act contrary to the universal opinion which has prevailed for many years as to the meaning of the section, which has always been known as the "reputed ownership" clause. That clause is intended to meet the case of a man obtaining credit from his being seen in the possession of property as his own, and it imposes on the true owner of the property the penalty of losing it if he has allowed such delusive credit to be obtained. What is the position of a man who has goods sent to him on sale or return? The owner sends the goods to him with the option of keeping them, and that option the person to whom they are sent may exercise in one of three ways—he may say that he accepts them at the price named, or he may sell them, or he may keep them so long that it would be unreasonable that he should afterwards return them to the sender. If he attempts to sell the goods, he does so not as owner, but only as having an option to sell or return. If by the custom of the trade possession does not raise a reputation of ownership, then the case does come within the purview of the statute. The evidence in this case shows that by a well-known custom of the horse-dealing trade, horses are sent on sale or return. If a horse is kept for months, then it is regarded as the property of the horsedealer, but possession for six or seven days is not sufficient to raise a reputation of ownership. I am of opinion that the registrar's decision was quite right, and that the appeal must be dismissed with costs.

JAMES, L.J.—I am of the same opinion. It is said that the reputed ownership clause is so absolute that it cannot be countervailed. It is said that even if a horsedealer put over his door these words, "I sell horses which I hold on sale or return," that would not be sufficient to exclude the operation of the clause. If the circumstances of a case are not such as to raise a delusive reputation of ownership, and to enable the person having possession to make a false representation thereby, the reason of the provision fails, and *cessante ratione cessat ipsa lex*.

BRAMWELL, L.J.—I am of the same opinion.

Appeal accordingly dismissed with costs.

Solicitors for the appellant, *Denton, Hall, and Fox*.

Solicitor for the respondent, *A. Leslie*.

Feb. 6 and 7.

(Before JESSEL, M.R., JAMES and BRAMWELL, L.J.J.)

*Ex parte* THE POSTMASTER-GENERAL; *Re* BONHAM: *Ex parte* THE LORDS OF THE TREASURY; *Re* BONHAM. (a)

*Bankruptcy—Rights of the Crown—Liquidation petition—Appointment of receiver—Extent issued between filing of petition and appointment of trustee—Relation back of trustee's title—Bankruptcy Act 1869, ss. 11, 13, 32, 49, 65, 72, 125—Bankruptcy Rules 1870, rr. 260, 262.*

*The Crown is not bound by the general provisions of the Bankruptcy Act 1869, but only by those sections in which it is expressly named, and*

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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consequently the Crown is not affected by the relation back of the title of the trustee in a bankruptcy or liquidation.

Therefore, the Crown is entitled to levy an extent on the property of a liquidating debtor after the filing of the petition, and the appointment of a receiver, who has taken possession of the debtor's property, if it does so before the appointment of a trustee; for the filing of a petition, and the appointment of a receiver does not amount to a *cessio bonorum*, and the property remains in the debtor in the interval between the filing of the petition and the appointment of the trustee.

THIS was an appeal from a decision of Mr. Registrar Murray, sitting as Chief Judge in Bankruptcy.

On the 21st Sept. 1878, Messrs. Bonham and McDonnell, who carried on business in various parts of London as auctioneers, filed a petition for the liquidation of their affairs by arrangement; and on the same day a receiver and manager was appointed by the court, on the application of the debtors, supported by some of their creditors, and the receiver forthwith took possession of the debtors' property.

At the time when the liquidation petition was filed the debtors owed a considerable sum to the Postmaster-General, in respect of old stores which they had sold for him, and they were also indebted to the Lords of the Treasury in respect of a similar sale of old stores on behalf of the Convict Department.

On the 27th Sept. the Postmaster-General, who had received notice of the filing of the liquidation petition and of the appointment of the receiver, obtained an order from a judge for the immediate issue of a writ of extent against the debtors' goods.

On the 11th Oct. a similar writ was issued at the suit of the Lords of the Treasury, as representing the Convict Department.

On the 15th Oct. the sheriff seized under the writs goods of the debtors, of which the trustee was in possession.

On the 17th Oct. the first meeting of the creditors was held, and they resolved on a liquidation by arrangement and appointed a trustee, which resolutions were duly confirmed at a second meeting.

The Registrar held that the title of the trustee in the liquidation must prevail against that of the Crown under the extent, and ordered the sheriff to deliver up the goods to the trustee, being of opinion that the effect of the filing of the liquidation petition and the appointment of a receiver on the application of the debtors was to create a *quasi* trust of their property for the benefit of their creditors, and that this so changed the title to the debtors' property as to exclude the operation of the extent.

From this decision the Postmaster-General and the Lords of the Treasury appealed.

The *Solicitor-General* (Sir H. S. Giffard) and *Casserley* (with them *C. Bowen*), for the Postmaster-General.—The Court of Bankruptcy has no jurisdiction, Her Majesty being entitled to have matters affecting her revenue decided in her own Court of Exchequer:

*Manning's Exchequer*, p. 90.

The Crown, moreover, is not bound by the Bankruptcy Act 1869, except by those sections in which

it is expressly named. For "Acts of Parliament which would divest or abridge the king of his prerogatives, his interests, or his remedies, in the slightest degree, do not in general extend to or bind the king, unless there be express words to that effect":

*Chitty's Prerogatives of the Crown*, p. 363.

"The rule of law has always been," says Tyndall, C.J., in *Giles v. Grover* (9 Bing. 277), "that the prerogative of the Crown cannot be taken away, except by express and unambiguous words." And that principle was recognised in the very recent case of *Re W. J. Henley and Co.* (39 L. T. Rep. N. S. 53; L. Rep. 9 Ch. Div. 481). There is no express provision in the Bankruptcy Act 1869 that the Crown shall be bound. The 13th section of the Act, which empowers the court, after the presentation of a bankruptcy petition, to restrain further proceedings in any action, suit, execution, or other legal process against the debtor in respect of any debt provable in the bankruptcy, does not name an "extent." [JESSEL, M.R.—Is not an extent a kind of execution?] No; though it is the commencement of proceedings which may lead to an execution. The 49th section of the Act excepts debts due to the Crown from the effect of an order of discharge; but the fact that an Act contains certain exemptions in favour of the Crown does not make its general provisions binding upon the Crown:

*Mayor of Weymouth v. Nugent*, 11 L. T. Rep. N. S. 672; 6 B. & S. 22.

The registrar based his decision upon *Ex parte Jay, Re Powis* (29 L. T. Rep. N. S. 854; L. Rep. 9 Ch. 133), as an authority that the property in the debtors' goods was in the receiver from the date of his appointment, as trustee for the creditors; but a receiver is a trustee only in the sense in which every bailee is a trustee, and in that case the Lord Chancellor does not use the word trustee; it is only used in the headnote to the case. *Ex parte Jones, Re Jones* (33 L. T. Rep. N. S. 116; L. Rep. 10 Ch. 663), is in favour of our contention that the property does not pass till the appointment of the trustee; and the property, not being in the receiver, must remain in the debtor in the interval between the filing of the petition and the appointment of the trustee. [JAMES, L.J.—The question is whether it is *in nubibus*, or *in gremio legis*—in suspense.] *In custodia legis* is the expression used by Tyndall, C.J. in *Giles v. Grover* (9 Bing. 277), and the property is no doubt protected by the appointment of a receiver, but it does not pass out of the debtor. They also referred to

Bankruptcy Act 1869, ss. 65, 72.

*Mackenzie* (with him the *Attorney-General*, Sir John Holker) and *C. Bowen*, for the Lords of the Treasury, adopted the same line of argument.

*Benjamin*, Q.C. and *Bigham* for the trustee.—We say that the Bankruptcy Act does bind the Crown. The 32nd section gives priority to such Crown debts as assessed taxes and property or income tax, as well as to clerks' or servants' wages, &c., and then provides that save as aforesaid, all debts provable under the bankruptcy shall be paid *pari passu*—that must mean all other Crown debts, such as that in the present case. Then the Crown is expressly named in the 49th section, by which debts due to the Crown are exempted from the release. We also say that the



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filing of a liquidation petition and the appointment of a receiver at the instance of the debtors amounted in effect to a voluntary *cessio bonorum* for the benefit of the creditors, so that the property of the debtors was taken from them and placed in the custody of the law, and the extent of the Crown could not operate upon it. The rules show that this is the effect of the appointment of a receiver :

Bankruptcy Rules 1870, rr. 260, 262 ;  
Bankruptcy Forms 1870, No. 13.

As to the difference between a messenger of court under the old Bankruptcy Act and a receiver, they referred to Griffith and Holmes on Bankruptcy, p. 44. As to the Crown being bound by an Act of Parliament without being expressly named, they referred to

Moore v. Smith, 28 L. J. Mag. Cas. 126.

No reply was called for.

JESSEL, M.R.—The question we have to decide appears to me to be a very simple one. The first point to be considered is, what is the general law on the subject of the prerogative of the Crown. Now on that I think there is no dispute whatever. As regards the binding of the Crown by an Act of Parliament, there is a general rule that where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the king shall be bound by such Act though not named; but where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king shall not be bound unless the statute is made by express terms to extend to him. That is the general rule. Now this point came before the Court of Exchequer in the case of the *Attorney-General v. Donaldson* (10 M. & W. 117); and there Baron Alderson says, it is a well-established rule, generally speaking, in the construction of Acts of Parliament, that the king is not included unless there be words to that effect. Now the question we have to consider really comes to this; are there words to that effect in the Bankruptcy Act 1869? And we must remember that where you find a clear and strong alteration of the law, you expect to find clear and strong words to effect that alteration. Up to the time of the passing of the Act with which we are dealing, it is hardly contended that the Crown was bound. It was not mentioned in the old Acts, and the doctrine of relation back which was the creation of statute did not affect the Crown, which was not bound by the statute. It is now said that the Crown is bound by the Bankruptcy Act 1869. The Crown is said to be bound under the operation of three or four sections of the Act. First of all we may look at the 13th section, which gives power to the court to appoint a receiver: "The court may at any time after the presentation of a bankruptcy petition against the debtor restrain further proceedings in any action, suit, execution, or other legal process against the debtor in respect of any debt provable in bankruptcy, or it may allow such proceedings whether in progress at the commencement of the bankruptcy or commenced during its continuance, to proceed upon such terms as the court may think just. The court may also, at any time after the presentation of such petition, appoint a receiver or manager of the property or business of the debtor against whom the petition is presented, or any part

thereof, and may direct immediate possession to be taken of such property or business, or any part thereof." Now, I may observe on that section that it does not appear to me to apply to the Crown. When you look at the words of it, if it had been intended to interfere with the rights of the Crown, I do not think it would have used the words "restrain further proceedings in any action." There would have been some mode pointed out by which the Crown's rights were interfered with, because no lawyer would have imagined that a clause allowing the court to restrain proceedings in an action would apply to the Crown when the Crown was the plaintiff in the action. So far as that section goes, it appears to me that the wording of it is against the contention that it applies to the Crown. Then we were referred to the 32nd section, which provides that certain debts shall be paid in preference and between themselves shall rank equally. Then we find that the 1st sub-section of the section is: "All parochial or other local rates due from him"—that is, the bankrupt—"at the date of the order of adjudication, and having become due and payable within twelve months next before such time. All assessed taxes, land tax and property, or income tax, assessed on him up to the 5th April next before the date of the order of adjudication, and not exceeding, in the whole, one year's assessment." And the 2nd sub-section relates to the wages and salaries of the bankrupt's clerks or servants, and "save as aforesaid all debts provable under the bankruptcy shall be paid *pari passu*." Now, it is quite true that assessed taxes, land tax and property, or income tax, are Crown debts, and this section does, to that extent, affect a certain kind of Crown debts, but does that show that the rest of the Act and the other provisions where the Crown is not named, are intended to apply to the Crown? It only shows this, that in the distribution of the bankrupt's estate by the trustee, certain preferences are given, including these particular Crown debts, and no others, and of course "debts provable under the bankruptcy," must mean not only debts provable properly so called, but debts which the creditor comes in and proves, and of course if he does not take the benefit of the section, he does not get anything under it. He does not get a debt which is not proved. The only other section to which our attention was called was the 49th, and the effect of that section is that the discharge of the bankrupt is not to discharge him from a Crown debt except with the assent of the Crown: "An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud, but it shall release the bankrupt from all other debts provable under the bankruptcy with the exception of, first, debts due to the Crown; secondly, debts with which the bankrupt stands charged at the suit of the Crown, or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer, on a bail bond entered into for the appearance of any person prosecuted for any such offence. And he shall not be discharged from such excepted debts unless the Commissioners of the Treasury certify in writing their consent to his being discharged therefrom." That, again, is an option given to the Crown, and to that extent,



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no doubt, it affects the Crown. It gives the Crown the benefit of the option, and that is all. It does not appear, when we look at those sections, that there is anything in them to show that the Crown is intended to be bound and deprived of its undoubted prerogative by any of the other sections of the Act. As I said before, looking at the wording of them, I should rather come to the opposite conclusion. If that is so, what is the result? If the property remained the property of the debtor at the time of the issuing of the writ of extent, the Crown remains entitled. The only other argument adduced on behalf of the respondent was that there had really been a *cessio bonorum* effected by the presentation of the petition for liquidation by arrangement. Now, it is quite clear that the Crown can only take under a writ of extent the property of the debtor, and if the debtor has assigned or transferred that property, of course the Crown cannot take it. Therefore it is necessary to consider what the effect of the presentation of the petition for liquidation by arrangement is. The presentation of such petition by the debtor is undoubtedly a request by him to be allowed to liquidate by arrangement, and not to be made a bankrupt; but he is not allowed to present such a petition except on condition that he shall admit his insolvency, and thereby commit an act of bankruptcy, so that if the creditors think fit they may make him a bankrupt on that petition. That is not his desire. That is a condition imposed upon him, so to say, against his will. After the petition is presented, he may apply to the court for the appointment of a receiver, as he did in this case. If he does not apply, the creditors may themselves appoint a receiver, and then the next step is this; either the creditors agree to a liquidation by arrangement, or they agree to take a composition, or they may do nothing, or they may make the debtor a bankrupt. In two out of the four cases the property remains in the bankrupt, in the case of a composition being accepted and in the case of nothing being done; in the other two of the four cases the property vests by relation back in the trustee appointed by the creditors; but until one course or other is taken, there is no vesting of the property, which must remain in the debtor, and therefore until you determine what is to become of it there cannot, as it appears to me, be anything in the shape of a parting with the property, or a *cessio bonorum* by the debtor. In other words, the potentiality of something happening afterwards to divest the property is not a parting with the property by a debtor so as to prevent the extent of the Crown affecting such property. It appears to me on those grounds that the appeal ought to be allowed.

JAMES, L.J.—I am entirely of the same opinion. In the early part of the argument of the Solicitor-General I was trying to arrive at the conclusion that this could be construed into an equitable *cessio bonorum*, but I cannot see my way on any legal principle to arrive at such a result from what took place. At the utmost, it is an offer to do something which may result at some future time on the happening of some contingency, in a *cessio bonorum*. But the offer to part with the goods does not amount to a parting with them so as to prevent a person who has a legal right taking the goods in the meantime.

BRAMWELL, L.J.—I am of the same opinion.

*Appeal accordingly allowed.*

Solicitors for the appellants, *W. H. Ashurst; Solicitor to the Treasury.*

Solicitors for the respondent, *Stevens, Bawtree, and Stevens.*

Wednesday, Jan. 29.

(Before JESSEL, M.R. and JAMES and BRAMWELL, L.JJ.)

Re THE STOCKTON IRONWORKS COMPANY. (a)

*Company—Mortgage—Attornment clause—Winding-up order—Distress—Judicature Act 1875, s. 10—Bills of Sale Act 1854.*

*Shortly before the commencement of the winding-up of a company, a distress was levied upon chattels belonging to them, under an attornment clause contained in a mortgage of the company's land and works to their bankers, to secure the balance of the current account.*

*The mortgage was executed on the 22nd Feb. 1875, in the ordinary form of a mortgage to secure the balance of an account current with the bankers, and was limited to secure 50,000*l.*, and under the attornment clause the company agreed to become tenants from year to year to the mortgagees at the annual rent of 5000*l.* On the 16th July 1877 the bankers levied a distress on the mortgaged property, and seized chattels of the company, which ultimately realised less than 5000*l.* On the 19th July 1877 a petition was presented to wind-up the company, and on the 28th July a winding-up order was made. The deed was not registered under the Bills of Sale Act 1854.*

*Upon a summons taken out by the liquidator to show cause why the proceeds of the above sale should not be paid, and the remaining chattels delivered over to him:*

*Held (reversing the decision of Bacon, V.C.), that the proceeds of the sale, which amounted to less than the amount of one year's rent under the attornment clause, belonged to the mortgagees.*

This was an appeal from a decision of Bacon, V.C., the question raised being, whether a distress levied by mortgagees of the Stockton Ironworks Company's land and works under an attornment clause in their mortgage deed, just before a petition was presented to wind-up the company, was valid as against the liquidator. On the 23rd Feb. 1875 the company executed a mortgage of their land, works, and fixtures to their bankers, Messrs. Backhouse, of Darlington, to secure the balance of their account current, including interest and commission with interest thereon. The amount secured was not to exceed 50,000*l.*, and the deed contained a clause by which the company attorned and became tenants from year to year to the bankers at a rent of 5000*l.* per annum. This deed was not registered under the Bills of Sale Act.

On the 13th July 1877 the directors of the company issued a circular announcing that they were in difficulties, and on the 14th a creditor named Fleming issued a writ against the company for payment of a debt of 1380*l.* odd. On the 16th one Bradley gave notice to the managing director that he held a distress warrant from the bank, and the managing director and Bradley went to the works and there saw two men in the employ of

(a) Reported by E. S. ROCKE, Esq., Barrister-at-Law.

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the company, and told them that Bradley had come to take possession of the works, at the same time giving them a sealed envelope which they did not open, but which contained the distress warrant.

On the 19th July a petition for winding-up the company was presented, and on the 28th July a compulsory order was made. The liquidator claimed the chattels, and they were afterwards sold without prejudice to the rights of the parties. The sum realised by the sale was only 4500*l.*—i.e., less than one year's rent under the clause in the mortgage deed—and that sum was paid into a bank to a separate account.

The liquidator having taken out a summons to show cause why the proceeds of the sale should not be paid and the remaining chattels delivered over to him, the matter was argued before the Vice-Chancellor on the 5th Dec. 1878, when the following judgment was delivered:

BACON, V.C., after some preliminary observations, said:—In this case I have to deal with the rights of the creditors, secured and unsecured, as they were on the day when the winding-up petition was presented. At that time a distress had been levied upon the chattels of the company, on the authority of a deed which, in one respect, is an ordinary mortgage deed; but it contains in it also the attornment clause that in default of due payment of the interest the mortgagees shall have a right, founded upon the attornment which the mortgagors make to them, to distrain for rent. On looking at the deed, I ask myself, to what end could this proviso be introduced in a mortgage deed unless it was to avoid the letter and meaning of the Bills of Sale Act, and to provide for the mortgagees a remedy which, when insolvency happened, they could have put in force? Now, in *Ex parte Williams* (37 L. T. Rep. N.S. 764; L. Rep. 7 Ch. Div. 138), which has been referred to, the mortgagees covenanted to leave the mortgagor in quiet possession unless bankruptcy should happen, and then followed the most innocent and unobjectionable attornment clause. The Lords Justices, upon considering the deed in that case, were satisfied that the original purpose was to give to the mortgagees a security equivalent to that which a bill of sale would have given them if it had been registered, and that it was to provide against accidental bankruptcy. After considering the deed here, and the relation between the bankers and the company, I cannot doubt that the real object and intention of the parties was, that while the interest was duly paid the bankers would be content to take their interest, and, if that failed to be paid them, then that they should have power to take the chattels assigned to them under the power of distress, and so pay themselves at the rate of 5000*l.* per year. I do not think it signifies much whether 5000*l.* a year was the amount of the interest, or whether it exceeded that greatly, because, if the stipulation is entered into between the parties, they must be bound by it. If that is against the law of debtor and creditor, then it is invalid. The Lords Justices came to the conclusion in *Ex parte Williams* that the intention of the parties by the attornment clause was that the mortgagees should have a remedy available in case of bankruptcy. In my opinion a similar conclusion ought to be drawn from the deed in this case, and I think the only intent and meaning of it was that if bankruptcy or insolvency should happen

the mortgagees should have a remedy which would give them a preference over the other creditors in the bankruptcy. So much for the deed. There is moreover this to be considered, that at the time when the title of the liquidator arose, the 10th section of the Judicature Act 1875 was of course operative, and the law then was that between secured and unsecured creditors the law of bankruptcy should prevail. The bankers are secured creditors, and the rest of the creditors are unsecured. The estate is to be administered among them according to their respective rights. A broker comes and says, "I have come here to distrain," and a managing director says, "I am very sorry to see you, but I cannot help it." The broker says, "Find me two trustworthy men," and two men are brought out and he gives them directions to remain in possession of the property, and they obey his directions and night and day keep watch over it. That is all they do. If this were a bankruptcy, is that a possession that the person taking it can maintain any right to? From that day down to some day later, the business of the company was carried on as usual and no visible change took place in the possession by the company of the chattels which it is said had been distrained upon, and in the possession of the company they had remained with the full consent of the bankers. That would be enough to dispose of the case, in my opinion. The bankers could not sell for five days, and they did not attempt to sell. The broker who had formally taken possession exercised no right of ownership, excluded nobody and stopped no business, but in a conversation between himself and the managing director of the company, he said, "I give you notice that I am here in possession and those men shall keep possession for me." The case of the *Printing and Numerical Registering Company* (38 L. T. Rep. N. S. 676; L. Rep. 8 Ch. Div. 535) is valuable because it contains an exposition of the law by the Master of the Rolls which in my opinion ought to be followed. The Master of the Rolls, referring to the Act of Parliament, says, "The respective rights of the secured and unsecured creditors of a company in liquidation are the same as under the law of bankruptcy." If that is so, the case of reputed ownership is plainly made out and there is no dispute about it. The Master of the Rolls further says, "The question I have to consider is, are the creditors in question secured or unsecured? They are certainly secured in a sense by having taken the property of the company, the debtor, in execution." A distress, in my opinion, is no more potent than an execution. "Under that execution they were entitled to sell the property and to pay themselves out of the proceeds; they are secured in that way." I have not heard it disputed that the bankers in this case are secured creditors. At the time the petition was presented the brokers had not distrained. Then, if the applicants in this case are secured creditors, what are their rights? Their rights are to be determined by the law of bankruptcy. The 87th section of the Bankruptcy Act provides for the case where there has been a seizure and a bankruptcy within fourteen days, and where the proceeds are held by the sheriff for the trustee in bankruptcy. The Master of the Rolls says, "That section therefore defines the rights of an execution creditor in bankruptcy. Now, the 10th

section of the Judicature Act 1875 says that in the winding-up of a company the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors as may be in force for the time being under the law of bankruptcy with respect to the estate of persons adjudged bankrupt." I can hardly conceive any words in which the meaning could be more distinctly expressed, or an enactment more plain and positive. The Master of the Rolls continues: "One of such rules is, as I have shown, that an execution creditor is not to have the benefit of his execution if, within fourteen days after the sale of the debtor's property, the sheriff has notice of bankruptcy. I must therefore apply that rule to the present case, and hold that even if the sheriff had actually sold the property of the company the execution creditors could have had no right to pay themselves out of the proceeds, but the whole of the proceeds must have been handed over to the liquidator for the general benefit of the creditors." In my opinion the law, so expressed by the Master of the Rolls, is the law which governs this and all such like cases of a secured creditor whose security is not perfected and completed by sale or by any other act which can make him other than a secured creditor. Now, let me suppose there was an application before me on behalf of the secured creditor that he might complete his security by the receipt of the proceeds of the sale of this property. The court being reminded there was no law to administer but the law of bankruptcy—the law of reputed ownership is a part of the law in bankruptcy—the reputed ownership was clearly in this company up to the time when its insolvency commenced, and the rights being the same as they would be in bankruptcy, the bankers who exercised their power to distrain and made this very imperfect distress, could have no right to complete their distress at the expense of the unsecured creditors. I am of opinion therefore that the liquidator's summons ought to be acceded to, and as to the sum of 4533*l.*, that he is entitled to receive it, and to receive, possess, and realise under the liquidation all the other chattels which were seized by Mr. Bradley under his distress.

The mortgagees appealed.

Sir H. Jackson, Q.C., Horton Smith, Q.C., and B. B. Rogers, for the appellants, contended that the distress was perfectly valid, only it was levied with all possible leniency. With regard to the attornment clause, such clauses were in use long before the Bills of Sale Act 1854, and it was only by the Bills of Sale Act 1878 that, from the 1st of January 1879, they were deemed to be bills of sale. If the rule of bankruptcy applied then they were within the 34th section of the Act of 1869, which at once displaced the ruling of the Vice-Chancellor, because it gave power to a landlord to distrain for rent either before or after the commencement of the bankruptcy, with the limitation that, if such distress were levied after the commencement of the bankruptcy, it should be available only for one year's rent accrued due prior to the adjudication; but even then the landlord might prove under the bankruptcy for the overplus due for which the distress might not have been available. Supposing, however, the case was not saved by sect. 34, they contended that the goods were pledged to the landlord for the payment of his

rent, and that there was no equity to deprive him of that pledge. They referred to

*Higginbotham v. Holme*, 19 Ves. 88;

*Jolly v. Arbutnot*, 4 De G. & J. 224;

*Re Printing and Numerical Registering Company* (supra);

*Re Roberts*; *Ex parte Hill*, 37 L. T. Rep. N. S. 46

L. Rep. Ch. Div. 63;

*Lesham v. Philpott*, L. Rep. 10 Ex. 242; 33 L. T. Rep. N. S. 98.

Hemming, Q.C. and Bomer, for the official liquidator, contended that by the 10th section of the Judicature Act 1875 the same rules were to prevail in a winding-up as to the respective rights of secured and unsecured creditors, as might be in force for the time being under the law of bankruptcy, and that under the law of bankruptcy the attornment clause must be treated as void by reason of its interfering with the proper distribution of the estate, and giving the mortgagees an undue advantage over the other creditors. In *Re Thompson, Ex parte Williams* (37 L. T. Rep. N. S. 764; L. Rep. 7 Ch. Div. 138) it was held that an arrangement similar to the one in this case was void, on the ground of its being a mere device to give the mortgagees the benefit of the 34th section of the Bankruptcy Act 1869 in the event of the mortgagor's bankruptcy. The 34th section was intended to protect *bona fide* landlords and tenants; but the sham here was that, while the parties represented themselves as landlord and tenant, they were really in the position of debtor and creditor. The rent asked for was so excessive and above the annual value of the property that no actual tenancy was created. They further submitted that the deed, not having been registered, was void under the Bills of Sale Act 1854, and moreover that the distress was only colourable, the bank having taken merely friendly possession of the property, and never having demanded payment of interest or principal.

JESSEL, M.R., after stating the facts, said:—The first question to be considered in this case is whether there was any tenancy at all created by the attornment clause, or, as it has been put in the argument for the respondents, any *bona fide* tenancy. Now, it appears to me, that there was. It must be remembered that, according to the practice of conveyancers, when the mortgagor is occupying the property, so that there is no rent receivable to meet the interest on the mortgage debt, it was the common practice that the mortgagor should agree to become tenant to the mortgagee at a specified rent. There is nothing novel or remarkable in the mortgage. It is in the ordinary form. But then it was said that the rent in the present case was so excessive and so very much above the annual value of the property, that it showed of itself that it never could have been intended that there should be an actual tenancy created. But in the first place I am not satisfied that the rent was excessive. The evidence stands in this way: Five valuers say it was worth all the 5000*l.* a year, and four valuers say it was not worth more than half, but when we consider the nature of the property, it becomes impossible to say that there was any excess or any large excess. You cannot let these properties to anybody. They are not ordinary properties as to which valuers can really give an opinion which would be accepted by other persons, even in the

same profession as valuers. It must be to a great extent a mere matter of individual opinion, and upon this evidence I am by no means satisfied that the rent was in fact excessive, and certainly it is not shown to me to have been so excessive as to prove that there was any intention on the part of the two parties to this mortgage that it should not be a real rent, but a fictitious rent. But then it was said that the object of the parties was to do something which was repugnant to the bankruptcy laws, because the object was to enable the mortgagees to distrain for the rent in arrear, and in that way to obtain a preference in the event of a bankruptcy. As regards one year's rent, which is all we are now considering, the 34th section of the Bankruptcy Act gives the landlord that preference, and therefore there is nothing in the law of bankruptcy to prevent his obtaining the benefit of it, if he is a real landlord, and he is not the less a real landlord because he is mortgagee. It was part of the bargain that he should become landlord, and, in any event, the rent of the mortgaged property would be a security to the mortgagee. It does not appear to me there is anything in this case which would enable me to apply the doctrine laid down in the Court of Appeal in *Ex parte Williams*, as to which I express my entire assent. That being so, there is only one other objection remaining to be considered, and that is whether or not there was a distress. It is said that because the bailiff who put in the distress went to two of the company's workmen and told them to keep possession for him, therefore it is not to be looked upon as a real distress. But I think that is a mistake. No doubt the bankers only wanted to make themselves safe. They did not wish to prevent the company going on, if it could go on, so long as they were safe, and they did not wish that the public should know too much about the distress so long as there was a chance of their being paid. The fact is, that a petition to wind up was presented within three days after they made the distress. What they did, therefore, was really only for the purpose of exercising their legal right of distress, which is a right incident to the position of landlord; and their object and meaning, and the object and meaning of the company too by their manager, who attended to the arrangement by which the workmen kept possession on behalf of the brokers, was that there should be a distress to make the bankers safe, whatever should happen to the company. It appears to me the distress was perfectly *bonâ fide*; that the sole object of the parties was a *bonâ fide* distress, and therefore there is no objection upon that ground. There were other arguments brought forward on behalf of the respondents, but they were not the grounds of the judgment in the court below; and for my own part I do not see that they have any application whatever to the case before the court. I may mention particularly those arguments on the Bills of Sale Act, which do not appear to me to apply at all. This mortgage is not a bill of sale under the Bills of Sale Act then in force. Without considering the question whether the effect of the 10th section of the Judicature Act of 1875 is to bring into operation the Bills of Sale Act, and make it applicable to the case of a winding-up, it is enough to say that this mortgage is not a bill of sale. On the whole, it appears to me that the appellants are right in

their contention, and that the order of the Vice-Chancellor must be discharged with costs, and the money must be paid to the bankers.

JAMES, L.J.—I am of the same opinion. As to the case of *Ex parte Williams*, which has been called to our attention, I entirely reaffirm everything that was said there. If we could see that the rent was such an absurd sum that it really could never have been intended as a rent, but that it was only part of a device which would enable the mortgagee to obtain, in the event of the mortgagor's bankruptcy, something which he would not otherwise obtain, the principle of *Ex parte Williams* would apply. But in the present case I am by no means satisfied that there was anything unreasonable in the sum which was reserved as a rent. No doubt the bankers did intend to get security upon the chattels of the company that otherwise they would not have obtained, but then they got that security by means which are not prohibited by law; they got it by means of an arrangement that they should be landlords and the company their tenants—an arrangement which, in the then state of the law, carried with it the incident of distress. They got the rights of a landlord, but they assumed also the rights of a mortgagee in possession. The bankers were as much mortgagees in possession of the rent as if they had granted a lease of the property to a new tenant, and they would therefore have been liable to account to a second mortgagee for what they had received, or what, but for their wilful default, they might have received in respect of the rent of £5000. Their position was very different from that of the holder of a bill of sale of chattels. He could seize the chattels for the whole amount of his debt, but they could only distrain for a year's rent. That being so, it appears to me there was nothing done here in violation of any positive rule of law, and no fraud on the bankruptcy law. I therefore agree with the Master of the Rolls that the order of the court below should be reversed with costs, and also that the costs of the appeal should be given to the appellants.

BRAMWELL, L.J.—I am of the same opinion. I have no doubt that this deed was in every part of it intended to be a security to the bankers for the balance of their account current with the company, and that whatever money received under the distress would go in payment of the distress; and I have no doubt also that the object of this attornment clause was to enable the mortgagees to avail themselves of the chattels which they would seize under a distress for rent. My observation upon this is that the bankers had a right so to arrange. The law does not prevent them from entering into such an arrangement with all its benefits and with all its inconveniences. One of the consequences has been already pointed out by James, L.J. Another consequence is that for six months the company would have a right to possession as tenants. If the bank had taken the security in the form of a present grant of chattels on the premises, with a right to seize subsequent chattels, there would have been no right on the part of the mortgagors to dispose of any of the chattels which they had so granted. In that way they would have belonged to the mortgagees, but under the actual arrangement, until a distress was levied, all the chattels on the premises might have been sold by the mortgagors, or might have been taken in execution by the

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sheriff, and upon being removed from the premises would have been free from any claim for rent. Then one word more with reference to the distinction between this case and that of *Es parte Williams*. I think it is very likely that the parties here did not contemplate that the 5000l. a year would have been paid. They thought that everything would go on prosperously and fortunately, and that the interest on the mortgage debt would have been kept down; but there was no agreement inconsistent with the payment of the rent. To my mind, the difference between this case and *Es parte Williams* is this, that in *Es parte Williams* it was found, and, if I may add my concurrence, it was rightly found, that the intention and object of the arrangement there was to commit a fraud upon the bankruptcy laws; that the clause was to come into operation only in the event of bankruptcy. That was the substance of the agreement. There is nothing of the kind here.

*Appeal allowed, with costs.*

Solicitors: Oree and Son; Kearsley, Son, and Hawes.

### SITTINGS AT WESTMINSTER.

May 4 and July 2, 1878.

(Before BAGGALLAY, BRAMWELL, and BRETT, L.JJ.)

BAKENDALE v. BENNETT. (a)

*Bill of exchange—Inchoate bill stolen—Bond fide holder for value—Liability of acceptor for negligence—Forgery of drawer's name.*

A., to whom B. owed 50l., drew the form of a bill of exchange for that sum, but without signing his name as drawer, and sent it to B. for acceptance. B. accepted the bill and returned it to A. Subsequently A., not desiring to use the bill, returned it to B., the drawer's name being still blank. B. placed the bill in an unlocked drawer in his business chambers, from which place it was stolen. Subsequently B. was sued on his acceptance by a bond fide holder of the bill for value, when it was discovered that the name of a third person had been inserted as the drawer of the bill, without A.'s authority.

Held, that B. was not liable to be sued as the acceptor of the bill, per Bramwell L.J., on the ground that B.'s negligence was not the proximate or effective cause of the fraud, whereby the bond fide holder of the bill had been deceived; and, per Baggallay and Brett, L.JJ., on the grounds that, after the return of the bill to B., he had never delivered it to anyone as an acceptance, and that he had not been negligent, not having acted otherwise than in a way in which an ordinarily careful man would act.

Young v. Grote (4 Bing. 253) questioned; Ingham v. Primrose (7 C. B. N. S. 82; 28 L. J. 294, C. P.) overruled.

APPEAL by the defendant from a judgment of Lopes J., who tried the case without a jury, in favour of the plaintiff in an action by a bond fide holder for value of a bill of exchange against the acceptor. It appeared that the defendant, who had money transactions with one Holmes, received in 1872 from him a stamped draft in his handwriting without any drawer's name. The defendant then at the request of Holmes, accepted this draft as an accommodation bill; Holmes how-

ever returned this paper to the defendant without filling in the drawer's name, and the defendant then put it away in an unlocked desk in his chambers. It was afterwards taken away by some unknown person, and came by indorsement to the plaintiff as a bond fide holder for value, the name of one Cartwright having been inserted as the drawer. The defendant had never authorised anyone to take the draft or to fill in the drawer's name.

On these facts Lopes, J. found that the bill was stolen, and was a forgery; but he was of opinion that the defendant had, by his negligence, led to the bill being put into circulation, and that the plaintiff being an indorsee for value was entitled to recover, and he gave judgment for the plaintiff.

A rule nisi was obtained by the defendant for a new trial, on the ground that the findings of the learned judge were against the weight of evidence, and this rule was argued at the same time with a motion for judgment made by the defendant.

*Buttleson* (with him *Rolland*) for the defendant.—This bill when stolen was not a complete instrument, and the defendant never gave any authority to anyone to make it a bill, so that there never was an acceptance, for there was no drawer's name:

*Stoessiger v. South-Eastern Railway Company*, 3 E.

& B. 553;

*Young v. Grote*, 4 Bing. 253; and

*Ingham v. Primrose*, 7 C. B. N. S. 82,

can be distinguished, as in those cases the documents were complete. The defendant has not been negligent. On the question the remarks of Blackburn, J. in *Swan v. North British Australian Company* (2 H. & C. at p. 181) are in point. [BRAMWELL, L.J. referred to *Bank of Ireland v. Trustees of Evan's Charities*, 5 H. of L. Cas. 389.]

He was stopped by the Court.

*Jeune* for the plaintiff.—The plaintiff is a holder for value; he has been placed in a false position by the negligence of the defendant, and he is therefore entitled to recover. In *Ingham v. Primrose* (*ubi sup.*) the defendant intended to cancel the bill; but he was held liable, because, as in *Young v. Grote* (*ubi sup.*) he had led the plaintiff into a false position by his negligence. A bill need not be drawn by the person to whom the acceptor hands it:

*Schultz v. Astley*, 2 Bing. N. C. 544.

In *Montague v. Perkins* (22 L. J. C. P. p. 187) an acceptor was held liable on a blank acceptance, even though filled up after a reasonable time. [BRAMWELL, L.J. referred to *Hogarth v. Latham*, 3 Q. B. Div. 643.]

*Buttleson*, in reply, referred to

*Aude v. Dixon*, 6 Exch. 869.

*Cur. adv. vult.*

July 2.—BRAMWELL, L.J.—I am of opinion that this judgment cannot be supported. The defendant is sued on a bill alleged to have been drawn by W. Cartwright on and accepted by him. In very truth he never accepted such a bill; and if he is to be liable, it can only be on the ground that he is estopped to deny that he did so accept such a bill. Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or

(a) Reported by W. APFLETON, Esq., Barrister-at-Law.

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failed to say or do, that he would unless estopped be saying something contrary to his former conduct in what he had said or done or failed to say or do. Is that the case here? Let us examine the facts. The defendant drew a bill (or what would be a bill had it had a drawer's name) without a drawer's name, addressed to himself, and then wrote what was in terms an acceptance across it. In this condition it, not being a bill, was stolen from him, filled up with a drawer's name, and transferred to the plaintiff a *bonâ fide* holder for value. It may be that no crime was committed in the filling in of the drawer's name, for the thief may have taken it to a person telling him it was given by the defendant to the thief with authority to get it filled in with a drawer's name by any person he, the thief, pleased. This may have been believed, and the drawer's name *bonâ fide* put by such person. I do not say such person could have recovered on the bill. I am of opinion he could not; but what I wish to point out is, that the bill might be made a complete instrument without the commission of any crime in the completion. But a crime was committed in this case by the stealing of the document, and without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the defendant at liberty to show this? Why is he estopped? What has he said or done contrary to the truth, or which should cause anyone to believe the truth to be other than it is? Is it not a rule that everyone has a right to suppose that a crime will not be committed, and to act on that belief? Where is the limit if the defendant is estopped here? Suppose he had signed a blank cheque with no payee or date or amount, and it was stolen, would he be liable or accountable, not merely to his banker, the drawee, but to a holder? If so, suppose there was no stamp law, and a man simply wrote his name, and the paper was stolen from him, and somebody put a form of a cheque or bill to the signature, would the signer be liable? I cannot think so. But what about the authorities? It must be admitted, the cases of *Young v. Grote* (4 Bing. 253) and *Ingham v. Primrose* (7 C. B. N. S. 82; L. J. C. P. 294) go a long way to justify this judgment; but in all those cases, and in all the others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument, it has not been got from him by the commission of a crime. This undoubtedly is a distinction, and a real distinction. The defendant here has not voluntarily put into anyone's hands the means or part of the means for committing a crime. But it is said that he had done so through negligence. I confess I think he has been negligent, that is to say, I think if he had had this paper from a third person as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. Then *The Bank of Ireland v. Evans' Trustees* (5 H. of L. Cas. 389) shows, under such circumstances, there is no estoppel. It is true that was not the case of the negotiable instrument, but those who complained of the negligence were the parties immediately affected by the forged instrument.

BRETT, L.J.—In this case I agree with the conclusion at which my brother Bramwell has arrived, but not with his reasons. The defendant signed

a blank acceptance and gave it to a person who wanted money, that he might get it discounted; that person sent the blank acceptance back to the defendant, who put it into a drawer in his room; the room was not a place of general resort, and the drawer into which the acceptance was put was left unlocked; somebody, not a servant of the defendant, stole it, and it was filled up by a different person from him to whom the acceptance was originally given, and who had returned it. On these facts Lopes, J. held that the defendant had been guilty of negligence, and was therefore liable on the bill to the plaintiff. Bramwell, L.J. says that the defendant is not liable, because, if he be guilty of negligence, the negligence is not the proximate or effective cause of the fraud. It seems to me that the defendant never authorised the bill to be filled in with a drawer's name, and he cannot be sued on it. I do not think it right to say that the defendant was negligent. The law as to the liability of a person who accepts a bill in blank is that he gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will cover; he does not strictly authorize, but enables him to fill it up to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorised the holder to fill it up, he is liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up; he has enabled his agent to deceive an innocent party, and he is liable. Sometimes it is said that the acceptor of such a bill is liable because bills of exchange are negotiable instruments, current in like manner as if they were gold or banknotes; but whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance intending it to be used. No case has been decided where the acceptor has been held liable if the instrument has not been delivered by the acceptor to another person. In this case it is true that the defendant, after writing his name across the stamped paper, sent it to another person to be used. When he sent it to the person, if he had filled it in to any amount that the stamp would cover the defendant would be liable because he sent it with the intention that it should be acted upon; but it was sent back to the defendant, and he was then in the same condition as if he had never issued the acceptance. The case is this: The defendant accepts the bill and puts it into his drawer; it is as if he had never issued it with the intention that it should be filled up; it is as if after having accepted the bill he left it in his room for a moment and a thief came in and stole it. He has never intended that the bill should be filled up by anybody, and no person was his agent to fill it up. Then it has been said that the defendant is liable because he has been negligent; but was the defendant negligent? As observed by Blackburn J. in *Swan v. North British Australasian Company* (2 H. & C. 175; 32 L. J. 273, Ex.) there must be the neglect of some duty owing to some person. Here how can the defendant be negligent who owes no duty to anybody? Against whom was the defendant negligent, and to whom did he owe a duty? He put a bill into a drawer in his own room; to say that was a want of due care is impossible. It was not negligence for two reasons, first he did not owe

any duty to anyone; and secondly, he did not act otherwise than in a way which an ordinary careful man would act. As to the authorities that have been cited, in *Schultz v. Astley* (4 Bing. N. C. 544) the blank acceptance had been filled up by a stranger, and a fraud had been committed; nevertheless the acceptor was held to be liable. There, however, the acceptance had been issued, and it was intended that it should be filled up by someone; but Crompton J. in *Stoessiger v. South Eastern Railway Company* (3 E. & B. 556) said that case had gone to the utmost extent of the law. I do not think that the doctrine there laid down ought to be extended. In *Ingham v. Primrose* (7 C. B. N. S. 82; 28 L. J. 294, C. P.) the acceptor of a bill of exchange, with the intention of cancelling it, tore it into two pieces and threw them into the street, they were picked up by the indorser, joined together, and the bill was put into circulation. The acceptor was held liable, because, said the court, although he did intend to cancel it, yet he did not cancel it. It seems to me to be difficult to support that case, and the correct mode of dealing with it is to say we do not agree with it. In *Young v. Grote* (4 Bing. 253) Young left a blank cheque with his wife, and in filling up the cheque for 50l. the word fifty was written in the middle of the line, ample space being left for the insertion of other words. By a forgery, before the word fifty the words "three hundred and" were inserted. Notwithstanding the forgery, the court held Young liable. It is said that the case may be upheld on the ground that Young owed a duty to his own bankers, and that he was guilty of negligence in not drawing his cheques on them with ordinary care; but that case does not govern the present, it only applies to cases between bankers and mere customers. In *Bank of Ireland v. Evans's Charity Trustees* (5 H. of L. Cas. 389), Parke, B., in delivering the opinion of the judges in the House of Lords, remarks, with reference to *Young v. Grote* (4 Bing. 253): "In that case it was held to have been the fault of the drawer of the cheque that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently that the drawer, having caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment." He then gives instances in which a person would not be liable, and which govern the present case: "If a man should lose his cheque book, or neglect to lock his desk in which it is kept, a servant or stranger should take it, it is impossible, in our opinion, to contend that a banker paying his forged cheque would be enabled to charge his customer with that payment. Would it be contended that if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal?" Lord Cranworth, speaking of *Young v. Grote* (4 Bing. 253) says that case went upon the ground, whether correctly arrived at in point of fact is immaterial, that in order to make negligence a good answer, there must be something that amounts to an estoppel or ratification, "that the plaintiff was estopped from saying that he did not sign the cheque," and then he says that the doctrine of ratification is well illustrated in *Coles v. Bank of*

*England* (10 A. & E. 437). I think the observations made by the Lords in the case of *Bank of Ireland v. Evans's Charity Trustees* (5 H. of L. Cas. 389), have shaken *Young v. Grote* (4 Bing. 253) and *Coles v. Bank of England* (10 A. & E. 437) as authorities. In the present case I think there was no estoppel, no ratification, and no negligence, and that the defendant is entitled to our judgment.

BAGGALLAY, J. concurred that the judgment ought to be entered for the defendant.

*Judgment for the defendant.*

Solicitors for plaintiff, George Kirby and Millett.

Solicitor for defendant, G. Reader.

Monday, Nov. 25, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

BORROWMAN, PHILLIPS, AND CO. v. FREE AND HOLLIS. (a)

*Sale of goods—Tender—Appropriation of goods to contract—Election.*

Plaintiffs agreed to sell a cargo of maize to defendants, "as per bill of lading, to be dated between 15th May and 30th June inclusive. Payment by cash in exchange for shipping documents, or by buyer's acceptances at sixty days' sight, with shipping documents attached as usual." Plaintiffs under this contract tendered, on 22nd June, to defendants a cargo from the ship *Charles Platt*, but plaintiffs, when they made the tender, had not received the bill of lading. Defendants refused to accept the cargo ex *Charles Platt*, and the matter was referred, under an arbitration clause in the contract, to an arbitrator, who decided that, plaintiffs not having the shipping documents, defendants were not bound to accept the tender. On the 9th July plaintiffs offered another cargo ex *Maria D.*, which in every respect satisfied the contract. Defendants refused to accept the second tender, and plaintiffs sued them for loss incurred by reason of such refusal.

Held (reversing the decision of Denman, J.), that plaintiffs were entitled to recover; that the tender of the *Charles Platt* being a bad one under the contract, plaintiffs had not elected to perform their contract by that tender, and could therefore make a good tender, which defendants were bound to accept, of the *Maria D.*

APPEAL from a judgment of Denman, J.

The action was to recover damages incurred by the plaintiffs through the defendants having refused to accept a cargo of maize under a contract made by the plaintiffs, Messrs. Borrowman, Phillips, and Co., as agents for Messrs. Vogan Brothers as the defendants.

The defence set up was, that the plaintiffs tendered a cargo of maize to the defendants by a ship called the *Charles Platt*; that this was not such a cargo as the defendants were bound to accept under their contract; that afterwards the plaintiffs tendered a cargo by another vessel, the *Maria D.*, which the defendants refused, and rightly refused, to accept on the ground that the plaintiffs had elected to fulfil their contract with the cargo of the first ship tendered; that they had thereby exercised their option of appropriating goods to the contract, and could not compel the defendants to accept any other cargo. Issue was

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.



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joined on this defence. The following were the material facts proved or admitted at the trial:

The contract under which the plaintiffs claimed was made by them as agents for Messrs. Vogan Brothers on May 7, 1877. The benefit of the contract and all rights under it were assigned, with notice of the assignment to the defendants, to the plaintiffs in Feb. 1878. The defendants disputed this assignment and notice at the trial, but they were proved by the plaintiffs.

The contract, so far as it is material for the purpose of this report, was as follows:

London, 7th May 1877.

Sold to Messrs Free and Hollis a cargo of mixed American maize . . . say 3000 to 4000 quarters of 480lbs., as per bill of lading, to be dated between the 15th of May and the 30th of June inclusive, at the price of thirty shillings and sixpence per 480lb.

Payment by cash in London in exchange for shipping documents . . . or by the buyer's acceptances at sixty days' sight from date of arrival of bill of lading in London with shipping documents attached as usual.

Sellers to render invoice within seven days of arrival of bill of lading in England.

The contract also contained a clause providing that any disputes arising out of the contract should be referred to arbitration.

On 23rd June the plaintiffs tendered to the defendants, under the above contract, a cargo arriving by the ship *Charles Platt*, stating at the same time that they were not yet in possession of the shipping documents. On 2nd July the plaintiffs, by letter, informed the defendants that the *Charles Platt* had arrived at Queenstown, and said, "We have no invoice yet." The defendants refused to accept this cargo on the ground that the shipping documents had not yet arrived, and the question of whether the tender was or was not a good one was referred to arbitration under the arbitration clause in the contract. The arbitrator considered that the tender was not a good one, and that the defendants were not bound to accept it as the plaintiffs' performance of the contract.

By a letter to the defendants dated the 9th July the plaintiffs offered another cargo satisfying the conditions of the contract in every respect. The material parts of this letter were:

Referring to our conversation of to-day, we beg to hand you an invoice of the cargo of maize per *Maria D.* from Baltimore, bill of lading to hand to-day, and dated about the 24th June, in fulfilment of your contract dated the 7th May. We shall be glad to know whether you elect to pay cash for the cargo, or our friends are to draw on you with shipping documents attached as usual.

On the following day the defendants replied, refusing to accept the cargo, and alleged that the arbitrator, having decided that the first tender was a bad one, the plaintiffs had exhausted their right to appropriate goods to the contract.

The bill of lading of the *Maria D.* was dated 29th June. The plaintiffs had contracted to buy the cargo per *Maria D.* after the defendants refused to accept the cargo per *Charles Platt*. At the time they tendered the cargo of the *Maria D.* the plaintiffs had received the invoice from the vendor, but the cargo and shipping documents were not in their possession until 4th Aug.

On the defendants' refusal to accept the cargo per *Maria D.*, the plaintiffs, after notice to the defendants, sold the cargo at Queenstown, and the price of maize having fallen considerably they sustained the loss in respect of which the action was brought.

Part of the defendants' contention at the

trial was that, as the plaintiffs had never tendered the shipping documents of the *Maria D.*, there had been no good tender of that vessel. In answer to this the plaintiffs contended that by refusing to accept the cargo the defendants had waived a tender of the shipping documents. Denman, J. allowed the pleadings to be amended so as to raise this issue. The jury were discharged by consent without giving a verdict, and the learned judge then found in favour of the plaintiffs that the defendants had waived a tender of the shipping documents of the *Maria D.*, but he gave judgment for the defendants on the ground that the plaintiffs had elected to fulfil the contract with the *Charles Platt*, and had appropriated the cargo of that ship to the satisfaction of the contract, and that the arbitrator, having decided that the tender of the cargo of the *Charles Platt* was not such a tender as the defendants were bound to accept, they could not be compelled to accept any other cargo as a fulfilment of the contract.

The plaintiffs appealed.

*Herschell*, Q.C. and *A. L. Smith* for the plaintiffs.—This judgment ought not to be upheld. The cargo of the *Maria D.*, which was in all respects such a cargo as would satisfy the contract, was tendered between the contract dates, and, no specific cargo being mentioned, any cargo in other respects satisfying the contract will do. The tender of the cargo per *Charles Platt* did not determine the plaintiffs' option to appropriate a cargo to the contract. The doctrine of election does not apply here. It applies only where there are two or more alternative things which can be done under the contract, and one of the parties elects to do one of them. *Guth v. Lees* (3 H. & C. 558), which will be relied on for the defendants, is very distinguishable from the present case. There the plaintiff had an alternative option to deliver in the months of August or September; he elected to deliver in August, and gave the defendant notice. The contracting parties then were in the same position as if August had been named in the contract; the defendant had an obligation imposed upon him to accept, and he had been led to alter his position in consequence of the plaintiff's election. *Thornton v. Simpson* (6 Taunt. 556) and *Tetley v. Shand* (25 L. T. Rep. N. S. 656) are decided on the same principles. The defendants were bound to accept the second tender, the first having been found by the arbitrator to be not a good tender under the contract.

*Benjamin*, Q.C. and *Philbrick*, Q.C. (*Beginald Brown* with them) for the defendants.—There was no good tender of the second vessel, the *Maria D.* The plaintiffs, when they offered the cargo of that vessel, had not the shipping documents in their possession, and therefore could not make a good tender under the contract. The learned judge was wrong in finding as a fact that the defendants waived a tender of the shipping documents. At any rate, if there was a waiver, it was obtained through incorrect statements of the plaintiffs contained in their letter of July 9th. As to the question of law, the contract was for the sale of a cargo of mixed maize, and it could therefore be satisfied by any cargo answering the contract description. But, by electing to tender the *Charles Platt* the plaintiffs appropriated goods to the contract, which must be read as though



the *Charles Platt*, was written into it. The principle is stated by Lord Campbell in *Brown v. The Royal Insurance Company* (1 E. & E. 853). He says (at p. 858), "Where a contract provides for an election, the party making the election is in the same position as if he had originally contracted to do the act which he has elected to do." *Tetley v. Shand* (25 L. T. Rep. N. S. 658) does not apply here. That case decides no more than that where there is a simple proposal of goods to satisfy the contract, a refusal to accept those goods by the vendor, and an acquiescence in that refusal, the vendee cannot refuse to accept a subsequent tender properly made under the contract. In the present case the plaintiffs insisted on their first tender, and went to arbitration upon it. They therefore elected to make that tender their performance of the contract. The general principles as to election are well laid down in *Blackburn on Sales*, 126 to 129. It may be stated thus: Where the subject-matter of the contract is left indefinite, and one party has the option to render that definite and determined which previously was not so, his election having been once definitively made he cannot elect again. [BRETT, L.J.—Lord Blackburn is treating of passing the property in the goods by the appropriation of them to the contract; that question is not the one here.] *Gath v. Lees* (3 H. & C. 558) is in point. The option was to be exercised as to time of delivering under the contract, and it was held that, the seller having elected to deliver in August (his option under the contract being to deliver in August or September), the contract became one to deliver in August, and the seller having made his election was bound by it. Here the option is to be exercised with respect to cargo, but there is no distinction in principle between *Gath v. Lees* and the present case.

BRAMWELL, L.J.—I am of opinion that this judgment cannot be supported. Denman, J. did not attempt to deal very fully with the subject, and indeed scarcely expressed an opinion upon it. As to the second point, that the plaintiffs were never in a position to make a good tender of the second vessel, the *Maria D.*, I do not think the point was taken at the trial in the only way in which it could have been effectually taken. If it had been, the plaintiffs might have answered it by evidence to show that they could have handed over the shipping documents. There was a sale of a cargo of maize, "as per bill of lading, to be dated between May 15 and June 30." The first thing practically to be done was for the seller to name a ship, and to send an invoice of the goods. That was the only thing he could then do, because the ship not having arrived, he was not in possession of the shipping documents. Then the buyer is to exercise his judgment as to whether he will make payment by cash or by bills. And the seller is to be ready with shipping documents, and to exchange them either for bills or cash, according to the manner in which payment was to be made. The objection made at the trial by the defendants, as I understand it, was this: "At the time when you nominated or tendered the ship *Maria D.* and sent the invoice, you had not the shipping documents in your possession, and could not hand them over to us." Now, I think that it was not necessary for the plaintiffs to then have the shipping documents in their possession. There

was no occasion at that time to tender them. All they had to do was to nominate the ship and send the invoice. They did so by writing the letter of the 2nd July, and by sending the invoice. It is manifest that there was no untruthful representation in that letter, because they speak of the bills of lading as being dated *about* the &c., showing that they had them not in their possession, or they could have named the date which would be upon them. I therefore think the objection is an unfounded one in point of law; but upon the inquiry here the matter is put in a somewhat different shape. It is said, "You did not make a good tender, because the cargo was not yours at the time. You had not the shipping documents, and could not transfer the cargo to us." Now, I think that, where an objection like this is not taken at the trial, we ought not to allow it to be taken in the Court of Appeal, where the character of the objection is such that any evidence might have been given at the trial to alter the state of things. It is frequently only when a question like this has been thoroughly discussed that, by what may be termed a process of evolution, the objection finally assumes its proper shape. I doubt very much whether it would have been a good objection in point of law if taken at the trial; but, if it had been taken there, the plaintiffs might, and probably could, have shown that they had bought the cargo, and had as full power to deal with it as if it was in their possession. It is perfectly competent for a man, in the absence of fraud, to sell that which at the time does not belong to him. He can acquire it and so fulfil his contract. I think, therefore, the objection is not a valid one. As to the other question, which is one of a more general character, I cannot agree with the decision of Denman, J. It is perhaps necessary to state shortly my understanding of the facts. This contract was entered into, and the *Charles Platt* had arrived at Queens-town; the bills of lading and shipping documents were not in England, not having, I suppose, yet arrived. A tender of the ship and cargo is made to the defendants; but they object, and it is unnecessary to decide whether their objection was a good one. But they cannot be called upon to take the cargo which was then with the ship at the port of call, because the plaintiffs had not the bills of lading so as to enable the defendants to deal with the ship. The plaintiffs then say that they have a right under the contract to have the matter settled by arbitration, and the arbitrator decides that they have not made a good tender. What is the consequence? The plaintiffs say, "If we have tendered wrongfully before, we now make a tender which we have a right to do under the contract, and we make it in sufficient time to satisfy the contract." Why should they not do so? It was said that the plaintiffs had determined their option as to the subject-matter of the contract, and that when they named the *Charles Platt* the contract ought to be read as if the ship *Charles Platt* had been put in it. But the defendants' main argument was, that the *Charles Platt* could not be read in the contract because the plaintiffs had not the shipping documents, and there would be no good tender under the contract. Now the argument seems to be, "Because there was no good tender under the contract you cannot make a good tender afterwards." It is an incongruous and repugnant result. It is because the *Charles Platt* cannot be

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BORROWMAN, PHILLIPS, AND CO. v. FREE AND HOLLIS.

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read in the contract that the plaintiffs are entitled to offer a second ship under the contract. Either the tender of the *Charles Platt* was within the contract or it was not. If it was not, they had no right to offer it. Whether it was or was not, they withdrew it on the defendants' objection and substitute another tender under the contract. As to the cases, *Guth v. Lees* is said to be favourable to the defendants' case. There the plaintiff had the option of delivering in August or September. He elected to deliver in August, and he was held to be bound by that election, as was the defendant, because his election was one which the plaintiff had a right to make under the contract. In the present case, if the plaintiffs had followed up what they had done with regard to the *Charles Platt* they could not have maintained their action, because, by their own agreement, they would have precluded themselves from the right to insist upon the tender of the *Maria D.* The reasoning that went to show in *Guth v. Lees* that the action was not maintainable, shows therefore that in this case it is maintainable. That case was decided upon the ground that the plaintiff had exercised an option which he had; this case is decided upon the ground that plaintiffs did not and could not exercise any option at all with respect to the tender of the *Charles Platt*.

BRETT, L.J.—I think also that the judgment of Denman, J. must be reversed. The action by the plaintiffs against the defendants rests upon the allegations, that the plaintiffs were ready and willing to deliver to the defendants a cargo *Ex Maria D.*, according to the terms of a contract between the parties, that they would have offered a bill of lading of the cargo, but the defendants absolved them from so doing, and that the defendants refused to accept the cargo. The first point made by the defendants is that, although in fact the plaintiffs were ready to deliver, they could not in law be said to be ready to deliver because they could not and did not hand over the bills of lading. Having read the judge's notes of the trial it is clear that the point was not taken. If it had been the matter might have been set right by further evidence on the part of the plaintiffs. I think, therefore, the objection cannot be raised in the Court of Appeal. It is next said that, even if the plaintiffs could have made a complete delivery of the *Maria D.*, yet they did not in fact offer to do so, and that the tender of the bills of lading was not waived by the defendants; that is to say, that the finding of Denman, J. was contrary to the evidence. I think that it was entirely justified by the evidence, and that the tender of the bills of lading was waived by the defendants. The case, therefore, is reduced to the main point upon which the judgment of Denman, J. was given. It is said that, even if the plaintiffs could have made a complete delivery under their contract of the *Maria D.*, yet they could not tender her so as to oblige the defendants to accept her cargo, because they had previously tendered the *Charles Platt*, and had insisted upon that tender. It is admitted that, if they had not so insisted, the tender of the *Maria D.* would have been a good one under the contract. That contention was founded upon an alleged doctrine of election. Mr. Benjamin also said that even although the fact of the plaintiffs' first tender might not have been enough to prevent them from making the second, yet they had in effect brought

their action to enforce the first tender, and so had adopted it as their performance of the contract. Now, if they brought an action and recovered damages, then they certainly could not go on with the second tender, because the damages recovered would have satisfied the contract. But the answer is that the plaintiffs did not bring their action and recover damages, and that what they did with respect to the first tender did not take long enough to bar them from making the second within the contract time. This was what was done: There was an agreement for arbitration, and one point only was referred, namely, whether the plaintiffs could tender the *Charles Platt* under the contract, not having bills of lading in their hands. If the plaintiffs had succeeded in the arbitration, could they have then brought their action against the defendant for not having accepted the first tender? Clearly not. This shows that it was not the whole question, but only one part of it, which was referred to arbitration. The obligation of the parties in other respects went on under the contract. I think the alleged doctrine of election has no application to the present case. The doctrine, as it is laid down in Lord Blackburn's work on sales, from which Mr Benjamin read extracts, refers entirely to the question of when the property passes in contracts for sale when the subject matter is left to be determined. It is stated there that an election to appropriate goods to the contract by one party without the assent of the other is not an election at all; and the question of authority to appropriate goods under the contract is dealt with. Here, in trying to apply the doctrine, the first objection one meets is that the plaintiffs, in making the first tender, did not act according to the contract. There is then nothing left to fall back upon, but the doctrine which was applied in *Telley v. Shand* (*ubi sup.*) that, where the plaintiff proposes to deliver goods under the contract, and the defendant refuses to accept that proposal, and the plaintiff is in time to make another offer according to the contract, he may do so. *Thornton v. Simpson*, in my opinion, does not apply to the present case. *Guth v. Lees* did not proceed upon the doctrine of election at all. The question was raised there upon demurrer to an equitable plea. The seller proposed to appropriate goods to the contract which the buyer could have properly rejected, but he did not object to them, and was ready to accept them. The seller declined to deliver the goods, but proposed to deliver others after the buyer had altered his position in consequence of the first offer. The decision was only upon this equitable plea, and it was held that after the seller had allowed the buyer to alter his position, he could not insist upon the buyer's taking the other goods. No question of election came in there, and that case is no authority for saying that if the seller had not allowed the buyer so to alter his position, he could not have made another tender according to the contract. Here, the plaintiffs having offered in the first place goods which, under the contract, they had no right to offer, they had a right to offer the other goods, being within the time. I do not decide what would have been the case if the plaintiffs had held the defendants to the first tender of the *Charles Platt*. The appeal must be allowed.

CORROX, L.J.—I also think that the judgment of Denman, J., given without reserving

the point for further consideration, cannot be sustained. The first point argued for the defendants was, that the plaintiffs did not deliver a tender of the *Maria D.*, so as to make the defendants liable under the contract. It was put in two ways. It was said there was no tender of the *Maria D.*, because the shipping documents were not tendered, and that the waiver by the defendants of the tender of bills of lading was obtained by the plaintiffs' misrepresentation. Assume the shipping documents were not tendered, in my opinion the plaintiffs had made a good tender under the contract. I am not satisfied on the evidence that the waiver of the tender of the bills of lading was not obtained by misrepresentation, but I agree with the rest of the court that the point was not taken in that way at the trial. I wish to state my view that, if a point is not taken at the trial, the Court of Appeal ought not to allow it to be taken there, unless satisfied that all the facts were before the court below, and that no further evidence could have been given to dispose of the objection. Another objection for the defendants is, that the plaintiffs never could have made any good tender of the *Maria D.*, because they never were in possession of the cargo, not having the shipping documents. That point also was not raised at the trial, and ought not to be raised here. But there was nothing wrong in the plaintiffs' tendering a cargo under the contract which they had not got; if they could get it, they could fulfil their contract. But the more important question is, assuming there was a good tender of the *Maria D.*, whether the plaintiffs were in a position to make that tender at all under the contract. That depends upon what was done with reference to another ship, the *Charles Platt*. The defendants' argument was, that when there is a contract the subject-matter of which is unidentified, and one party appropriates goods to the contract, and insists upon the appropriation, he has made his election, and cannot afterwards tender other goods. That argument derives its strength from not explaining sufficiently what is meant by election. Here, it is said, the plaintiffs made their election by tendering the *Charles Platt*; but that is not an election such as was referred to in the argument, and as is dealt with in Lord Blackburn's book, because, if there had been an election of the ship and cargo within the terms of the contract, it would have been binding on the defendants. Here there was no election which would bind both parties. Here the arbitrator decided that the plaintiffs were wrong in tendering the first ship without having the bills of lading; there was therefore no election within the contract. A rule based upon the vendor having done something which, under the contract, he had a right to do cannot be applied to a case like the present, where the plaintiffs did something which they had no right to do under the contract. Mr. Benjamin admitted that if, when the *Charles Platt* was tendered, and the objection to it made, the plaintiffs had said, "Very well, since you object, I withdraw the *Charles Platt*, and tender you another ship under the contract," the plaintiffs would not have been prevented from making the other tender; but it is said that the arbitration was equivalent to an action for damages brought by the plaintiffs against the defendants for not accepting the first tender. I cannot agree with that view. The arbitration was nothing more

than the decision of a particular point between the parties whether or not the ship *Charles Platt* was properly tendered under the contract. The arbitrator decided that it was not, and that leaves the plaintiffs open to satisfy the contract by making another tender within sufficient time. As to *Gath v. Lees*, if, in this case, the defendants had altered their position in consequence of something done by the plaintiffs, the question would be different. *Gath v. Lees* only decided that the plea was a good equitable plea. I think it would be also a good legal one. It was a plea in effect that there had been a contract assented to by both parties, and that another contract could not be substituted without the assent of both parties. I am of opinion that this appeal should be allowed.

*Judgment reversed.*

Solicitors for the plaintiffs, *Plews, Irvine, and Hodges.*

Solicitors for the defendants, *Philbrick and Cowpe.*

Wednesday, Nov. 21, 1878.

(Before BRAMWELL and COTTON, L.JJ.)

BEGG v. COOPER. (a)

*Practice—Leave to sign final judgment—Summons—Affidavit—Order XIV., r. 1 a,*

*The making of the affidavit required by rule 1a of Order XIV. is not a condition precedent to the issue of the summons for leave to sign final judgment. So that, where the plaintiff made a defective affidavit, then obtained his summons, and afterwards swore a fresh and good affidavit, it was*

*Held (affirming the decision of the Q.B. Division, Cockburn, C.J. and Mellor and Field, JJ.) that the issue of the summons was good, and leave to sign final judgment might be given.*

APPEAL from a decision of the Q.B. Division.

The plaintiff specially indorsed his writ under Order III. r. 6, and the defendant appeared.

The plaintiff then obtained a summons in order to sign final judgment under Order XIV., r. 1. When the matter came before the master in chambers, the affidavit made by the plaintiff, as required by Order XIV., r. 1, proved to be defective, and, after several adjournments, a fresh affidavit was sworn by another person not a party to the action, and filed, and on this affidavit the master gave leave to sign final judgment.

On appeal, Brett, L.J. in chambers affirmed the master's order.

The defendant appealed to the Q. B. Division, who affirmed the order of Brett, L.J.

The defendant appealed.

*Cole, Q.C.* for the defendant.—By Order XIV., r. 1 a, where the defendant appears to a writ of summons specially indorsed under Order III., r. 6, the plaintiff may, on affidavit made by himself or by any other person who can swear positively to the debt or cause of action . . . call on the defendant to show cause why the plaintiff should not be at liberty to sign final judgment," &c., and a copy of the affidavit is to accompany the summons or notice of motion. The summons is only issued on reading the affidavit required by Order XIV., r. 1 a, and is bad if the affidavit is insufficient.

(a) Reported by W. AFFLETON, Esq., Barrister-at-Law.

*A. Stone*, for the plaintiff, was not heard.

BRAMWELL, L.J. — This appeal must be dismissed. I do not think that any affidavit is necessary prior to issuing a summons. As a rule the summons is issued without a precedent affidavit, and is only a means of bringing the parties before the judge. Therefore, unless, in Order XIV., r. 1, there are express words saying that the summons is only to be issued upon an affidavit, we ought not to say that the affidavit is a condition precedent. When one looks at Order XIV., r. 1, there is nothing to show that it was intended that the ordinary practice should be departed from. If the collocation of sentences in the rule had been different this would have been manifest. The words are, "The plaintiff may by affidavit made, &c., call on the defendant to show cause before the court or a judge why the plaintiff should not be at liberty to sign final judgment." If the words had been, "the plaintiff may call on the defendant by summons to show cause, &c., and such summons shall be accompanied by an affidavit, &c.," the case would not have been capable of argument. It is supposed that the summons cannot be issued without an affidavit, because the material by which the summons is to be supported is to be first supplied. That is a mistake. The Legislature might have said so, but have not; and we ought not, without strong reasons, to put that construction upon the rule. There is this further remark, that the order provides that the defendant may be called before the court by notice of motion, and in that case it is impossible that there could be a preliminary examination of the affidavit by anybody. If an examination is not necessary before notice of motion, why should it be so before the issue of a summons? They are equivalent operations. The rule really means, "You may issue a summons, and it shall be supported by an affidavit stating, &c., and a copy of the affidavit shall accompany the summons," &c. It does not follow that the affidavit is to be made before the summons is issued. The importance of the matter is in this, that if the affidavit is a condition precedent to the issue of the summons, and the affidavit is defective, it will be impossible to mend the defect after the issue of the summons, and so make it a condition subsequent. I do not think it is a condition precedent; but, even if it were, I should say, in conformity with the practice which has so long prevailed in relation to all summonses, that if objection is made to the affidavit, a judge or master has a discretion to allow an adjournment in order to have it amended. If not, a summons under Order XIV. would be in a different plight to all other summonses, and I see no reason why it should be so. The adjournment can be made on payment of costs by the party seeking it, so as to indemnify the other side. I think therefore the foundation of Mr. Cole's argument, that various mischiefs would occur if the affidavit could be amended, fails him. The summons, on the face of it, is legal. I think this appeal should be dismissed.

COTTON, L.J. — I am of the same opinion. The power given to the court by Order XIV. should be exercised with very great caution; that is to say, that the defendant should be allowed to defend on showing any reasonable ground. But we are not bound to look very strictly at forms in order to help him. The objection here seems

to me not merely formal, but without foundation. As I understand it, it is that the affidavit is a condition precedent to the granting of the summons. But I think that under the rules both the summons and notice of motion are simply means of bringing the defendant into court in order that he may show cause why final judgment should not be signed. In my opinion the rules do not require the affidavit to be made before the summons is issued. The first part merely says that the plaintiff may call upon the defendant to show cause why judgment should not be signed, and it then goes on to say by what means the summons is to be supported. If the defendant is called into court by notice of motion there can be no examination beforehand of the affidavit. There is no more reason why the affidavit should be examined in the case of a summons. The whole foundation of the question is whether or not the notice of motion or the summons found the court's jurisdiction, or whether or not it is founded on the affidavit. In my opinion, if the affidavit in support of the summons is insufficient, the defendant may refuse to answer it, and have the summons dismissed. Where the defect is merely formal, a judge exercises an improper discretion if he dismisses it. I am of opinion that this appeal fails.

Solicitor for plaintiff, *John Anderson*.

Solicitors for defendant, *Cook and Co.*

Wednesday, Nov. 20, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

GALATTI v. WAKEFIELD. (a);

*Practice — Arbitration — Costs of reference and award — County Court Act 1867 (30 & 31 Vict. c. 142), s. 5.*

*An order of reference, made by consent, in an action founded on contract, provided that the costs of the certificate and award should be in the discretion of the arbitrator, who should award or certify by whom or to whom the same should be paid.*

*The arbitrator awarded 10l. 3s. 4d. to the plaintiff, and directed that the defendant should pay to the plaintiff the costs of the reference and award, but did not certify under 30 & 31 Vict. c. 142, s. 5, that there was sufficient reason for bringing the action in a Superior Court.*

*Held (affirming the order of Cleasby, B.), that the plaintiff was entitled to these costs without such a certificate.*

APPEAL from the Exchequer Division.

The action was commenced in the Liverpool District Registry to recover a sum of 80l. 6s. 1d., which the plaintiff alleged to be due to him for commission. The defendant delivered a counterclaim amounting to 42l. 3s. 7d. The cause and all matters in dispute between the parties were referred by consent to a barrister. The order of reference which was drawn up provided that:

The costs of the said cause shall abide the event and determination of the said certificate or award, and the costs of the said certificate or award shall be in the discretion of the said arbitrator, who shall award or certify by whom or to whom, and in what manner, the same shall be paid, and the same shall be taxed, allowed, or deducted by the district registrar, and shall be recovered, if necessary, in the same manner as if the same were costs in the cause.

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

The arbitrator made an award in favour of the plaintiff for the sum of 10*l.* 8*s.* 4*d.*, which he directed should be paid to the plaintiff by the defendant, and the award was also in favour of the plaintiff on the counter-claim, the arbitrator deciding that the defendant was not entitled to recover anything. The arbitrator directed the defendant to pay to the plaintiff the costs of and incidental to the reference, and the costs of the award, but he did not certify on the record that there was sufficient reason for bringing the action in the Superior Court. (a)

The district registrar refused to tax the plaintiff's costs of the reference and award.

Cleasby, B. made an order that the registrar should proceed with the taxation of these costs, and this order was confirmed by the divisional court (Kelly, C.B. and Mellor, J.)

The defendant appealed.

*B. Hown Collins* for the defendant.—The plaintiff is not entitled to the costs of the reference and award, not having obtained a certificate that there was sufficient reason for bringing the action in the Superior Court within the meaning of 30 & 31 Vict. c. 142, s. 5. This is shown by the decision of the Court of Common Pleas in *Moore v. Watson* (L. Rep. 2 C. P. 314; 15 L. T. Rep. N. S. 662; 36 L. J. 122, C. P.), for the repealed section on which that case was decided (13 & 14 Vict. c. 61, s. 11), corresponds with 30 & 31 Vict. c. 142, s. 5, and references by consent are on the same footing with compulsory references, and the same reasons are applicable to both. The decision of the Court of Exchequer in *Forshaw v. De Wetts* (L. Rep. 6 Ex. 200; 24 L. T. Rep. N. S. 397; 40 L. J. 153, Ex.), which it must be admitted is opposed to the contention of the defendant in the present case, is not law, being inconsistent with the earlier decision already cited, and may be overruled by this court. He also referred to

*Smith v. Edge*, 2 H. & C. 659; 33 L. J. 9, Ex.;  
*Oswell v. The Amman Aberdare Colliery Company*,  
12 L. T. Rep. N. S. 451; 34 L. J. 161, Q. B.

*French*, for the plaintiff, was not called on.

BRAMWELL, L.J.—Mr. Collins has said all that could have been said on behalf of the defendant, but nevertheless I am of opinion that the judgment of the court below is right, and ought to be affirmed. It is admitted that the case in the Court of Exchequer which has been referred to, *Forshaw v. De Wetts* (*ubi sup.*), is in point, and I think the decision in that case is right, and for the reasons given in the judgment. I think it is impossible to say that the parties cannot do that which they have sought to do here, that is, agree that the costs shall be paid as the arbitrator may direct. Mr. Collins's main argument is this: he says there is no difference between the effect of the terms of the order of reference in a compulsory reference and the effect of the same terms in a voluntary reference. I do not say how this is, but it may be that we ought to say that the decision of the Court of

Exchequer in *Forshaw v. De Wetts* (*ubi sup.*) is right, and the decision of the Court of Common Pleas in *Moore v. Watson* (*ubi sup.*) is not wrong, because the reference in the case in the Common Pleas was compulsory, while that in the case in the Exchequer was not. However, without differing from the decision of the Common Pleas, I do not say that I agree with it, and I wish to reserve that question until it comes before me for decision. That case was decided on the technical ground that an award was equivalent to a verdict, and the costs of the reference were taxed as costs of the cause, and therefore the award was nugatory so far as it related to these costs when the amount awarded was under the County Court limit. I find it difficult to agree with this reasoning; for, suppose costs were given to the defendant on a reference where a nominal sum, such as 1*l.*, was awarded to the plaintiff (and it is conceivable that such an award might properly be made), how is the defendant to get the costs awarded to him? for he cannot get them as costs in the cause. Not therefore in words differing from the decision of the Common Pleas, but at the same time not agreeing with it, I am of opinion that the case is not applicable, and that the plaintiff is entitled to these costs, and the order appealed from was rightly made.

BRETT, L.J.—I am of the same opinion. The question is solely as to the costs of the reference, and the plaintiff and defendant have agreed that these costs shall be in the discretion of the arbitrator. There is nothing in any Act of Parliament to prevent such an agreement taking effect. In *Moore v. Watson* (*ubi sup.*) there was no agreement. I will not express any opinion as to the correctness of that decision, for it is distinguishable from the present case.

COTTON, L.J.—I am of the same opinion.

*Judgment affirmed.*

Solicitor for plaintiff, *J. H. Lydall*, for *Stephens and Danger*, Liverpool.

Solicitors for defendant, *Shaw and Trewellen*, for *Ponles*, Liverpool.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Nov. 18 and 19, 1878.

(Before HALL, V.O.)

ANCONA v. WADDELL. (a)

*Will—Construction—Life interest determinable on bankruptcy—Words of futurity in clause of forfeiture—Bankruptcy of annuitant—Annulment of bankruptcy.*

*In a case where a life interest in property was given, and there was a clause providing that if the annuitant "should become insolvent or be declared bankrupt, or should assign, charge, or incur a debt, or attempt or affect to assign, charge, or incur his share of the income of the trust estate," his interest should absolutely cease and be forfeited, and go over as in the will provided, and the annuitant became bankrupt before the date of the will to the knowledge of the testatrix, and the bankruptcy was annulled three years after the testatrix's death, but before the time had arrived at which any payment could have been*

(a) By 30 & 31 Vict. c. 142, s. 5, if a plaintiff in any action commenced in a Superior Court recovers a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, "he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the court or a judge at chambers shall by rule or order allow such costs."

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

made in the residuary legatee in whose favour the will was operated:

*And, that no forfeiture took place.*

CAROLINE MAITLAND made her will on the 13th Feb. 1874, by which she gave the residue of her real and personal estate to trustees upon trust to convert the same into money and invest it in the securities in the will mentioned, and to stand possessed of the said securities upon trust out of the income thereof to pay an annuity of 50l. to her sister, and to pay one-fourth part of the residue of the income to her son Robert Maitland during his life, one-fourth to her son Thomas Maitland during his life, one-fourth to her son, the defendant William Maitland, during his life, and in case the defendant, Jennie Dillon, wife of the said William Maitland, should survive her husband, upon trust to pay her one-half of her husband's annuity so long as she should remain his widow; and the remaining fourth part to her two granddaughters, daughters of the said Robert Maitland, equally, during their joint lives, from the time when they should attain the age of twenty-one years, or be married under that age, for their separate use. And the testatrix declared that, if any of the persons other than her sister, entitled under the said will to any part of the income, should become insolvent or be declared bankrupt, or should assign, charge, or incur, or attempt or affect to assign, charge or incur, other than by any settlement made by the said two granddaughters on their marriage, his or her share of the income of the trust estate, or any part thereof, or should other than as aforesaid do or suffer anything whereby the same, or any part thereof, would, through his or her act or default, or by operation or process of law, or otherwise, if belonging absolutely to him or her, become vested in or payable to some other person or persons, then and thenceforward his or her interest in the share of the income should absolutely cease, determine, and be forfeited, and go as thereafter provided, as well with respect to the original share of the said income thereinbefore limited to him or her during his or her life, as also to any share or shares of such income which might then have accrued, or might but for that clause thereafter accrue under any provision contained in the will. Provided also that nothing therein contained should affect the original share of her son William in the income of her trust estate, so as to deprive him of the interest thereinbefore given to her in the events aforesaid.

The will also contained trusts in favour of the survivor of the sons and granddaughters whose shares of income should not have become forfeited, and in favour of grandchildren with respect to the principal moneys; and there was a clause empowering the trustees to compound, and allow time for the payment of debts due to the testatrix, and to settle all accounts on such terms as they should think expedient, and to refer matters in difference to arbitration, and to postpone the conversion of her estate, and otherwise to manage the estate.

The testatrix died on the 5th Feb. 1875, leaving all the legatees her surviving.

On the 7th Dec. 1872 a petition in bankruptcy was presented against William Maitland, and on the 20th June 1873 he was adjudicated bankrupt. The testatrix proved as a creditor in the bankruptcy, and voted by proxy at the meetings of the

creditors held both before and after the date of her will for the appointment of a trustee.

On the 4th March 1875 the bankrupt called a meeting of the creditors, and made a proposal for a composition, which was accepted by the statutory majority; but the composition was not carried out in consequence of formal difficulties, and particularly in consequence of the delay of a particular creditor in filing his affidavit, as ordered by the court. In consequence of the various claims made through the bankruptcy of Wm. Maitland, the trustees of the will filed their bill for the administration of the testatrix's estate, and the claim was made in July 1876.

In May 1878 the trustees in bankruptcy and the creditors agreed that a composition should be accepted; this was approved by the Court of Bankruptcy, and on the 20th March 1878, an order was made for the annulment of the bankruptcy.

The case now came on for further consideration, and the question was whether William Maitland's share of income was forfeited by his bankruptcy. No payment had been made in respect of this share to anybody.

Dickinson, Q.C. and Cracknell, for the plaintiffs, stated the facts of the case, and pointed out that the words of the will contemplated future acts of bankruptcy, whereas the bankruptcy proceedings were taken before the date of the will, and were within the knowledge of the testatrix.

Hastings, Q.C. and George Henderson for William Maitland.—The forfeiture has not taken effect. The result of the annulment of the bankruptcy is, that the rights of parties are what they would have been if there had been no bankruptcy:

*White v. Chitty*, 13 L. T. Rep. N. S. 750; L. Rep. 1 Eq. 372;

*Lloyd v. Lloyd*, L. Rep. 2 Eq. 722;

*Smallcombe v. Olivier*, 13 M. & W. 77.

There is nothing to prevent the intention of the testatrix, viz., personal enjoyment by the legatee, from being carried out:

*Trappes v. Meredith*, 21 L. T. Rep. N. S. 782; L. Rep. 9 Eq. 229.

The estate was in the course of administration by the court, and long before anything became payable the bankruptcy was annulled, and the parties are thereby remitted to their original position. And, though *Trappes v. Meredith* was reversed on appeal by Lord Chancellor Hatherley, the principle "that words of futurity in a gift of this description are not to operate so as to defeat the manifest intention of the testator that the gift shall be a personal benefit to the legatee, and shall not become payable to any other person," was expressly approved, as were also the decisions in *Manning v. Chambers* (1 De G. & Sm. 282) and *Seymour v. Lucas* (3 L. T. Rep. N. S. 10; 1 Dr. & Sm. 177). The bankruptcy, therefore, has not operated as a forfeiture.

T. L. Wilkinson, for the other sons of the testatrix, who did not oppose their brother's claim.

M'Swinney, for the two infant granddaughters, who were not parties to the action, but had been required to attend.—Use is being made of the delay to further a claim which would otherwise have been unsustainable. The testatrix died four years ago, and it is impossible to say that there was not a time at which payment could have been

required by somebody previously to the annulment of the bankruptcy. That is the test: and as at the time when such payment might have been made a forfeiture would have been brought about, the clause of forfeiture must be held still to have its effect. *Re Parnham's Trusts* (L. Rep. 13 Eq. 413) shows that *White v. Chitty* (*vide sup.*) and *Lloyd v. Lloyd* (*vide sup.*) do not apply to this case. The decision on appeal of *Trappes v. Meredith* is in my favour, as it was decided that forfeiture took place. See also

*Cox v. Fonblanque*, L. Rep. 6 Eq. 482.

*Hastings*, Q.C., in reply.

HALL, V.C.—I have looked into the cases and considered the question which was argued yesterday, and it appears to me that, applying the principles which are laid down in the cases of *White v. Chitty* and *Lloyd v. Lloyd*, and also in *Parnham's Trusts*—this is not a case in which there has been a forfeiture. I do not consider that the decision in the case of *Trappes v. Meredith*, which was before James, V.C., and afterwards reversed, and *Cox v. Fonblanque* which was relied upon for the grandchildren, are at variance with that view. I do not even consider that the principle which was laid down in *Re Parnham's Trusts* is at variance with that view; but the decision there depended upon the particular circumstances of the case. I may call in aid that which Wood, V.C. mentioned in *Lloyd v. Lloyd*, when referring to the decisions in which language of futurity had been held to embrace cases of actual bankruptcy at the time of the execution of the instrument, or between that time and the death of the testator. He says: "The reason why, in some cases to which I have referred, the court has rather strained the language, so as to occasion forfeiture, has been to prevent the property passing into hands other than those which the testator intended should receive it." In like manner, if the circumstances of the case admit, the court will endeavour to interpret the language in favour of the legatee for whom the testator has intended to make as extended a provision as he can. Therefore I say that, if necessary, I would endeavour to interpret the language of this will in favour of the legatee so as to effectuate what at least the testatrix would have done under existing circumstances. Of course my observations and my judgment have application only to a case like the present, which is one of residue of income, and where the bankruptcy was annulled, as I consider it was, though the certificate of annulment was not drawn up within a reasonable time, that is to say within five months, and before, as I consider, it could be said that there was any actual income of the share which could be treated as payable to or retained or appropriated for the benefit of this residuary legatee.

Solicitors: *Wilkins, Baker, Baylis, and Baker; Stoper and Rundle; J. P. Woulfe.*

Dec. 3, 4, and 9, 1878.

(Before HALL, V.C.)

LAMING v. GEE. (a)

*Practice—Administration—Breach of trust—Supplemental action—Leave of court—Consolidated Orders XXXI., r. 11.*

*When an administration action has been instituted and the common decree has been obtained, the old practice is unchanged which required that the leave of the court should be obtained before a fresh action or new proceedings can be instituted charging a trustee or executor with breach of trust or wilful default.*

*In a case where the facts constituting the breach of trust did not become known to the plaintiff until after judgment in the administration action, and a fresh action was instituted without the leave of the court, the hearing of the second action was treated as an application for the leave of the court to bring an action against an executor for breach of trust.*

EDMUND GEE (who died in March 1872) by his will devised all his real estate to the defendants in this action upon trust to sell and to stand possessed of the proceeds of sale upon trusts in favour of his children, and appointed the defendants executors of his will.

After the testator's death an action for administration was instituted by summons, under the title of *Laming v. Smith*, by the plaintiff in this action. The ordinary administration decree was made in Sept. 1875.

In consequence of information obtained by the inquiries directed and of the production of documents, the plaintiff instituted the present action, which was to establish that a breach of trust had been committed by the defendants, and that they had been guilty of wilful default in having sold the testator's estate at an undervalue.

The plaintiff had attempted in the action of *Laming v. Smith* to raise these questions, but had not been allowed to do so by the chief clerk, who said that in order to do so a fresh action should be instituted.

*Dickinson*, Q.C. and *Ohute* for the plaintiffs.

*Bevir*, Q.C. and *Yate Lee* for two of the defendants, *Smith* and *Whitfield*.—There is a preliminary objection. It is too late to obtain the relief now sought, as the leave of the court has not been obtained. This is in the nature of a bill of review, and the rule laid down in *Hodson v. Ball* (1 Ph. 177), which was a case identical with the present, is still in force. There a bill seeking to make executors liable for misconduct, after another bill asking for the ordinary accounts, without the leave of the court being obtained, was ordered to be taken off the file. The same rule is laid down in *Harvey v. Bradley* (L. Rep. 4 Eq. 13), and in *Partington v. Reynolds* (4 Drew. 253). The plaintiffs had full knowledge before the original suit, and they had ample opportunity in chambers of getting leave to appeal. [*Dickinson*, Q.C. referred to *Job v. Job* (L. Rep. 5 Ch. Div. 562) as establishing that under the new practice an order charging an executor with wilful default can be obtained on a proper case made.] But *Job v. Job* lays down that an executor is in the position of a gratuitous bailee; and *Mayer v.*

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.



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*Murray* (L. Rep. 8 Ch. Div. 424) is clear upon the point.

*Romer* for the defendant George Gee.—*Mayer v. Murray* sets at rest a doubt which had arisen upon *Job v. Job*. The Master of the Rolls says in the former case: "I will here say a word about *Job v. Job*, which was recently before me, and which I understand has led to some misapprehension . . . Now an order charging an executor with wilful default could not be made unless he was so charged in the pleadings; therefore the charge, unless originally pleaded, must be introduced by amendment—that is, of course, by amendment at any stage of the action at which amendments may be made, that is, before judgment." Therefore the law is as it was before the Judicature Acts, and those Acts have made no difference.

*Dickinson*, Q.C. and *Chute* for the plaintiffs.—Under the old practice, where there was a decree for common accounts, there could not be any inquiry as to wilful default, and therefore a supplemental bill had to be filed, as laid down in *Hodson v. Ball*. But this action was instituted by summons before knowledge of the facts, and then the common decree was taken. There are no pleadings in the original action, and therefore *Hodson v. Ball* and *Mayer v. Murray* are inapplicable, as they relate exclusively to cases which began with a bill or statement of claim, and decide that in such cases you must either amend, or, on leave obtained, file a supplemental bill. Besides, the defendants have not taken this objection in the statement of defence. They object not to the supplemental action, but to the relief claimed. [*Hastings*, Q.C., *amicus curiæ*, referred to an unreported case on appeal from Hall, V.C.'s chambers, of *Re Cowley*, in which the Court of Appeal had decided that Order XXXIII. of Rules of Court 1875 altered the old practice, and that inquiries and accounts might be taken at any time on the trial before or after judgment.]

HALL, V.C.—The first question I have to determine is, whether the case is rightly before me now for a hearing. The old practice is clear in such circumstances as the present. The new action could not have been begun without the leave of the court. It is said that the practice has been changed. It is suggested that, notwithstanding the judgment delivered in the original action, at any stage of the action under the rules of court accounts and inquiries might be directed. The Master of the Rolls, it appears to me, lays down the law which is to apply to these cases: in a case of wilful default (which does not differ from this case), there must be an amendment in the pleadings. Supposing, however—which is the other view laid before me—that the plaintiff might get his inquiries and accounts by means of an application in chambers even after judgment, still, even in that case there must be an application in chambers made on affidavit on the merits. That might be considered a practice equivalent to obtaining the leave of the court. So that in one form or other you must have the leave of the court for re-opening that which might have been made the subject of the original action. There is nothing, it appears to me, which takes this away, and a very salutary practice it is. It is a practice which was originally instituted for good reasons, and notwithstanding the Judicature Acts those reasons

remain; nothing has made them non-existing, they have as much weight as ever they had with respect to the institution of a second action against a person who has been once charged. It appears to me, therefore, that leave is still necessary in one form or another—i.e., leave in the presence of the persons sought to be charged. That leave has not been obtained. It appears to me, therefore, that the action cannot be sustained. It is said in reference to this, that the objection was not taken on the pleadings; that it is not in the form which justifies the court in dealing with it. The objections in the defence are, that though the plaintiff in the statement of claim alleges that he instituted the first action before he was aware of the circumstances, he allowed nearly a year to elapse, and that the action is ill-founded and unnecessary. That does not in so many words say that, if the plaintiff had had a case and tried in a proper way to extend the action and does not do so, he can have no relief; nor does it say that he knew all that he has since known. But it sufficiently puts him to amendment, or, at least, in circumstances in which it would have been necessary to get leave and put in a statement of claim. In these circumstances, this action, by analogy to the old practice, ought to have been preceded by an application for the leave of the court; and with respect to the form of the objection, though in the statement of defence it is not taken, still it has been raised at the bar, and I cannot treat the case as though it had not been raised. Therefore, that being my view of the procedure both before and since the Judicature Acts, it appears to me that the action ought to be dismissed.

It was then stated on the plaintiff's behalf that the breach of trust had not come to his knowledge till after the judgment in *Laming v. Smith*. His Lordship then said that if that were so he should be disposed to treat this as an application for the leave of the court, and to allow evidence to be gone into on that point. As the result of the evidence it appeared that the alleged breach of trust had not come to the plaintiff's knowledge till after the proceedings for the production of documents in *Laming v. Smith*, which took place after judgment.

HALL, V.C., after stating the effect of the evidence, proceeded to say that it was plain that the plaintiff had a substantial case entitling him to relief, and that the facts having come to his knowledge after the judgment in *Laming v. Smith*, a case had been made in which the court would have granted leave to institute a fresh action if it had been applied to in the first instance. He should therefore treat the present action as one in which such leave had been granted, and allow the case to proceed on the merits.

The action was then heard on the merits and dismissed with costs.

Solicitors: *Wright, Bonner*, and *Wright*, for *Bonner* and *Calthrop*, Spalding; *Peacock* and *Goddard*, for *Thompson*, *Phillips*, and *Evans*, Stamford.

CHAM. DIV.] *Re LANDORE SIEMENS STEEL CO. (LIM.)—HARGREAVES v. SCOTT AND ANOTHER.* [C.P. DIV.]

Friday, Jan. 24.

(Before MALINS, V.C.)

*Re LANDORE SIEMENS STEEL COMPANY (LIMITED).* (a)

*Practice—Transfer of action—Rules of Court 1875, Order LI., r. 2 a.*

*After an order for compulsorily winding-up a company, an order was made ex parte for transferring an action begun at the Rolls to the Vice-Chancellor's court.*

An order had been made this day by the Vice-Chancellor for compulsorily winding-up this company. An action had been begun at the Rolls by certain debenture holders of the company for a receiver.

Higgins, Q.C. and Shebbeare asked ex parte to have the action at the Rolls transferred to this court under Order LI., r. 2 a. They referred to

*Field v. Field*, W. N. 1877, 98;

*Whitaker v. Robinson*, Ib. 201.

Under sect. 85 of the Companies Act 1862, the court, even before a winding-up order, would give an injunction ex parte restraining further proceedings against a company. After the Judicature Acts, there was some difference of opinion among the judges whether this court could restrain proceedings in another branch of the High Court, notwithstanding its special powers under the Winding-up Acts; hence this rule was made.

MALINS, V.C.—I accede to the application, under the rule and the decided cases.

Solicitors: *Phelps and Woodforde*.

Friday, Feb. 7.

(Before MALINS, V.C.)

*Re CARNARVONSHIRE SLATE COMPANY (LIMITED).* (a)

*Costs of creditor opposing winding-up petition.*

*Costs were given to a creditor who opposed a petition by a paid-up shareholder to wind-up an insolvent company.*

This was a petition for winding-up an insolvent company. The petitioner was a paid-up shareholder, and also a creditor. His debt was 50l. for fees due to him as a director. The petition was opposed by secured creditors, whose security was insufficient for their debt.

J. Napier Higgins, Q.C. and Chester for the petitioner.

Locock Webb, Q.C. and Stallard, for the company, did not oppose.

Everitt for the opposing creditors.

The petition was dismissed, and

Everitt asked for costs.—He referred to Buckley on the Companies Acts (3rd edit. 194, 195; and Ib. 197): "There is no exception to deprive of their costs creditors appearing on a shareholders' petition which fails. They are invited by the petitioner to appear by the advertisement of the petition, and if he fails he must pay their costs."

MALINS, V.C. (having stated in his judgment on the question of dismissal, that if this were treated as a shareholder's petition, the ground that it was by a paid-up shareholder for winding-up an insolvent company was enough to make it unsustainable, and that, if it were treated as a creditor's petition, the ground that the petitioner's

debt was his fees as director of a ruined concern, was enough to make it unsustainable) said:—If there is no precedent on the subject, I make one, and give Mr. Everitt his costs.

Solicitors for the petitioner and for the company, Miller and Miller.

Solicitors for the opposing creditors, Thomas Thomson and Ward.

## COMMON PLEAS DIVISION.

Wednesday, Nov. 6, 1878.

(Before GROVE and DENMAN, JJ.)

*HARGREAVES v. SCOTT AND ANOTHER.* (a)

*Costs, taxation of—Municipal election petition—Counsel's fees—Discretion of master—35 & 36 Vict. c. 60, s. 19, sub-sect. 2.*

*The Court will not interfere with the master's taxation of counsel's fees, unless there is ground for thinking that he has not exercised a reasonable and fair discretion.*

THIS was an appeal from a decision of Field, J., upholding the master's taxation of the costs of a municipal election petition. A Queen's counsel had been taken specially down to Carlisle, and he received 100 guineas with his brief, and a refresher of 25 guineas on each of the five days that the case lasted. His junior received 35 guineas with his brief, and a refresher of 15 guineas per day. On taxation, the master reduced the fee on the Queen's counsel's brief to 25 guineas, with refreshers of 15 guineas per day; and on the junior's brief to 15 guineas, and refreshers of 10 guineas per day. The master had appended to his allocatur a note to the effect that he had exercised his discretion according to the practice.

Day, Q.C. for the appellant.—The Corrupt Practices (Municipal Elections) Act 1872 (35 & 36 Vict. c. 60), s. 19, sub-sect. 2, enacts that "the costs may be taxed in the prescribed manner, but according to the same principles as costs between attorney and client in a suit in the High Court of Chancery." All costs which can be recovered by an attorney from his client can be recovered as costs between attorney and client in a suit in the High Court of Chancery. All costs reasonably incurred by the attorney can be recovered by him from his client. It is submitted that the fees that have been disallowed were costs reasonably incurred by the attorney. In *Hill v. Peel* (the Southampton case) (L. Rep. 5 C. P. 172), Bovill, C. J. says that the meaning of a like provision in the Parliamentary Elections Act is, that the parties are entitled to "an indemnity for all costs that are reasonably incurred by them in the ordinary course of matters of this nature, but not to any extraordinary or unusual expenses incurred in consequence of over caution or over anxiety as to any particular case, or from considerations of any special importance arising from the rank, position, wealth, or character of either of the parties, or any special desire on his part to insure success." In that case the brief was very voluminous, and contained instructions for the examination of eight-five witnesses on behalf of the respondent. The leading counsel received with his brief 200 guineas, and 50 guineas each day for refreshers, besides consultation fees; the

(a) Reported by W. M. HARRIS, Esq., Barrister-at-Law.

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

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master allowed only 100 guineas with the brief, and 25 guineas each day for refreshers, to include consultation fees. The junior counsel received 150 guineas with his brief, and 30 guineas each day for refreshers, besides consultation fees; the master allowed only 75 guineas with the brief, and 15 guineas each day for refreshers, to include consultation fees. Bovill, C.J., in giving judgment, said: "The Southampton case appears to us to stand upon a somewhat different footing. The master seems to have allowed the fees in that case rather as in accordance with a general rule than upon a due consideration of the circumstances of the particular case; and, looking to the affidavits and voluminous briefs in that particular case, we think it will be more satisfactory that the case should be re-considered by him, and upon the principles which we have laid down." In the present case the brief contained about 200 sheets, and there were 160 witnesses examined.

*Willis, Q.C. (F. Turner with him) in support of the master's taxation. He cited*

*Tillett v. Stracey*, 22 L. T. Rep. N. S. 101; L. Rep. 5 C. P. 185; 39 L. J. 93, C. P.

GROVE, J.—I see no reason for interfering with the discretion of the master in this case, which has been held by the judge at chambers to have been rightly exercised. Each of these cases depends on its own facts. This was a municipal election petition. Of course such a case may involve difficult questions of law, as may any case that comes before a revising barrister or a County Court judge. But it seems to me that we must look at the general nature of such cases. Considering that this was a municipal election petition, I do not see that the master has plainly exercised a wrong discretion. If I had been asked what would be the reasonable fees to give in this case, I should have said fifty guineas on the brief and fifteen guineas refresher. Practically that is what the master has allowed, as I never heard of a refresher being given before a case has begun. What I understand the master to say, is what one would expect him to say,—I do not lay down any hard and fast rule as to what fees are to be allowed in municipal election petitions, but I have allowed what, according to the practice, is reasonable.

DENMAN, J.—I see no ground for thinking that in this case the master did not exercise a reasonable and fair discretion.

*Appeal dismissed with costs.*

Solicitors for the appellant, *Matthews and Greetham.*

Solicitor for the respondents, *W. Hunter.*

*Monday, Nov. 25, 1878.*

(Before GROVE and LINDLEY, J.J.)

STOKES v. GRANT AND OTHERS. (a)

*Practice—Pleading—Striking out matter—Embarrassing allegations—Order XXVII., r. 1.*

*Allegations in a statement of defence that the statement of claim is bad in law, which do not amount to and are not intended as demurrers, may be struck out as embarrassing.*

*Semble, allegations which are merely useless or superfluous may be struck out as embarrassing.*

APPEAL from a decision of Lush, J. at chambers, dismissing a master's order to strike out certain

paragraphs of the statement of defence, with leave to the defendant to demur in lieu thereof.

The action was brought against the defendants as promoters, directors, and officers of the Emma Silver Mining Company, for knowingly issuing a prospectus of the company containing certain false and fraudulent statements, and omitting to specify certain contracts in accordance with the Companies Act 1867 (30 & 31 Vict. c. 131), s. 38, whereby the testator of the plaintiff (who sued as executor) was induced to take shares and suffered loss.

The statement of defence of the defendant Grant denied that he was a promoter of the company, that he issued or sent to the plaintiff's testator the prospectus complained of, and all the other material allegations of the statement of claim.

The paragraphs objected to and ordered to be struck out were as follows:

16. And the said defendant will further contend that the statement of claim, so far as relates to the shares alleged to have been subscribed for on Nov. 14, 1871, is bad in law, and shows no cause of action against the said defendant on the ground that all the damages sued for therein in respect of such shares are shown to have proceeded from the independent wrongful acts and defaults of parties other than the said defendant, which acts and defaults he is not shown to have been connected with or answerable for in any wise whatever.

38. The said defendant further says that before the commencement of the present action the said company, as representing the shareholders, and with the full assent and concurrence of the said testator or of the plaintiffs as his executors, and for his benefit or that of his estate, commenced an action against the said defendant for damage caused to the said company by his alleged misrepresentation, and the same has never been discontinued and is still pending. Such action was in respect of identically the same matters as are set forth in the statement of claim herein, and the damages sought to be recovered thereby were the same as those sued for herein, and the said defendant contends that it is contrary to law and justice that he should be vexed with the present action during the pendency of the aforesaid action.

39. And the said defendant further says that, in the aforesaid actions and in other suits instituted on behalf of the said testator or of the plaintiffs and other shareholders of the said company in courts of competent jurisdiction in the United States of America by the said company as representing the said testator or the plaintiffs and such other shareholders, the plaintiffs are seeking to recover moneys alleged to be due from the vendors of the said mine in respect of breaches of the contract of sale, and also damages from the defendants to such suits as joint tortfeasors with the said defendant in respect of the matters alleged in the statement of claim herein. The said defendant is unable to state with particularity the nature or results of any of the said actions in the United States, as he has been unable to obtain a copy of the proceedings therein, copies of which, however, he believes to be in the possession of the plaintiffs or their solicitors. The said defendant will rely on any defence to the whole or any portion of the claim in this action, afforded by the proceedings or results of any of the aforesaid actions, whether the same be by way of estoppel or as to damages or otherwise.

41. The said defendant further says that, even if the said testator would have had in his lifetime a good cause of action against the said defendant in respect of the matters alleged in the statement of claim (which the said defendant denies), the said cause of action did not survive to his executors upon his death, and that, even if the plaintiffs are in fact the executors of the said testator, they have no right or title to maintain this action.

*Moulton* for the appellant (the defendant).—The result of the actions referred to in paragraphs 37, 38, and 39 may be such as to entitle the defendant to a defence, and it is right that he should be allowed to plead them. As to paragraphs 16, 41, it

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

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[Div.]

is true that they raise contentions of law, but they are not on that account objectionable. By Order XIX., r. 18, each party in any pleading must allege all such facts as he means to rely upon, and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise. The defendant is not obliged to demur, but may content himself with giving the plaintiff notice of the points of law which he intends to raise. Such notice may be superfluous, but it cannot be said to be embarrassing.

*Mackenzie* (*C. Bowen* with him) for the plaintiff. —By Order XIX., r. 4, every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies. That is, facts are to be stated, and nothing else. The defendant has here raised certain defences which are contingent upon future events; and in paragraphs 16, 41, he does in effect, though not in form, demur. [LINDLEY, J.—How are you embarrassed?] The plaintiff cannot tell whether to ignore such paragraphs, to take issue on them, or to join in demurrer.

*Moulton* in reply.

GROVES, J.—I am of opinion that the decision of Lush, J. was right, and that the appeal must be dismissed. The pleadings objected to and struck out at chambers are sects. 16, 41, 37, 38 and 39. We do not know the grounds on which they were struck out, but it may be supposed that they were regarded as embarrassing, and perhaps useless as well. As to pars. 37, 38, and 39, there can be no doubt that they are embarrassing. They consist in most part of a hypothetical series of contingencies, which can lead to no practical issues, and with which the plaintiff could not know how to deal. We should not be carrying out the spirit of the Judicature Acts if we were not to strike them out. Then comes the question of sects. 16 and 41. Now, in respect of these paragraphs, I believe my brother Lindley has some doubts. I cannot say that I feel any. It is said that these paragraphs are perhaps useless, but that they are not shown to be embarrassing, and are not so in fact. I cannot help thinking, however, that a series of useless allegations may very possibly become embarrassing. It is very difficult to say what might be the effect on a judge and jury of leaving even useless allegations unanswered. The 16th paragraph alleges that part of the statement of claim is "bad in law." That seems to me to be very like a demurrer; and then it goes on to state the grounds: "On the ground that the damages sued for therein in respect of such shares are shown to have proceeded from the independent wrongful acts and defaults of parties other than the said defendant." I should be very much embarrassed to know how to reply to this, or whether not to reply to it at all. Even if it is only useless, it seems to me that, if a lot of useless allegations are to be allowed on the record, pleadings would become more embarrassing every day—a mere farrago of useless and irrelevant allegations. Paragraph 41, again, is a mere contingent assertion of law. It says that, even if some facts are proved, yet even then the action would not be maintainable—that the defendant will have a good answer to the claim, if certain matters are established at the trial, or if certain matters are true. The plaintiff knows perfectly well that, if he does not attempt to answer or meet that in the right way, the de-

fendant will take every advantage of his not having done so. There can be no occasion to cause additional costs by allegations of this kind.

LINDLEY, J.—The rule under which we are asked to strike out the paragraphs objected to is Order XXVII., r. 1, and the question is whether these paragraphs are embarrassing within the meaning of that rule. With regard to sects. 37, 38, 39, they appear to me embarrassing to any pleader who has to deal with them, or any judge who has to try the case. As pleas or defences, they are, to my mind, embarrassing, and ought not to be allowed. They rest on a series of contingencies, and I should have struck them out myself. But with regard to the other two paragraphs (16 and 41), I should not myself have thought them embarrassing at chambers. The mere fact, however, that my brother Lush thought them embarrassing at chambers is some proof that they are so; and perhaps the reason that they would not have embarrassed me is that I am more used to that sort of pleading. It is said in their defence that they merely give notice of points of law intended to be raised. Now you are entitled to raise the point that the statement of claim is bad in law at the trial; but, if you want to raise it in a summary way before trial, you must demur. If you do not demur, but go to trial, you incur additional costs, and that is all. These paragraphs have been thought embarrassing by judges of far greater experience than myself in cases before a jury, and I cannot venture to disagree with them, being convinced that they are at any rate entirely useless. They must be struck out.

*Appeal dismissed.*

Solicitors for the plaintiff, *Snell and Greenip*.

Solicitors for the defendants, *Lewis and Lewis*.

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### DIVORCE BUSINESS.

*Feb. 4 and 11.*

(Before the Right Honourable the PRESIDENT.)

YGLESIAS v. YGLESIAS AND SELBY. (a)

*Variation of settlement—22 & 23 Vict. c. 61, s. 5—41 Vict. c. 19 (Matrimonial Causes Act 1878), s. 3. The Matrimonial Causes Act 1878 has not a retrospective operation; therefore the 3rd section of that Act, which extends the provisions of the 5th section of 22 & 23 Vict. c. 61, with regard to the power of the court to vary settlements in cases of dissolution, does not apply to any case where a marriage has been dissolved by decree absolute previous to the 27th May 1878.*

In this case the marriage was dissolved by decree absolute on the 5th March 1878. There was no issue of the marriage. Previously to the passing of the Matrimonial Causes Act 1878 (41 Vict. c. 19), the power of the court to vary settlements was regulated by the 5th section of 22 & 23 Vict. c. 61, which provides that

The court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit.

(a) Reported by L. D. FOWLES, Esq., Barrister-at-Law.

ADM.]

THE SEAHAM—THE JACOB LANDSTROM.

[ADM.]

By the 3rd section of the Matrimonial Causes Act 1878 (41 Vict. c. 19), it is provided that

The court may exercise the powers vested in it by the provisions of sect. 5 of the Act of 22 & 23 Vict. c. 61, notwithstanding that there are no children of the marriage.

The latter Act came into operation on the 27th May 1878.

*Feb. 4.*—*Pritchard* applied to the court on behalf of the petitioners for leave to file a petition to vary a post-nuptial settlement under which the respondent—who was out of the country and had become the wife of the co-respondent—took a life interest in a sum of 2000*l.*, the money of the petitioner. He contended that the statute, being remedial in its nature, ought to be construed liberally, and had a retrospective effect. *Our. adv. vult.*

*Feb. 11.*—The PRESIDENT (Sir James Hannen).—I have carefully considered this application, and have come to the conclusion that I ought not to allow it. If it is well founded, on the ground that a retrospective operation should be given to the Act, then a like application might be made in every case which has come before the court in which there have been settlements but no children, issue of the marriage of the parties. Even if there were anything in the language of the Act which would justify the interpretation sought to be put upon it, it was not, in my judgment, the intention of the Legislature to give it such an effect. At any rate, I have a discretion in the matter, and in the exercise of that discretion I shall reject the application.

*Application rejected.*

Solicitors for the applicant, *H. H. Mason and Son.*

#### ADMIRALTY BUSINESS.

*Saturday, Dec. 21, 1878.*

(Before Sir R. PHILLIMORE.)

THE SEAHAM. (a)

*Practice*—*Trial by jury*—*Admiralty Division*—*Transfer*—38 & 39 Vict. c. 77, s. 11 (2) (3), Order XXXVI., rr. 3, 27.

*An action assigned to the Admiralty Division, but which would not have been within the cognisance of the High Court of Admiralty before the Judicature Acts, transferred to another division on that ground, not on the ground that it could not be tried in the Admiralty Division by a jury.*

*Seem, an action may be tried, and the issues of fact therein decided, by a jury, in the Admiralty Division of the High Court as well as in the Common Law Divisions.*

This was a motion to transfer an action for "damage to cargo" from this division to the Queen's Bench Division of the High Court.

The *Seaham* was a British ship, and her owners were resident in Great Britain.

*E. C. Clarkson*, for the defendants, owners of the *Seaham*.—This is not a case within the Admiralty Court Act 1861, s. 6 (24 Vict. c. 10), and therefore not one over which the High Court of Admiralty would have had jurisdiction; therefore it has been wrongly assigned to this division: (Supreme Court of Judicature Act 1875, s. 11 (3),

38 & 39 Vict. c. 77). No doubt the court has power to retain it (Supreme Court of Judicature Act 1875, s. 11 (2), 38 & 39 Vict. c. 77), but it would be inconvenient, and besides we desire to try the case by jury: we have a right to demand trial by jury (Order XXXVI., rr. 3, 27.) [Sir R. PHILLIMORE.—Is there anything to prevent you trying the case with a jury in this division?] There is at all events no precedent for so doing, and the cases in the Chancery Division in which a jury is required are set down for trial in London or Westminster in the general list, and tried before one of the judges of the Common Law Divisions. I should therefore, later on, have to ask for directions how the trial was to take place, and the cause being improperly assigned here, I take the more direct and simple course of asking to transfer it bodily.

*W. G. F. Phillimore*.—Allowing that this case comes within the provisions of Order XXXVI., rr. 3, 27, and that the defendants have a right to try by jury, there is nothing to prevent the exercise of the right in this division, even if it should ultimately be necessary to try issues of fact with a jury, and to follow the Chancery precedent in such a case; there may well be issues of law which we prefer to have decided in this court.

Sir R. PHILLIMORE.—I shall grant the present application, as the cause has been wrongly assigned to this division, but not on the ground that I have no power to summon a jury. Costs to be costs in the cause.

Solicitors for plaintiff, *Stokes and Co.*

Solicitors for defendant, *Cooper and Co.*

*Tuesday, March 5, 1878.*

(Before Sir R. PHILLIMORE.)

THE JACOB LANDSTROM. (a)

*Practice*—*Salvage*—*Rival salvors*—*Consolidation*—*Tender*.

*The court has power to order the consolidation of salvage suits in all cases, but it will not usually exercise the power contrary to the wish of the various plaintiffs; but if the plaintiffs institute and prosecute several suits without necessity, they will be condemned in costs.*

*When there are separate suits instituted in respect of services rendered to a vessel and her crew by rival salvors, and the defendant is unable to estimate the respective values of two several services, he will be allowed to make a single tender in respect of the whole services rendered.*

This was a motion in a cause of salvage by the defendants, owners of the *Jacob Landstrom*, to consolidate two salvage suits which had been brought against that vessel, or in the alternative to be allowed to make a single tender in respect of both suits. The notice served on the plaintiffs in Action 1878, K. No. 5, was as follows:

We, *Stokes, Saunders, and Stokes*, solicitors for the defendants in this cause, give notice that we shall by counsel, on the 5th March 1878, move the judge in court to order that this action be consolidated with action 1877, O. No. 379, or that in the event of either of the plaintiffs objecting thereto, the defendants may make a tender in court in this action of a sum that they may deem sufficient to satisfy the claims for salvage in both actions, notwithstanding the actions may not be consolidated.

(a) Reported by J. P. ASPINALL and F. W. RAIKES, Esqs., Barristers-at-Law.

(a) Reported by J. P. ASPINALL and F. W. RAIKES, Esqs., Barristers-at-Law.

ADM.]

WATSON v. SANDFORD.

[NISI PRIUS.

A notice was served on the plaintiffs in action 1877, O. No. 379, in the same terms excepting that "Action 1878, K. No. 5" was substituted for "Action 1877, O. No. 379."

March 5. — *Stutts* for the defendants.—The court has power to order the consolidation of the suits; but if it should be of opinion that the interests of the salvors are so diverse as not to be conveniently disposed of in the same suit, it will not on that account subject us to the inconvenience of making separate tenders in each suit. We admit that we are liable to pay some salvage, and desire to tender; but if the plaintiffs' claims are so difficult to adjust *inter se*, that they are compelled to keep their actions separate, how can we, before the trial of the question, say in what proportions their services or alleged services should be rewarded?

W. G. Phillimore, for plaintiffs in Action 1877, O. No. 379.—The consolidation of suits is a matter in the discretion of the court, and it has been already decided in the registry not to allow it, and this court will not interfere on appeal with a matter of discretion. There is no precedent for a tender being made common to two separate actions, and such a proceeding would occasion greater inconvenience than it is alleged that it would prevent. Suppose one set of salvors consider the amount sufficient and accept it, they will be compelled to fight the question of amount at their own risk against the other set which consider it insufficient, apart altogether from the question of apportionment. The defendants' servants did not abandon the ship, and their mate has been examined; therefore, all the circumstances of the salvage and the relative value of the services rendered by each set of salvors are in their knowledge, and they cannot be within the personal knowledge of both sets of salvors. They have had the benefit and should bear the burden, not we who rendered the service. The questions to be tried are separate, and we are entitled to a separate judgment in each, and therefore to a separate tender for each.

Nelson, for the plaintiffs in Action 1878, K. No. 5, also objected both to the consolidation and to a joint tender, but claimed if the consolidation was ordered that he should have the conduct of the cause, as he was the first salvor in the field.

Sir R. PHILLIMORE.—The first question that comes before the court is as to the power of consolidation. It is hardly necessary to say that it has always been considered a special power of this court to order actions to be consolidated both in cases of wages and other suits. The practice is laid down by Dr. Lushington as follows (*The William Hutt*, 1 Lush. 27; 1 L. T. Rep. N. S. 448): "According to my knowledge the universal practice of the court has been to consolidate actions where the decision of each action depends on precisely the same facts; and in salvage suits the court has gone further, consolidating actions where there are several sets of salvors not rendering precisely the same services. The power of consolidating actions is most beneficial. But for this power the owners of a ship would often be vexed by a host of different actions arising out of one matter, as in a case of collisions by all the several owners of cargo in the vessel run down, and the court could afford no relief, having no power to order the evidence in one action to be taken as evidence in another." I perceive also

that in one case (*The Melpomene*, L. Rep. 4 A. & E. 129), decided in July 1873, I ordered two causes to be consolidated where the application was made by the defendants and resisted by the plaintiffs. Nevertheless, the practice of the court for many years has been not to compel a consolidation where the different plaintiffs object to it and maintain that their interests are diverse. In such cases the court has not ordered consolidation, but has always held it to be in its power to condemn the party refusing to consolidate in costs. I do not therefore order a consolidation of these actions. There remains the further question whether it is not competent to the owner of the salvaged property to make one single joint tender in both separate actions. On the whole I am of opinion that it is competent for him to do so. It is quite clear that there are some cases in which it would be impossible for him to make separate tenders. For example, take the case of a vessel absolutely derelict and two salvors setting up separate claims, it would be impossible for the owner to know what the several services rendered were, but he would know the value of the vessel and her cargo and freight, and therefore might estimate what the value of the services in the aggregate was. In such a case it would be unjust to call upon the owners of property to make separate tenders, and I am of opinion that the present case falls within the same category. There is a salvage of the crew and a separate salvage of the vessel. The owner may estimate the whole value of the service rendered to his property at a certain sum and tender it in court, and if the salvors refuse it they do so at the risk of costs. I order a single tender for the whole services rendered to the ship, the defendants to elect if they choose in which action it is to be paid in.

Solicitors for plaintiffs in Action O. No. 397 (1877), *Lowless and Co.*

Solicitors for the plaintiffs in Action K. No. 5 (1878), *Tatham and Co.*

Solicitors for defendants in both actions, *Stokes, Saunders, and Stokes.*

### NISI PRIUS.

#### COMMON PLEAS DIVISION.

Wednesday, Feb. 12.

(Before LOPEZ, J. and a Common Jury.)

WATSON v. SANDFORD.

*Evidence — Declarations of deceased person — Admissibility.*

*In an action by an executor to recover a debt due to the estate a parol statement by his testator against his pecuniary interest with reference to such debt is admissible.*

THIS was an action by an executor to recover 100*l.* and interest, the amount of an I O U, given by the defendant to one Sophia Richardson in Sept. 1869. She died in 1873, and the writ was issued in June 1877. One defence raised was the Statute of Limitations, to which there was a reply of acknowledgment within six years. The evidence in support of this reply was that of a nurse who was asked:

Q.—Did Miss Richardson make a statement to you about any interest which had been paid by Mr. Sandford.

F. O. Crump, for the defendant, objected that this evidence was inadmissible.

[BANK.]

Ex parte BULMER; Re HUGHES.

[BANK.]

*McColl* for the plaintiff.—It is a parol declaration by Miss Richardson against her pecuniary interest.

LOPES, J.—I doubt whether it is admissible. Miss Richardson would have been the plaintiff in an action brought in her lifetime. It has been decided that parol as well as written statements against the interest of the party making them are admissible where those parties are witnesses only: (*Reg. v. Overseers of Birmingham*, 31 L. J. 63, M. C.) The question is whether a statement by a testatrix against her own interest is admissible in an action by the executor.

Crump said that the doctrine had been carried far enough without extending it any farther. He had no authority against the proposition, but he submitted that it did not come within the decided cases, which did not refer to parties or to the statements of parties in actions by their representatives.

*McColl* pointed out that, when the rule was established, parties could not give evidence.

LOPES, J. mentioned *Reg. v. Exeter Union* (L. Rep. 4 Q. B. 341), and decided to admit the evidence.

Ultimately, on the answer given by the witness, "She said Mr. Sandford had been and paid me interest on the 100l.," the jury found a

*Verdict for the defendant.*

Solicitor for the plaintiff, *Watson*.

Solicitors for the defendant, *Stevens and Harries*, for *Sharland and Hatten*, Gravesend.

## COURT OF BANKRUPTCY.

Monday, Jan. 13.

(Before the CHIEF JUDGE.)

Ex parte BULMER; Re HUGHES. (a)

*Protected transaction—Execution creditor—Sale by high bailiff before the time fixed by statute—Act of bankruptcy—Notice of—County Courts Act 1846, sect. 106—Bankruptcy Act 1869, sect. 95, sub-sect. 3.*

*An execution levied by seizure upon the goods of a trader under a County Court judgment, and sold by the high bailiff by consent of both parties after the commission of an act of bankruptcy of which the execution creditor had notice, and upon which the adjudication subsequently proceeded, but before the expiration of the five days required by the County Courts Act 1846 (9 & 10 Vict. c. 95), s. 106, is not a protected transaction within sect. 95, cl. 3, of the Bankruptcy Act 1869.*

THIS was an appeal from the decision of the County Court of Denbighshire, holden at Wrexham, dated the 22nd Oct. 1878, whereby it was ordered that the appellant, Francis William Bulmer, should pay to John Evans, the trustee of the bankrupt, the sum of 37l. 14s., being the proceeds of the sale of certain goods taken in execution of a judgment obtained by F. W. Bulmer against the bankrupt.

On the 15th Feb. 1878 an action for 33l. 15s. was commenced in the County Court of Corwen, in Merionethshire, by F. W. Bulmer against the bankrupt, John Hughes, whose acceptance of a bill of exchange had been dishonoured.

(a) Reported by A. A. DORIA, Esq., Barrister-at-Law.

On the 19th Feb. 1878 J. Hughes executed in favour of John Evans and Thomas Jones a bill of sale of all his property and effects to secure the sum of 659l. 17s. The bill of sale was duly registered on the 23rd Feb. Evans and Jones took possession under their bill of sale. On the 25th J. Hughes absconded, and on the 27th Feb. F. W. Bulmer signed judgment in the action, and issued a writ of *fi. fa.*, under which the High Bailiff on the same day seized the goods of the debtor. Messrs. Evans and Jones immediately gave notice to the High Bailiff that they claimed the goods as absolute owners under their bill of sale, whereupon an interpleader summons was issued. To avoid unnecessary expense by holding possession it was agreed between the parties that a portion of the goods sufficient to realise the amount of F. W. Bulmer's judgment should be sold, and the proceeds of the sale paid into the North and South Wales Bank at Corwen to abide the result of the interpleader summons. A sale was accordingly made on the 1st March, and the proceeds, amounting to 37l. 19s., were paid into the bank. Upon the same 1st March a petition in bankruptcy was presented against J. Hughes, and an injunction granted to restrain the sale. A telegram announcing this was at once sent to the auctioneer conducting the sale, but, notwithstanding the receipt of the telegram, the sale was continued. On the 6th March J. Hughes was adjudicated bankrupt, the act of bankruptcy being the execution of the bill of sale of the 19th Feb.

On the 9th May an order was made upon the interpleader summons directing that out of the sum of 37l. 19s. paid into the Corwen Bank as above stated the sum of 37l. 14s. should be paid to F. W. Bulmer; but on the 22nd May J. Evans, who had been appointed trustee in the bankruptcy, applied to the County Court for a declaration that the money in question formed part of the bankrupt's property, and a declaration to that effect was accordingly made on the 22nd Oct. 1878. It was against this order that F. W. Bulmer now appealed.

*Finlay Knight*, for the appellant, contended that the matter was *res judicata*, for that upon the interpleader summons the County Court judge had decided that the trustee was entitled to the money. If this were not so, still the transaction was protected under sect. 95, sub-sect. 3, by reason that his client had no notice of any act of bankruptcy having been committed when the goods were seized and sold. The notice to the high bailiff was too vague to affect the question, as it did not show that the execution of the bill of sale was an act of bankruptcy:

*Evans v. Hallam*, 24 L. T. Rep. N. S. 939; L. Rep. 6, Q. B. 713.

Moreover, notice to the sheriff or the high bailiff was not notice to an execution creditor.

*Yate Lee* appeared for the respondent.—He contended that the sale on the 1st March was illegal, as the County Courts Act 1846 provides that five days must intervene between the seizure and sale of goods taken in execution, unless the debtor consent to an earlier sale. No such consent was obtained in the present case, inasmuch as the debtor was absent when the bankruptcy petition was filed, and therefore the sale was illegal. The execution of the bill of sale on the 19th Feb. was an act of bankruptcy. The appellant must prove that on



the 4th March, the earliest date at which a sale could legally take place, he had no notice of an act of bankruptcy committed by the debtor and available against him for adjudication :

*Es parte Schulte; Re Matanlé*, 30 L. T. Rep. N. S. 478; L. Rep. 9 Ch. App. 409.

*Es parte Eyles; Re Edwards*, L. Rep. 16 Eq. 99.

*Finlay Knight* in reply.—Upon the true construction of the County Courts Act it could not be said that unless five days intervene between seizure and sale a sale is invalid. However that might be, the agreement that the sale should take place on the 1st March operated as a waiver of the Act of Parliament.

The CHIEF JUDGE.—My only difficulty arises under the Act of Parliament, which, however, is very plain in its terms. "You may seize the goods," it says, "but you must not sell them within five days of the seizure, except with the debtor's consent." Now, here, within the five days a sale takes place, and while selling the auctioneer has notice of an act of bankruptcy. The appellant says that it was by arrangement between the holders of the bill of sale and the execution creditors that the period of five days fixed by the statute was abridged. Now, if the title of the holders of the bill of sale were clear, I think that would take the case out of the Act of Parliament. But that is not the case which I have to deal with. The bill of sale itself is void, and has been abandoned, and the agreement was between an execution creditor and these parties, who had no right to the goods, that the time fixed by the Act should be abridged. I have no right to assume that the bill of sale holders had any right to the proceeds of the sale of those goods, and when the trustee insists that the Act of Parliament has been infringed and that the money belongs to him there seems to be no answer to his claim. The appeal must therefore be dismissed with costs.

Solicitors for the appellant, *Torr and Co.*, for *W. J. Cousins*, Leeds.

Solicitors for the respondent, *Sharp and Ullithorne*, for *Louis and Edwards*, Ruthin.

## Supreme Court of Judicature.

### COURT OF APPEAL

#### SITTINGS AT LINCOLN'S INN.

Jan. 24 and 27.

(Before JAMES, BAGGALLAY, and BRAMWELL, L.J.J.)

*Re FORD AND HILL.* (a)

*Vendor and purchaser—Requisitions on title—Inquiry as to incumbrances not disclosed on abstract.*

*A requisition on title in these words: "Is there, to the knowledge of the vendors or their solicitors, any settlement, deed, fact, omission, or any incumbrance affecting the property, not disclosed by the abstract?"*

*Held (reversing the decision of Hall, V.C.), to be an improper requisition.*

*Re Solomon and Davey (infra in note) overruled.*

*This was an appeal from a decision of Hall, V.C.*

*A Mr. Hill purchased a house at Bristol from*

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

Vol. XL., N. S., 1008.

*Messrs. Ford and Harford*, trustees for sale under a deed.

The abstract of title having been furnished in due course, Messrs. Meade-King and Bigg, of Bristol, the purchaser's solicitors, sent in their requisitions on the abstract to Messrs. Osborne, Ward, and Co., also of Bristol, the vendors' solicitors. The eighth requisition was in these words: "Is there, to the knowledge of the vendors or their solicitors, any settlement, deed, fact, omission, or any incumbrance affecting the property, not disclosed by the abstract?"

To this requisition the vendors' solicitors replied: "We invariably decline to answer questions of this description."

As the property was subject to various informal equitable charges, one of which was certainly not disclosed by the abstract, the purchaser's solicitors pressed their requisition, and ultimately took out a summons under the Vendor and Purchaser Act 1874, asking that the vendors and their solicitors might be ordered to make a full, sufficient, and complete answer to the requisition.

The Vice-Chancellor made an order "that the solicitors of the vendors (meaning all the partners in the firm) do make a full, sufficient, and complete answer to the requisition, and that a list of the incumbrances appearing in the abstract be made and shown to the vendees, and that the vendors do answer the said requisition as to their knowledge of any settlement, deed, fact, omission, or any incumbrance affecting the property not appearing in such list."

From this order the vendors appealed.

*Everitt* for the appellant. — To answer this requisition might make the solicitors criminally liable under the 22 & 23 Vict. c. 35, s. 24. In this particular case the title is limited by the conditions of sale, and the purchaser is really seeking to obtain the benefit of an unlimited title. Even if the vendors alone were required to answer the requisition, they could not do so without asking their solicitors for information, and the solicitors might be able to answer only by means of knowledge which they had acquired through another client. The only result of sanctioning such a requisition would be delay and expense. [JAMES, L.J.—The costs of a transfer of real estate are already heavy enough. I think costs are the greatest curse of the country.] The purchaser is clearly not entitled under his contract to put this requisition. The only authority in favour of the Vice-Chancellor's order is a previous decision of his own in an unreported case of *Re Solomon and Davey*. (a)

(a) *Re Solomon and Davey* (Before Hall, V.C., in chambers), 16th April, 1875.—The facts of the case appear sufficiently in the Vice-Chancellor's judgment, which was as follows: This is a summons under the 9th section of the 37 & 38 Vict. c. 78, intitled "An Act to amend the Law of Vendor and Purchaser, and further to simplify title to land." The property, the subject of the contract, is a freehold dwelling-house and shop in Thomas-street in the city of Bristol. The purchaser sent to the vendor's solicitor requisitions on title, the third requisition being this: "Whether the vendor is, or her solicitors are, aware of any judgments, settlements, mortgages, charges, or incumbrances of any description affecting the property, not disclosed by the abstract of the vendor's title." The vendor's solicitors decline to answer this requisition. I am of opinion that the requisition must be answered. It has been the practice of conveyancers, ever since I commenced practice, to make a requisition somewhat similar to the one in question.

*Levett* for the respondent.—A purchaser is entitled to a complete abstract, or, as it is stated in *Dart's Vendors and Purchasers* (5th edit. p. 161-2), "an abstract as perfect as the vendor at the time of delivery has in his either actual or constructive possession," or as *Kindersley, V.C.* has expressed it in *Oakden v. Pike* (11 Jur. N.S. 686), an abstract "which contains with sufficient clearness and sufficient fulness the effect of every instrument which constitutes part of the vendor's title." And Lord St. Leonards says, in his *Vendors and Purchasers* (14th edit. p. 407), "The solicitor should abstract every document upon which the title depends, or upon which any difficulty has arisen. Wherever he begins the root of the title, he ought to abstract every subsequent deed;" and at page 411 he says that, even as to equitable charges which have been discharged, the facts of the charge and discharge should be stated shortly; and in *Knatchbull v. Gruber* (3 Mer. 124), a suit by a vendor for specific performance, Lord Eldon said (at page 137), that "where a man makes a purchase of an estate to which the vendor represents that he has a good title, in such a case the purchaser has a right to insist that the question, whether he have or have not a good title, shall be sifted to the bottom" before he can be called upon either to accept an indemnity, or com-

Sometimes it has been less specific, that is, not mentioning settlements or mortgages. The requisition has generally been answered, but for a long time past some solicitors have objected to answer it, their reason being that answering it might subject them personally to legal liability to the purchaser, although they were not morally guilty. Upon such objection being made, the requisition has sometimes not been insisted on, but this has generally been done to avoid delay and possible litigation. Some counsel have always insisted on the requisition being answered, and I believe their doing so has almost always obtained an answer. The ground of objection to answering the requisition is, I consider, insufficient. Some solicitors answer the requisition in this manner: "Not that we are aware, but the purchaser's solicitor should make the usual searches." Such form of answer, I consider, gets rid of the objection. The requisition is one which causes the vendor's solicitor to consider whether the property sold is not affected by something which it had not occurred to him did affect it, such as a charge under some drainage or local Act; and it is the fact that purchasers have been thus frequently protected against defects of title which had been overlooked by the vendor's solicitor. The requisition in the present case goes to the solicitor's knowledge and also to that of his client. This involves inquiry by the solicitor from his client. I think it not unreasonable so to frame the requisition. To answer it the solicitor must communicate with his client. There may be cases in which, by reason of the client's absence, or under other circumstances, a purchaser may be compellable to complete his purchase without the answer to his requisition extending to the client's knowledge, but I think these are exceptional cases. In what I have above said I must not be considered as altogether approving of the requisition being made in the form above mentioned. The answer to it might lead to the disclosure of what the purchaser would rather not know. The requisition should, I think, ordinarily be added to thus: "And which, if remaining undisclosed, may prejudicially affect the purchaser." Wood, V.C., in *Drummond v. Tracey* (Johns. 608), seemed to consider (see p. 612) that a vendor's obligations were not merely co-extensive with his obligations in respect of the contents of the abstract; and, having regard to his judgment in that case, I cannot doubt that he would have held that the vendor's solicitor must answer all relevant questions in respect to existing liabilities, including such a question as the requisition in this case, and I consider that that judgment materially supports my decision, although it has been (and I think correctly) thought that the Vice-Chancellor's judgment in that case went too far.

pensation for a defect, or to abandon the contract. On the same principle, even when there is no suit for specific performance—for the case of *Re Burroughes, Lynn, and Seaton* (36 L. T. Rep. N. S. 778; J. Rep. 5 Ch. Div. 601), shows that on a proceeding under the Vendor and Purchaser Act 1874, the parties are in the same position as they would be under a reference as to title in a suit for specific performance—a purchaser must be entitled to ask the vendor whether his abstract is complete, and whether he remembers anything else affecting the title. The vendor's solicitor ought also to answer the question, because in most cases the vendor himself understands nothing about the subject, and his solicitor is the only person who knows anything about it. The effect of the Vice-Chancellor's order in this case is merely that the purchaser need not complete the purchase if the requisition is not answered. As for the argument that the solicitor might incur criminal liability under the 22 & 23 Vict. c. 35, s. 24, that section does not apply in the absence of fraudulent intent. [JAMES, L.J.—I think the solicitor would not, by answering the question according to his knowledge, expose himself to any criminal liability.] The requisition is a precautionary one, and would tend to prevent litigation. It is in accordance with the modern practice of conveyancers, as stated by Mr. Dart (*Vendors and Purchasers*, 5th edit., pp. 449, 450), though he adds that, "It is better to restrict the general requisition to an inquiry whether the vendor is aware of any document, judgment, or charge affecting the title or the property, not noticed in the abstract, and which, if remaining undisclosed, may prejudicially affect the purchaser." We are willing to have the requisition limited in that way. But Mr. Dart adds, "But the vendor's solicitors, and, as a general but not universal rule, the vendor himself, are bound to answer the inquiry even if unrestricted." He also cited

*Jenkins v. Hiles*, 6 Ves. 646, 653;

*Drummond v. Tracey*, Johns. 608, 612;

*Dart's Vendors and Purchasers*, 5 edit. 301-2.

No reply.

JAMES, L.J.—I am of opinion that the order made by the Vice-Chancellor in this case must be discharged. The question put by the purchaser's solicitors is, in my opinion, anything but a requisition on the title. It is rather a searching interrogatory seeking discovery from the vendors and their solicitors. As I understand the matter, the vendor is bound to produce an abstract of his title, and to verify the abstract by evidence on any requisition being made as to any point on which the title appears to be defective; but the evidence he is obliged to give is merely in verification of the abstract. Here, however, the vendor has been asked to give negative evidence—evidence of the non-existence of incumbrances. There is no judicial authority in favour of such a requisition except the decision of Hall, V.C. himself, in *Re Solomon and Davey* (*supra* in note), against which this is, in fact, an appeal. The alleged practice of conveyancers is of comparatively modern growth, and cannot be considered to have become established to such an extent as to be *in gremio contractus*. Nor do the opinions of Mr. Dart and Mr. Christie go anything like the length to which it has been urged on behalf of the respondent that they do. There is a danger in in-

introducing any such practice as this. Every new-fangled requisition ought to be discountenanced and discouraged by the court, because the result of allowing such things would be to add to the difficulty, delay, and expense which attend the completion of every contract for the sale of real estate, which are almost a disgrace to the law of this country. The result of allowing such innovations at all is illustrated by the way in which the question put by the purchaser's solicitors in the present case has grown beyond the simple form suggested by Mr. Dart. How could this requisition be answered if the vendor happened to be abroad? He might be at the antipodes, and be anxious to sell real property here in order to raise money immediately; and in such a case is the purchaser to be entitled to say that he will not complete till an answer can be obtained from the vendor at the other end of the world, till communications have taken place between him in New Zealand and his solicitors in England? Of course both a vendor and his solicitor are possibly liable to criminal consequences for a wilful suppression of any incumbrance which they know would vitiate the title to land sold by the vendor, and a purchaser has a right to say to his vendor, "I rely on the truth of the abstract you have furnished to me, as I warn you of your criminal liability if it is not so." The Vice-Chancellor's order clearly goes too far in ordering the solicitors who act for the vendor to answer this question. Under that order, as it stands, every one of the members of the firm would have to make a number of positive statements which it could hardly be in their power to make, and disobedience to which would render every one of them liable for contempt of court. Great inconvenience would arise from sanctioning this new practice; there is no judicial authority for it; and there is a great necessity—an obligation upon the court to discourage any new thing which would add to the expense and delay attending the transfer of land. I am therefore of opinion that this order should have been refused with costs, and that the appeal must be allowed with costs.

**BAGGALLAY, L.J.**—I am of the same opinion. I only desire to add that if the requisition was limited in the way which has been suggested, then, except as to those charges which a purchaser can discover for himself by searching in the proper places, all he would obtain by means of an answer to the requisition would be that which the solicitors are bound to disclose on the abstract. I think that, if the practice of making such a requisition were sanctioned, it would lead to a loose way of conducting business, and solicitors might say, "We need not be very accurate in our abstract, because there is a requisition afterwards which will give us the opportunity of supplying any omission in the abstract." The effect would be to lead to a very large increase in the expense of investigations of title.

**BRAMWELL, L.J.**—Questions of this kind arise more frequently in the Chancery Division than in the other divisions of the High Court, but I think there would be no doubt about the case in a Common Law Division. The vendor having refused to answer the requisition, suppose the purchaser refused to complete his contract, he could not have sustained an action at law against the vendor. To sustain an action a breach of contract would have to be made out, and for that purpose it would have to be shown that there was

an undertaking to answer the requisition, or that a good title had not been shown. Clearly there is no such undertaking, and the duty to show a good title is performed by the abstract. In all reason the same ground upon which the vendor would have succeeded at common law must make him succeed in the Chancery Division.

*Appeal accordingly allowed with costs.*

Solicitors for the appellant, *Prior, Bigg, Church, and Adams*, agents for *Meade-King and Bigg*, Bristol.

Solicitors for the respondent, *Gregory, Rowcliffes, and Rawle*, agents for *Osborne, Ward, Wassall, and Parr*, Bristol.

Tuesday, Feb. 4.

(Before, **JESSEL, M.R.**, and **JAMES and BRAMWELL, L.JJ.**)

**Re WEST JEWELL TIN MINING COMPANY; WESTON'S CASE.** (a)

*Company—Winding-up—Director—Purchase of vendor's paid-up shares at a discount—Misfeasance of director—Companies Act 1862, s. 165—Admission of new evidence on appeal—Rules of Court 1875, Order LVIII., r. 5.*

The articles of association of a company authorised the directors to carry out an agreement which had been entered into with the owner of a mine for the purchase of the mine by the company for 10,000*l.*, to be paid by the delivery to the vendor or his nominee of 5000 fully paid-up shares in the company of 2*l.* each. The directors, soon after the registration of the company, resolved to allot 5000 fully paid-up shares to the vendor in accordance with the agreement. Of these shares 500 were allotted direct to one of the directors as nominee of the vendor. The company was some years afterwards ordered to be wound-up, and the liquidator obtained an order calling upon this director to show cause why he should not pay the full nominal value of the shares so allotted to him. The director in his affidavit stated that he bought the shares of the vendor for 500*l.*, which was considered their full value at the time, but did not state the date of such purchase:

*Held*, that the onus of proving that he received the shares after the adoption of the agreement for the purchase of the vendor's mine lay upon the director, and that as he had not discharged that onus he must pay the difference between the sum already paid by him to the vendor and the full nominal value of the shares.

*Held*, also, that after the court had pointed out that the date of his purchase of the shares was the turning point in the case, he could not be allowed to give evidence that he had purchased them after the adoption of the agreement for the purchase of the vendor's mine, the vendor being dead, and there being no one to corroborate his evidence.

THIS was an appeal from a decision of the Vice-Warden of the Stannaries Court.

The West Jewell Tin Mining Company was registered on the 11th April 1870, with a nominal capital of 20,000*l.* in 10,000 shares of 2*l.* each, for the purpose of acquiring and working a mine in Cornwall.

Prior to the formation of the company, namely, on the 6th April 1870, an agreement was entered

(a) Reported by **H. FRAT, Esq., Barrister-at-Law.**

into between M. C. Greene, the owner of the mine, and J. B. Freeman, as trustee on behalf of the then intended company, for the sale of the mine to the company for 10,000*l.*, to be paid by the delivery to the vendor, his nominee or nominees, of 5000 fully paid-up shares of the nominal value of 2*l.* each.

This agreement was duly registered under the Companies Act 1867.

The articles of association stated the agreement, which they did not, however, make binding upon the company, but authorised the directors to carry it out. Amongst the subscribers to the memorandum of association was James Weston, who subscribed it for 500, the total number of shares subscribed for being 1100, and Weston was one of the three directors appointed by the articles.

The first meeting of the directors after the registration of the company was held on the 17th June 1870, Weston being present; and it was resolved to allot 5000 fully paid-up shares to Greene and his nominees in accordance with the agreement of the 6th April.

The directors did not pass any other resolution adopting the agreement, but the 5000 shares were allotted as fully paid-up to Greene and other persons nominated by him, and the mine was duly handed over to the company.

One of the nominees was Weston, to whom 500 of the vendor's fully paid-up shares were allotted.

Besides the shares subscribed for by the memorandum of association, 900 shares were allotted to various applicants on the terms of paying 2*l.* per share.

In Aug. 1877 an order was made to wind-up the company.

The liquidator finding that Weston, being a director, had received 500 of the vendor's fully paid-up shares, summoned him under the 165th section of the Companies Act 1862 to show cause why he should not pay to the liquidator 1000*l.*, the nominal value of the shares, on the ground that he had been guilty of a misfeasance or breach of trust towards the company.

In answer to this, Weston made an affidavit stating that he purchased the 500 shares from Greene in the ordinary way of business, paying him 500*l.* for them, which, he said, was at the time considered their full value; that they were allotted to him direct by the company as the nominee of Greene, in accordance with the agreement between Greene and the company; that he had never parted with any of the shares and never made any profit by them. He did not, however, say when he made the purchase of the shares from Greene.

In support of Weston's case, an affidavit was also made by one Waddington, a stock and share dealer in London that at the time when these shares were allotted to Weston there was no market for the shares of the company, and that 1*l.* per share was then a large price to pay for them.

Upon this evidence, the Vice-Warden of the Stannaries Court ordered that Weston should pay to the liquidator 500*l.*, being the full nominal value of the shares after giving him credit for the 500*l.* which he had paid to Greene.

From this order Weston appealed.

*Roxburgh, Q.C.* and *Woodroffe* for the appellant.—The full value was given for the shares. [JESSEL, M.R.—The appellant does not state when he bought them. If he bought them after the adoption of the agreement with the vendor, he would not be liable, but he does not prove that.] Will your Lordships allow him to be called to prove that he bought them after that date?

JESSEL, M.R.—I do not think we ought. I do not mean to impute to him that he would say anything but the truth, but it is too dangerous, after we have pointed out what the point is, to allow the only living man who can give evidence to testify in his own favour. If it had been a written contract or anything of that kind, or there had been any written evidence, we should have been very glad to admit it. Independently of anything like intentional untruth, it would depend very much on Mr. Weston's recollection of circumstances, and as to whether a conversation took place just before or just after a meeting. His interest is altogether one way, and he knows the exact point. It would not do.

JAMES and BRAMWELL, L.JJ. concurred.

*Roxburgh, Q.C.* and *Woodroffe* then proceeded to argue the appeal.—This is different from the other cases in which directors have been held accountable for misfeasance under the 165th section of the Act. There is no evidence that the shares in this company were ever worth more than 1*l.* per share. *Re Caerphilly Colliery Company; Pearson's case* (L. Rep. 5 Ch. Div. 336), and the other cases which were relied upon on behalf of the liquidator are quite distinguishable, for in all those cases the director had given nothing for the shares, and might be said to have made a profit at the expense of the company; but here Weston paid the full market value of the shares, and has made no profit by them.

*Higgins, Q.C.* and *C. H. Turner*, for the liquidator, were not called upon.

JESSEL, M.R.—This is an appeal from a decision of the Vice-Warden of the Stannaries Court. I must say that I am quite unable to be an assenting party to interfering with his decision. The circumstances are very simple. The vendor of the mine to this company—for it is a mining company—was to have 10,000*l.* in 5000 fully paid-up shares of 2*l.* each. We find that one of the original directors and signatories of the memorandum of association was a Mr. Weston, who took 500 shares. Those 500 shares were agreed to be taken by him, and he was to pay for them 2*l.* apiece, not immediately, but 10*s.* down and the rest as it should be called up. He took them at par value. We then find that the agreement with the vendor was properly registered, and was authorised by the articles of association of the company to be adopted by the company—authorised only, but not made binding by the articles. We then find a meeting of the directors in June. Of the directors Mr. Weston was one. At that meeting they do not formally adopt the agreement in so many words, but they do adopt it by carrying it out and allotting the shares to the vendor and his nominees. Among the nominees we find the name of Mr. Weston for 500 shares, and upon that evidence, if it is not met, of course he would be liable for the value of the 500 shares as he takes them from the vendor, he being in a fiduciary position at that time, and being one of the trustees

for the company to adopt that agreement. That is not disputed; but the appellant says he disproves the statement of his having received any present or bribe at all, and the way in which he seeks to disprove it is this. He simply says in his affidavit that he purchased the shares: "I purchased in the regular way of business, of the said Matthew Charles Green, 500 of the shares so allotted to him as aforesaid, and which were allotted direct to me by the company," &c. [His Lordship read the rest of the affidavit, the effect of which is sufficiently set forth above, and continued:] Beyond that there is the evidence of a broker of Old Broad-street, a gentleman of the name of Waddington, who says: [His Lordship read the affidavit, and continued:] He says that 1l. per share was a large price to pay for the shares. He does not say for fully paid-up shares or for non-fully paid-up shares, but he leaves entirely in blank what kind of shares. Now, upon that evidence the appellant does not meet the charge. He is bound to show that he bought these shares after he had performed his duty to the company as director, and adopted the sale by the vendor. If he agreed to buy them before, he was receiving a present of the excess of value of the shares over the 500l. which he had to give for them; and, as the obligation upon him as a trustee is to show that he acted properly, he should have proved the purchase for fair value after the date of the allotment, which was the date of the adoption of the agreement with the vendor. He has done nothing of the kind. It appears to me so far that the Vice-Warden has arrived at a correct conclusion that he had not shown a *bona fide* purchase at the right period to relieve him from liability. Now then as to value. At that time, as was said in *Pearson's case* (*ubi sup.*), not only were there other shares allotted to other people at par; but Mr. Weston himself was agreeing to take shares at par, and so were his co-directors, and in the books they treat all the shares as worth the par value. What ought the judge below to have done in such a case? He has to adopt the rule as laid down by the Court of Appeal, that when a director or any person in a fiduciary position accepts a present of this kind, he is to be charged and liable, and upon that compelled to make good the full possible value of any such present or bribe—the full possible value at the time. The court is not to endeavour to reduce the value. Then what is the full possible value under these circumstances? Clearly par value, and that is the decision at which the learned judge in the court below arrived, and at which I think he correctly arrived. I will say one word more as to the application which was made to us to allow Mr. Watson to give further evidence. The application was refused by the court on grounds which I think are sufficiently manifest. It was his duty to have given the evidence, if it could have been produced, in the first instance. It would be too dangerous to allow a man's single uncorroborated testimony—for Mr. Greene, it appears, is dead, and there is no evidence producible from him—to be admitted as evidence after it had been made manifest what was the turning point of the case; and without at all imputing to the witness the slightest desire to state anything but the truth in a transaction which occurred so long ago as this, as to which memory alone can hardly be

relied upon, we must recollect that he would be biased by his interest to recollect, or believe he recollected, that the transaction took place at a particular hour of the day which would make it legal, and not at an earlier hour which would make it illegal. Under those circumstances I think we should be badly exercising our discretion if we were to allow a witness to give further evidence in such a case.

JAMES, L.J.—I quite agree.

BRAMWELL, L.J.—And I.

*Appeal accordingly dismissed with costs.*

Solicitor for the appellant, *R. W. Stacpoole.*

Solicitor for the respondent, *E. Beall.*

Feb. 13 and 14.

(Before JAMES, BRAMWELL, and BRETT, L.JJ.)

*Ex parte WELCHMAN; Re HARE. (a)*

*Insolvency—Deceased insolvent debtor—Property acquired after date of final order—Vested reversion falling into possession after death of insolvent—Rights of official assignee—5 & 6 Vict. c. 116, s. 9—7 & 8 Vict. c. 96, ss. 4, 8—Bankruptcy Repeal Act 1869, s. 15.*

*The 9th section of the 5 & 6 Vict. c. 116, which provides that the assignees of an insolvent debtor under that Act shall be entitled to claim and demand from the petitioner, at any time after the final order, any estate and effects acquired by him at any time after such order shall have been made; and that all such estate and effects, of what kind soever and where-soever situate, shall be absolutely vested in such assignees upon their filing a copy of their claim served upon the petitioner personally, or by leaving it at the place of residence mentioned in his notice of petition, and they shall hold the same in like manner as they held the estate and effects of the petitioner transferred by force of the final order as thereinbefore provided:*

*Held to apply only to property acquired after the final order by a living insolvent, and not to the case of a deceased insolvent.*

*In the latter case, the proper remedy of the unsatisfied creditors is to bring an action for the administration of the insolvent's estate.*

THIS was an appeal from a decision of Mr. Registrar Brougham, sitting as Chief Judge in Bankruptcy.

An insolvent debtor, named Hare, presented his petition in Ang. 1859 under the Acts for the Relief of Insolvent Debtors (5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96), and obtained his final order in Dec. 1861.

In 1866 he became entitled under the trusts of a marriage settlement, on the death of his wife, as one of her next of kin, to a share of the trust funds, subject to the life estate of the husband.

Hare died in 1867, and the husband, subject to whose life estate he was entitled, died in 1870.

In 1871 a suit was instituted in the Court of Chancery to carry into execution the trusts of the settlement, and ultimately in that suit the share of the insolvent Hare was carried over to a separate account to be paid to his personal representatives when constituted.

In April 1878 administration was taken out to Hare's estate, and in May 1878 Hare's official

(a) Reported by H. FRAT, Esq., Barrister-at-Law.

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assignee for the first time became aware of his interest under the settlement.

Thereupon the official assignee filed under the provisions of the 5 & 6 Vict. c. 116, a copy of his claim to the fund standing to the separate account, and obtained from the registrar an order giving him leave to apply in the suit for the payment of the fund to him.

From this order the administrator of Hare appealed.

*Phear* for the appellant.—The 7th section of the 5 & 6 Vict. c. 116, vests the estate in the official assignee, but the 9th section prohibits him from taking possession without an order for the purpose, and requires him to serve his claim in a manner which cannot be done in the case of a deceased insolvent. Therefore this order was improperly made. He referred to

7 & 8 Vict. c. 96, ss. 4, 8;

*Platel v. Bevil*, 2 Ex. 117-18.

*Langley* for the respondent.—The 8th section of the 7 & 8 Vict. c. 96, empowers the commissioner to proceed for the discovery and distribution of the petitioner's property after his death, as he might have done if the petitioner were living. He also referred to

32 & 33 Vict. c. 83, s. 15;

*Barton v. Tattersall*, 1 Russ. & My. 237, 242.

No reply.

JAMES, L.J.—I am of opinion that this order must be discharged. It seems to me that it was applied for unnecessarily unless it was for the purpose of taking the whole of the assets out of the hands of the legal personal representative, leaving him without anything either to pay new debts or to pay himself anything that he may have advanced, or to pay even for the expenses of administration. The statute has not left these creditors in any way in an unfair position according to the construction which I am putting upon it, that is to say, leaving them without any remedy by reason of the death, because, after the death of the insolvent, whatever assets he was possessed of, if they are real assets they vest in his heir-at-law, if they are personal assets they vest in his legal personal representatives, and those assets real or personal, or whatever they may be, would have to be administered in the due course of administration by the person in whom the law has vested such assets. In the case of *Barton v. Tattersall* (*ubi sup.*), which has been referred to, Sir John Leach says that the court has laid down the course and the mode in which they were to be dealt with, the new creditors first and the old creditors afterwards, and therefore there is no necessity for coming to this court at all; and therefore we come to consider the construction of the statute with the knowledge that there is really nothing whatever depriving the creditors of their rights as between them and the volunteers under the intestacy, but only as between them and any new creditors or any other equitable rights that may have arisen. Then what is the statute? The statute of 5 & 6 Vict. c. 116, under which this application was made, as now construed and modified by the statute of 7 & 8 Vict. c. 96, clearly vest in the assignee the whole property which the insolvent had in point of possession, or in point of right up to and at the time of his bankruptcy, and thenceforth up to and at the time of his getting his final order. The whole prop-

erty was vested absolutely as to those assets. Those were the assets which were clearly intended to be included in that, as shown by the interpretation section in the second Act. But then it was thought rightly enough that the creditors whose debts were not satisfied, and who had been prevented from suing the man, and whose remedies were suspended by it, were not to be left entirely unprovided for, if from any change of circumstances the insolvent debtor should become possessed of property out of which he ought in justice and honesty to make a provision for the creditors. Well, then, machinery is provided for the purpose of enabling the assignee to take possession of those assets, and that machinery throughout applies only, as it seems to me, to the living man just as under the former Acts a judgment only could be entered up against the man, and could not have been entered up against his heir or his legal personal representatives after his death. There is nothing here which enables the court, it seems to me, to summon before it in any way the legal personal representatives to render any account, or to summon before it the heir-at-law to show why the assets ought not to be taken. There is no machinery provided for that purpose, and this is a very special jurisdiction given to a special tribunal which has to deal with persons in the position of the insolvent debtor. But then, when other rights have accrued, a right vested in the heir or a right vested in the legal personal representatives, it appears to me that there is no reason whatever why the court should have over those persons an exceptional jurisdiction, or why everything should not be left to be decided by the ordinary tribunals of the country. And therefore I see no reason whatever why we should endeavour to put words into the 9th section of the 5 & 6 Vict. c. 116, which we do not find there, and to say that the words "insolvent debtor" are to include the insolvent debtor's legal personal representatives. Then as to the claim, is it to be served upon the man, or at his place of abode, mentioned in his petition? Is it to be served upon those people for service upon whom there is no provision, and are they thus to be called upon to show cause why some part of the property should not be taken out of their hands? I see no reason whatever why we should strain the words of the section for the purpose of giving that jurisdiction over persons falling under those characters. There appears to me to be no difficulty whatever in applying the ordinary machinery of the law for the purpose of having whatever assets there may be of the deceased applied in the due course of administration. And even if it had come under the last words of the 9th section, the court could exercise a reasonable discretion. It is true that the assignee could not file the account, because the assignee's right depends entirely upon the statute; but the assignee of course would not have it for the purpose of distribution amongst the creditors, but the creditors themselves, each in his own right, in respect of his unsatisfied debt, would have such rights as any person whose debt has not been satisfied would have. I am therefore of opinion that the order was unnecessarily applied for and improvidently granted, the court having no jurisdiction to do it, and that it ought to be discharged.

BRAMWELL, L.J.—I am of the same opinion.

One may say that this is an obscure section. It is very remarkable. It says that in a certain event, that is to say, in the event of the filing of their claim, all the estate should be vested in the assignees. It then proceeds to say that nevertheless they cannot take any part of it without some order of the commissioner. Now, at first sight, I looked to see whether we could strain the Act of Parliament a bit in order that that most desirable thing should be accomplished, viz., that the creditors should get paid, and it occurred to me that there was a possibility of reading the Act in this way, that the property was to vest in the assignees upon their filing a copy of their claim, and that they were to serve another copy, or serve their claim, or a copy of their claim, at the place of residence mentioned in the notice, and then if that was a true construction of the Act of Parliament, and if that part of the thing could not be done by reason of the death of the debtor, it was not a condition precedent, and the property vested upon their filing their claim; and I should have been inclined to say that that was the law, rather than that the property should go to the representatives of the man—his legatees or devisees or whatever they might be—instead of going to the persons to whom he was indebted. But one finds that that is not the case, that the creditors are not without remedy, and that their remedy would be attended with this equitable circumstance, that the claims of other creditors, and of the administrator or executor or other person, would be taken into account. There really is no reason for straining the words of the Act of Parliament, and certainly those words are: "The property is to vest on their filing a copy of their claim served upon the petitioner personally," which would lead one to suppose that the first thing to be done was to serve the petition with their claim, and then to file a copy of it, and consequently that the Act of Parliament contemplated that this sect. 9 only applied where the man was still alive. That certainly does seem the more natural interpretation of it. Whether the draftsman meant it, whether he had it in his mind or not, is another question. What courts very often have to do, whether the question arises upon an Act of Parliament or upon an agreement, is to see what provision has been made for the happening of an event which was not in the contemplation of the person who drew the Act of Parliament or agreement. But, that the natural meaning of the words is that which has been put upon them by the Lord Justice I agree; and moreover, I think that if this were a discretionary matter there is no reason why we should not refer the applicant to his remedy by action for the administration of the insolvent's estate.

BRETT, L.J.—It seems to me that the court had no jurisdiction to make the order. It is an order affecting property acquired after the final order in insolvency. Now it seems to me that it is clear upon the construction of the statute that the only section which applies to such property is the 9th section, and the order cannot be made unless under the 9th section such property might vest in the assignee. Now the right of vesting property in the assignee is not a common law right. This is not a common law right, the mode of exercising which is regulated by statute; it is a right created by the statute. It is therefore created by the 9th section. That being so, and if there

are conditions on which alone it can rest, it cannot exist unless those conditions are fulfilled. Now, having to construe that section with regard to the right created by it, it seems to me that we ought not to consider that section otherwise than according to its ordinary grammatical construction. There is nothing which authorises us to do otherwise, and according to the ordinary grammatical construction of this section, where it says that the estate and effects shall vest upon their filing a copy of the claim served upon the petitioner—those are grammatical words of condition—the fact of the service of the claim or the claim having been served is a condition precedent to the right of vesting, but where the man is dead that condition cannot be fulfilled. Therefore, if the condition cannot be fulfilled, the right does not arise and the property cannot vest. Therefore the court has no jurisdiction to make such an order after the death.

JAMES, L.J.—Discharge the order.

*Appeal accordingly allowed with costs.*

Solicitor for the appellant, *A. S. Edmunds.*

Solicitor for the respondent, *A. S. Twyford.*

### SITTINGS AT WESTMINSTER.

*Dec. 9 and 10, 1878.*

(Before BRAXWELL, BRETT, and COTTON, L.JJ.)

REG. on the prosecution of THE LONDON AND NORTH-WESTERN RAILWAY COMPANY v. THE OVERSEERS OF THE TOWNSHIP OF THE FOREGN OF WALSHALL AND OTHERS. (a)

*Bating—Public health—Borough—Town council—Local Acts—Public Health Act 1872 (35 & 36 Vict. c. 79), ss. 7, 16—Sanitary Law Amendment Act 1874 (37 & 38 Vict. c. 89), s. 3—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 207, 211.*

*By a private Act, passed in 1848, Improvement Commissioners were appointed with powers to carry out certain improvements for sanitary purposes in a district comprising part of the municipal borough of Walsall and part of the town of Walsall outside the borough. The Act gave the commissioners power to levy a rate for defraying the expenses incurred in carrying the Act into execution, and provided that the occupiers of land used as a public railway in the district should be assessed at one-fourth only of its annual value. The Public Health Act 1872 made boroughs urban sanitary districts, and the council of a borough the urban sanitary authority; and by sect. 7 (and sect. 3 of the Sanitary Law Amendment Act 1874) all the powers, duties, and obligations with respect to sanitary purposes of bodies having jurisdiction under a local Act were transferred to the urban sanitary authority of the district.*

*Sect. 16 of the Act of 1872 provides that all expenses incurred or payable by an urban sanitary authority under the Sanitary Acts shall, where the Local Government Acts were not in force at the passing of the Act, be defrayed, in the case of the council of a borough, out of the borough fund or borough rate.*

*By sect. 207 of the Public Health Act 1875 all expenses incurred or payable by an urban authority in the execution of the Act . . . shall*

(a) Reported by W. AFFLETON, Esq., Barrister-at-Law.



be charged on and defrayed out of the district fund and general district rate leviable by them under the Act, except that, if in any district the expenses incurred by an urban authority, being the council of a borough, in the execution of the Sanitary Acts, were at the time of the passing of the Act payable out of the borough fund or borough rate, then the expenses incurred by that authority in the execution of the Act shall be charged on and defrayed out of the borough fund or borough rate. Sect. 211 provides that the occupiers of land used as a railway shall be assessed at one-fourth only of its annual value. By an Act passed on the 13th July 1876 the boundaries of the municipal borough of Walsall were enlarged and made to include that part of the commissioners' district which was previously outside the borough, and the corporation was declared to be the sanitary authority throughout the borough as extended. The appellants were the occupiers of a railway within the limits of the extended borough. On the 1st Dec. 1876 the corporation made a borough rate to provide for sanitary expenses, and assessed the appellants at the full rateable value of their land.

*Held* (affirming the decision of the Queen's Bench Division, Mellor and Lush, JJ.), that the corporation, in respect of sanitary purposes within the extended borough, had only power to make a general district rate, and to assess the appellants at one-fourth of the net annual value of their land used as railway.

**APPEAL** from a decision of the Queen's Bench Division.

This was a case stated on an appeal against a borough rate laid on that part of the foreign of Walsall which is situate within the municipal borough of Walsall.

The Queen's Bench Division affirmed the order of the court of quarter sessions.

The case is reported and the special case set out 35 L. T. Rep. N. S. 626.

The town council appealed, and the case came on for hearing on Feb. 5, 1878, when the objection was taken for the railway company that no appeal would lie from the decision of the Queen's Bench Division. The Court of Appeal (Cockburn, C.J., Bramwell, Brett, and Cotton, L.JJ.) took time to consider, and on the 18th May delivered judgment, holding (Bramwell and Cotton, L.JJ. dissenting) that no appeal would lie (reported 36 L. T. Rep. N. S. 665). The town council appealed from this decision to the House of Lords, and they reversed the judgment of the Court of Appeal, and remitted the case to the Court of Appeal for hearing. (The case in the House of Lords is reported 39 L. T. Rep. N. S. 453.)

*Herschell*, Q.C. and *Anstie* for the corporation (the appellants).

*Bosanquet* and *N. Nevill* for the London and North-Western Railway Company (the respondents).

The arguments were the same as in the court below, and sufficiently appear in the judgments (*post*).

**BRAMWELL, L.J.**—I think this judgment should be affirmed. I speak with great reserve and hesitation on the subject, because of one's utter unfamiliarity with the subject-matter of cases like this, which come on appeal from magistrates at

quarter sessions, and involve a consideration of the proceedings of bodies such as local boards and sanitary authorities. The question, as far as I understand it, turns first upon the 207th section of the Act of 1875, which says that "all expenses incurred or payable by an urban authority in the execution of this Act, and not otherwise provided for, shall be charged and defrayed out of the district fund or general district rate leviable by them under this Act, subject to the following exceptions." So far the section would comprise the present case, unless any one of the exceptions applies. Now, it is said to be within this exception: "That if in any district the expenses incurred by an urban authority, being the council of a borough, in the execution of the Sanitary Acts, were, at the time of the passing of this Act, payable out of the borough fund or borough rate, then the expenses incurred by that authority in the execution of this Act shall be charged on or defrayed out of the borough fund or borough rate." That provision, of course, requires it to be ascertained whether, at the time of the passing of the Act of 1875, these expenses were payable out of the borough rate. Now, I am of opinion that they were not, and upon this ground: that the joint effect of sects. 7 and 16 of the Act of 1872 is, either that the power of the commissioners to make rates for the district marked blue remained up to 1875, and that the town council had no power to make any rate for sanitary purposes within that district, or that the town council only succeeded to and got the power which the commissioners had before—that is to say, the power to make a rate for sanitary purposes within the area of the commissioners' district. That is the conclusion I have come to. That difficulties might certainly arise before the Act of 1875 came into force I can well imagine; but there is this in favour of my conclusion—and it is a consideration which may be fairly borne in mind in considering this question—that the construction contended for by the town council would shift the burden which previously existed, and would heighten and augment the obligations of the defendants, who are the owners of such property as is referred to in the exemption clauses relied upon by the railway company, in ease of the burden upon the other ratepayers. No reason can be given why that should be done, and I cannot but think upon the general view of the Acts of Parliament that it was not intended to be done. I think that the intention of the Legislature in passing the 207th section was that, where the borough rate had previously borne the whole of the sanitary expenses, it was to continue to do so; but where it had borne none, or only a part of them, it was not to bear any of them, or only to bear that part of them, in future, but a district rate was to be made. If the borough rate had borne some only of these expenses it would be just and reasonable that it should bear those only in the future, because otherwise it might happen that there would be an unjust shifting of liability. Whether it was right in the first instance to have certain property assessable at one-fourth of its real value is a question we have not to inquire into. It had been done for years, and property in the borough had consequently obtained an increased value. The effect of the construction suggested by the appellants would be to make the property specified in sect. 40 of the private Act of less comparative

value than it was before. No reason has been given why this should be done, and I do not think the Legislature intended to do it.

BRETT, L.J.—It seems to me that, in order that the plaintiffs may succeed in this case, we must find that in the present existing borough of Walsall the expenses in respect of sanitary matters can only be provided for by a general district rate, and that no part of them is payable out of the borough fund. I am quite aware that the question is not brought before us exactly in that form; but that would have been the form of the plaintiffs' objection if the parties had not come to an agreement. The proper application would then have been to quash the borough rate, but by arrangement the parties do not ask that the rate should be quashed, but they confine themselves to asking for a judgment which shall decide whether or not the plaintiffs are only liable to be rated to the extent of one-fourth of the net annual value of their railway within the borough. Nevertheless it seems to me that, in order to work this case out, we must hold that all sanitary expenses within the whole borough of Walsall, including the added part, are payable out of a general district rate, and not out of the borough fund, and I am of opinion that they are so payable. Now, I shall venture to take the case in an inverse way to that in which the Lord Justice has taken it. It seems to me that in the borough of Walsall from 1848 to 1872 there were two authorities. One was the town council acting for the whole borough, which at that time included all the part marked blue on the map, and not the pink part which was within the commissioners' district, and has since been added to the borough; and the other was the body composed of the Improvement Commissioners who acted for the blue part and the pink. Now, the town council at that time might, and I suppose did, form or make a borough fund by making a borough rate; but that would be done under the Municipal Corporations Act and for the purposes of that Act, and those purposes only. They had nothing to do with sanitary expenses. At that time the only real town within the borough was that which was contained in the blue part, the part of the borough comprised in the commissioners' district. The town extended beyond the borough that was contained in the blue to the pink, the part added to the borough in 1876, but by the local Act of 1848 there were commissioners to act for that which was the real town, namely, the blue and not the pink. By other statutes which were incorporated with that Act of 1848 they had the control, not only for all sanitary purposes, but for other purposes which generally are now incorporated into Sanitary Acts. In respect therefore of the sanitary purposes and the sanitary expenses by virtue of the incorporation of the other Acts with the Act of 1848, these commissioners were the persons to provide for the sanitary expenses, and they did so by levying a district rate; that is to say, they provided for them by levying a rate upon the blue and pink districts. But that rate, by the section of the Act of 1848, with regard to the property of railway companies, gave them what has been called a limitation; that is, that a rate levied in order to raise that fund under the Act of 1848 was, with regard to railways, to be levied only upon one-fourth of the net annual value. That seems to me to have been the state of things from Dec. 1848 to Jan. 1872, and then the general

Public Health Act of 1872 was passed. Now I agree with the judges of the Queen's Bench Division, that it is not necessary to consider whether the commissioners remained as the sanitary authority within the blue and pink part of the district under the Act of 1872, or whether their authority was given within the blue district to the town council. If they still remained the authority within the blue district, it seems to me that they would remain the authority in respect of the sanitary expenses incurred in the blue and pink districts; but if they were not, and if their authority passed to the town council with respect to the blue part, it seems to me that, although their authority passed, the same power which they had was merely transferred, and that I think follows from the words which are contained in sect. 7 of the Act of 1872, or rather it may be said in sect. 3 of the Act of 1874, which is an exposition and explanation of sect. 7 of the Act of 1872. The words of sect. 3 are, "All the powers, rights, duties, capacities, liabilities, and obligations of a sanitary authority having jurisdiction under a local Act in the district of an urban sanitary authority at the time of passing of the principal Act, so far as they or any of them related to such purposes, not 'were altered,' but 'were transferred to and became attached to the urban sanitary authority.'" That is to say, all the powers, in this borough, of the commissioners within the blue part, are transferred to and become attached to, upon the hypothesis, the town council. If the powers of the commissioners—the powers which they had when in the blue part—were only to make a district rate and to make a district rate containing, with respect to railways, the limitation for which the plaintiffs contend, then those powers only passed. If that be true, the state of the borough of Walsall from 1872 to 1875 was this: The town council was still the authority to make the borough fund—that is, the borough fund proper—applicable to the purposes of a borough fund under the Municipal Corporations Act. They were the municipal authorities and also the sanitary authority throughout the whole borough. With regard to the parts of the borough which were not within the blue (the part of the borough contained within the commissioners' district), they were the sanitary authorities under the Act of 1872, irrespective of the Act of 1848, and they would have the power within that part of the borough of the sanitary authority not circumscribed by the local Act of 1848; but as to that part of the borough which was within the blue, and which after all was the main built part of the borough, and therefore the portion in respect to which the sanitary expenses would be the largest, they were, upon the hypothesis, the sanitary authority, but they only had the power of the commissioners transferred to them by sect. 3. Therefore, within the blue part they would not have the larger authority, but only the authority of the commissioners—that is, to levy a district rate for sanitary purposes. So that in the borough of Walsall at that time you still had only a borough fund and a district rate—a borough rate throughout the whole borough for municipal purposes proper, and a borough rate liable to pay the sanitary expenses incurred in a part of the borough not within the blue part or old district of the commissioners; but you had a district rate for sanitary purposes to be laid and applied by the town council within the blue part.

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Now, it is obvious that such a state of things must have brought about the greatest possible difficulty, and it would seem a forcible argument to say that those difficulties were insurmountable, and that they were so great that we ought not to suppose that the Legislature meant them to exist, and that, therefore, we ought to put a different interpretation on the statute. But it seems to me sect. 33 or the statute of 1872 gives a key to the whole difficulty, and I agree with my learned brethren in the Divisional Court of Queen's Bench that that section is of the greatest importance. Sect. 43 is of importance as concerning the continued existence of the local Act; but sect. 33 has this importance to my mind, that it was a mode by which the difficulties might have been met. It gives power to the Local Government Board to interfere, and if an application had been made to the Local Government Board in London by the inhabitants of Walsall, and it had been shown to them that the Act of 1848, if it was allowed to exist in its full force, made it almost impossible for the town council to meet the sanitary expenses of the whole borough, then the Local Government Board might have altered and repealed the local Act of 1848, but if they had so repealed it justice would have required that they should have repealed it on terms. At all events there was a power, and that power might have been called into play, but it never was. Therefore the difficulty remains, no doubt, but that difficulty might have been met. Now, that was the state of the borough, as it seems to me, up to the year 1875. Then it has been admitted that the plaintiffs' contention is right unless the case of the borough of Walsall is brought within the first exception of the 207th section of the Act of 1875; and unless the case is brought within that exception it is within the general enactment with which the 207th section begins. If it is within the general enactment, then all the expenses incurred or payable by the urban authority in the execution of the Act of 1875—that is, by the town council—are to be charged on and defrayed out of the district fund and general district rate. Now, to my mind, the circumstances necessary to bring it within the exception to the Act of 1875 are wanting; and I therefore think that it is not within the first exception. If it is not, but is within the general enactment of the 207th section, then in the borough of Walsall after the passing of the Act of 1875, all sanitary expenses are to be paid out of a district fund or general district rate to be made according to that statute. After the Act of 1875 the state of the borough of Walsall was this: The town council was the only sanitary authority. The town council under the Municipal Corporations Act was the sanitary authority for the whole borough and it could raise a borough fund for municipal purposes under the Municipal Corporations Act, as it always could, but throughout the whole borough it was bound to pay the expenses incurred by sanitary proceedings out of a district fund and general district rate; that is to say, it was bound to make a rate upon the whole borough in respect of sanitary purposes. Then, by sect. 211 of the same statute, if there was to be a general district fund and general district rate for the whole borough, there was also to be the limitation with regard to rating railways

throughout the whole borough. Now, as to the question under the Act of 1875, it seems to me that the borough rate made by the defendants was bad, and in strict law ought to be quashed, and that there ought to have been in respect of all sanitary purposes a general district rate, and that under that district rate this railway, in respect of its whole length throughout the whole borough, ought only to be liable to be rated on one-fourth of the net annual value. Then comes the Act of 1876, which puts the borough into the pink part. Now, I do not think Mr. Nevill's argument in respect of sect. 15 of that statute is applicable, because sect. 15, whatever may be the decision on the point we have now to decide, cannot help the argument of it at all. But what the Act of 1876 does is to put the pink part into the borough and to make everything done in the pink part come within the rules, regulations, and laws applicable to the whole borough; so that with regard to the whole borough of Walsall, including the pink part, it seems to me the town council, as the town council, and being also the sanitary authority, were required to make a general rate throughout, and that there must be, or ought to be a general district rate, out of which such sanitary expenses in respect of the whole borough ought to be paid. I therefore think this judgment is right.

COTTON, L.J.—The question we have to consider by arrangement between the parties is this, how ought the expenses incurred under the Public Health Act of 1875 to be provided for? But for that arrangement the question would be whether or no the rate made in the year 1877 as a borough rate was, or was not good in consequence of it having been made for the purpose of providing for expenses under the Public Health Act 1875. Now that question really depends on the 207th, 209th, 210th, and 211th sections of the Act of 1875, because the rate is made and must be supported under those sections. Sect. 207 contains a general enactment as to how the expenses incurred under the Act, and in respect of the powers given by the Act, are to be met, and it constitutes in the borough that which I suppose was new at that time, namely, a distinct fund, and in addition to that it directs that the district rate shall be leviable, and that all the expenses incurred in the exercise of the powers given by the Act shall be paid out of the district fund in aid of the general district rate which the subsequent sections gave power to raise, unless the case is brought within the exceptions which are afterwards mentioned; and that general district rate was a rate which, as regards the railway companies and other particular owners of property, was only to be assessed on one-fourth the value of their property, whereas the rate which has been made upon them has been assessed upon the full value. Now, it was not contended that the case came within any of the exceptions mentioned in the 207th section unless it came within the first. I think it was said in argument on behalf of the corporation, and it is certainly my opinion, that that exception does apply unless the expenses incurred for sanitary purposes as an entirety were, at the time when the Act of 1875 came into operation, paid or payable out of the borough fund. This throws us back for the purpose of seeing what ought to have been the state of things when the Act of 1875 was passed. In the year 1848 the

private Act was passed which gave the commissioners powers which no one up to that time had of exercising a certain sanitary authority within particular districts; and for the purpose of providing for the expenses of sanitary works there was given to them by the Act of 1848 power to raise a district rate, and for that purpose railway companies and other owners of special property were to be assessed at one-fourth only of the net annual value of their property. Now, the district over which the commissioners had jurisdiction was partly within, and partly without, the borough of Walsall. The private Act remained in force up to the year 1872, and at that time the Improvement Commissioners were the only persons authorised to construct sanitary works in the district, and the rate which they could raise under the private Act was the only mode by which they could provide for sanitary expenses. Up to 1872 it is perfectly clear that the railway company were entitled to the exception in their favour of being rated only at one-fourth. And it lies upon those who contend that between 1872 and 1875 their right in that respect was taken away to show in what way it was taken away. Now, the Public Health Act 1875, as I understand it, did this: it made the town council the urban sanitary authority within the whole borough, but including part only of the district which had been within the jurisdiction of the Improvement Commissioners, and it transferred to and vested in the town council the power which had been previously exercised by the commissioners within so much of their district as was within the borough, and within the jurisdiction of the urban sanitary authority constituted under the Act of 1872. It certainly did not put an end to the power of the Improvement Commissioners, because one of the general sections, the third subsection of the 4th section, clearly says that their powers were to extend over that portion of their district not included within the district coming under the Acts of 1872, and in the 7th section of the Act of 1872, and the interpretation clause of the Act of 1874, it is not said that they are to come under any private Act, within the limits of the authority of the urban sanitary authority, nor does it say that similar powers were to be given to the urban sanitary authority, but that the powers and duties of the Improvement Commissioners were to be transferred to the urban sanitary authority constituted under the Act of 1872; so that my interpretation of the Act certainly is not that the Improvement Commissioners were, after the Act of 1872, themselves to exercise the power as regards this blue district which they had previously exercised, but that their powers were to be transferred to and vested in the new urban sanitary authority, and they took those powers, as is shown both by the 7th section of the Act of 1872 and by the 3rd section of the Act 1874, with all the obligations attaching. It is after all the Act of 1872 which says that all the powers, rights, duties, capacities, liabilities, and obligations shall be transferred, so that this town council has obtained a portion of this district which had formerly been within the power of the district commissioners subject to the obligations of the commissioners, one of which was that they were only to rate railway companies and certain other owners of property specified at one-fourth of their full value.

So far I should say we have got at nothing that can by possibility take away the exemption or privilege given to the owners of certain particular kinds of property. One matter which was relied on for the corporation was sect. 16 of the Act of 1872, and I agree that the proviso in that section is one which it is not very easy to construe; but I think one must remember this, that it is a rule of construction that if a particular benefit is given by a statute to a particular person you must not deprive him of the benefit that the statute has given without clear words in a subsequent Act to take it away from him. I think it is a very reasonable interpretation and construction of this proviso, that, where there had been a body exercising sanitary powers, and providing for the expenses which in the former state of things would have been raised and paid in a particular way, those expenses must still be so raised and paid. It was urged on behalf of the appellants that, provided the urban sanitary authority had, before the passing of this Act, the power to make a district rate to meet the expenses, and if the town council which is constituted and made the urban sanitary authority under the Act of 1872, had the power, then this sect. 16 would apply. That could not be so here, because the urban sanitary authority—that is the town council—never had power within the district to raise this rate at the time the Act of 1872 was passed, because it never had any sanitary power, and therefore never had any power to raise a district rate or any other rate for sanitary purposes. You must really not, I think, construe it in that way without strong necessity. If you take it literally probably the proviso cannot apply at all, because the urban sanitary authority never could have existed before the Act; it was a creation of the Act, and I think the reasonable interpretation is, not that which was alleged on the part of the town council, but that which I have mentioned, namely, that, where anybody had previously exercised the power now given to the urban sanitary authority to provide for these expenses by this general district rate, they should still be so provided for. That was the state of things which existed down to the Act of 1875, and at the date of that Act there was, as regards the blue district, the portion of the borough formerly within the power of the district commissioners, power to pay the expenses such as could be incurred under the Act of 1848, not out of the borough fund but out of another fund, and *ex hypothesi* they could not be paid out of the borough fund if the exemption (that privilege of the railway company) had not been taken away; because as regards the borough rate there was no power to assess them at less than their full value. The borough rate, as was conceded on both sides, would be made upon all owners of property equally at the full value of the property which they held, and if the exemption of the railway company had not been taken away (and I have stated my reason for thinking it had not been) then of necessity it could not be that the expenses at the time of the passing of the Act of 1875, as an entirety, had been provided for out of the borough rate, because, as regards a part of these expenses, the railway company were entitled to exemption. It comes then to this that, at the time of the Act of 1875 being passed, there was a part (and that is quite sufficient) of these expenses in respect of which the railway company had a right to say, "We are

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entitled to exemption." That part therefore could not be a matter to be paid and provided for out of the borough fund, because the first exception of sect. 207 of the Act of 1875 must be that, in making the general district rate, the owners of all railways and other works specified in the Act of 1848 are to be assessed at one-fourth only of the full value of their property.

*Judgment affirmed.*

Solicitors for appellants, *Sharpe, Parker, Pritchard, and Sharpe*, for *Wilkinson and Gillespie*, Walsall.

Solicitor for respondents, *B. F. Roberts*.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

*Saturday, Nov. 23, 1878.*

(Before JESSEL, M.R.)

*Re GARDNER'S TRUSTS. (a)*

*Practice—Jurisdiction—Appointment of new trustees—Vesting order—Last surviving trustee lunatic and out of jurisdiction.*

*A petition for the appointment of new trustees and for a vesting order, when the last surviving trustee is a lunatic and also out of the jurisdiction, need not, on the true construction of sects. 3 and 9 of the Trustee Act 1850, be presented in lunacy as well as in Chancery.*

THIS was a petition under the Trustee Acts for the appointment of new trustees and for a vesting order as to copyholds, the legal estate in which was outstanding in the customary heir, who was of unsound mind, of the last surviving trustee. The heir was out of the jurisdiction.

*Levetz*, for the petitioner, asked the court whether the vesting order could be made in Chancery alone under sect. 9 of the Trustee Act 1850, as the trustee was out of the jurisdiction, and whether, the heir being of unsound mind, it was not necessary that the petition should be presented in lunacy as well as in Chancery. He referred to

*Re Mason*, L. Rep. 10 Ch. 273.

The 3rd section of the Trustee Act 1850 provides:

That when any lunatic or person of unsound shall be seized or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor . . . to make an order that such lands be vested in such person or persons, in such manner, and for such estates as he shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

Sect. 9:

When any person solely seized or possessed of any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said court to make an order vesting such lands in such person or persons, in such manner, and for such estate as the said court shall direct, and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

JESSEL, M.R.—The only point decided in *Re Mason* was, that when you had a lunatic trustee you should intitule your petition in lunacy as well as in Chancery, under the 3rd section of the Act of 1850. But the Court of Appeal, in so

directing, do not seem to have given any reason for the direction. The 9th section says, that when the trustee is out of the jurisdiction the Court of Chancery may make a vesting order, and the 3rd section says, that when the trustee is a lunatic, the judges in lunacy may make the order. When you read the two sections together they evidently mean this, that when a lunatic trustee is within the jurisdiction the judges in lunacy should make the order, but that when he is out of the jurisdiction the Court of Chancery, now the Chancery Division, may alone make the order, just as in the case of any other trustee out of the jurisdiction. There will, therefore, be the usual vesting order.

Solicitors: *Phillips and Son*.

*Dec. 14 and 16, 1878.*

(Before JESSEL, M.R.)

*ATTORNEY-GENERAL v. MAYOR, &C. OF BRECON. (a)*

*Municipal corporation—Municipal Corporations Act 1835 (5 & 6 Will. 4, c. 76), s. 92—Application of borough fund—Opposing Bill in Parliament.*

*A municipal corporation is justified in using the borough fund for the purpose of opposing a Bill in Parliament whereby its existence, property, or privileges are sought to be imperilled or diminished, both by virtue of the 92nd section of the Municipal Corporations Act 1835, by which the employment of the borough fund is authorised in payment of "all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act," and by virtue of the general law by which the owners of property in trust are authorised to be reimbursed out of the trust estate for any expenses necessarily incurred for its protection or otherwise.*

THIS was an information to restrain the mayor and corporation of Brecon from applying the funds of the corporation in opposing a Bill promoted by the Brecon Markets Company, whereby it was alleged that the existence, property, and privileges of the corporation were likely to be injured.

The facts of this case sufficiently appear in the judgment.

The question turned partly on the construction of the 92nd section of the Municipal Corporations Act 1835 (5 & 6 Will. 4, c. 76), whereby the disposition of corporate property and the appropriation of the corporate income are to be regulated. The object and drift of the section sufficiently appear in the judgment, as also the following sections of the Act for incorporating the Brecon Markets Company, viz., ss. 21, 43, 65, 80, 82, 89, and 90; Local and Personal Acts, 25 & 26 Vict. clxxxvi.; and the 8th section of the Act to amend the Brecon Markets Act 1862; Local Acts, 41 & 42 Vict. c. clxxvii.

*Whitehorne and Macnaghten* for the Attorney-General.

*Ince*, Q.C. and *B. S. Wright* for the corporation.

The cases and arguments sufficiently appear in the judgment.

JESSEL, M.R.—The case before me is one of a very special character. As far as I know it has never occurred before, and I do not think it is

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

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very probable it will very often occur again; but still it raises important questions both as regards the meaning of public Acts of Parliament, and as regards the general law. In the first place, there is no doubt that the Municipal Corporations Acts were intended to impose great restrictions on the dealings by municipal corporations with the corporate funds. In substance, whatever the words used were, the Municipal Corporations Act reduced municipal corporations from the position of owners of property to the position of trustees of property. Instead of having the power which they possessed and abused, before the passing of the Act, of disposing of the property pretty well in any way the corporations thought fit, they were restricted to certain definite purposes as pointed out by the 92nd and other sections of the Act, the 92nd being the principal section, and the others merely ancillary. In substance, as I said before, they were reduced to the position of trustees. The 92nd section provided for certain expenses which, in the case of the borough funds not showing a surplus over what I will call the ordinary expenses of the borough, were restricted to expenses necessary for carrying the purposes of the Act into execution. Probably some definite word might have been used; for the word "necessary" like most other words in the language, has only a relative meaning, and that may be necessary in one case which is not in another, and you cannot lay down any absolute rule of what is necessary. Those are the words of the Act. Now it is manifest, the moment you read the Act, that if you read "purposes" merely for express purposes, you would have left the corporation in this position, that they could not even defend their property or their very existence against attack. If, therefore, it was said that the word "purposes" is to be read in the narrowest form, namely, the purposes expressed in the Act, this would follow: that if an action of ejectment were brought against the corporation, or what is now called "an action for recovery of land," to get from them the whole of their landed property, they would not be justified under the Municipal Corporations Act in incurring the costs of defending that action. That, of course, is too extravagant, and you must therefore assume that there is to be found somewhere, either under the word "purposes," as mentioned in the 92nd section, or under the general law, a provision for such a case as that. Again, if a proceeding were taken to destroy their charter of incorporation either directly or indirectly, it would be absurd to say that the corporation were not entitled to resist those proceedings, and not the less if these proceedings were by Bills in Parliament instead of by proceedings in a court of law. That is, that Acts threatening the existence of the corporation itself must be resisted, and must be resisted, of course, at the expense of the corporation. Then again, if you read the word "purposes" in the narrow and restricted view, it would be difficult to find any such purpose expressed in the Act; but you must either read it in the larger way, or else you must assume that the Legislature intended that the ordinary rights of corporations in defending themselves against attack, whether by action at law or by Bill in Parliament, or otherwise, were reserved to them. It does not appear to me to be very material to consider which is the proper view to take, because they both conduct you to

the same conclusion: that is, the first view makes it implied in the words to be found in the Act of Parliament, that there must be a mode of construction which includes such objects; the second says, the Act of Parliament reserves the ordinary rights of persons and corporations to defend themselves. That being so, and independently of the recent Act of Parliament, what is the principle on which these corporations should be allowed to defend themselves? There are decisions which, as I said before, go expressly to defending their property from attack, and defending their existence from attack. Does it not go further? If their existence, which is not a simple existence for the purpose of affixing a seal, but for the purpose of the government of the town, is interfered with—that is, if their duties and rights of government are interfered with—their existence is to that extent interfered with, though it is not the actual existence of a corporation. It is the existence of their corporate powers which in fact altogether go to make up their existence; and it appears to me that, on the same principle, a corporation, when attacked, shall have the right to defend itself. Supposing the corporation has a power to regulate the fairs and markets within the borough, and an individual, as lord of the manor, claims the right to control the regulations of the fairs and markets, then it is clear it is in the nature of property, a right to levy tolls. But suppose a company is instituted to take possession of the fairs and markets, and levy the tolls, and take them out of the hands of the corporation, and promotes a Bill in Parliament for the purpose, then it is also quite clear. But suppose there is no property in the corporation at all, but merely a right to regulate the fairs and markets—that is to prescribe the places where the fairs and markets shall be held, to prescribe the tolls that shall be taken in respect of them, and to prescribe the time at which the fairs and markets are to be held—is it to be supposed that an individual or a company can present a Bill to Parliament for taking away those privileges and duties of the corporation, and that the corporation shall have no power of defending itself even under the Municipal Corporations Act; shall have no right to spend the money necessary for defending its privileges and duties as a corporation? It appears to me that to make that statement shows there is no valid distinction between the right of property, which, after all, is only held by the corporation as trustee for these public purposes, and the powers and privileges forming a larger or smaller share of the government of the town, which are conferred on the corporation, and with which it is sought to interfere. As I said before, it seems to me that on principle you must imply a right in the corporation to defend itself from such an attack. Now, if that is so, it is of very little consequence, as I said before, by what means I arrive at that conclusion. I find the judges in some cases have adopted the one method, that is, they have read it as implied in the term "necessary expenses" in the Act of Parliament; in others they have adopted the second method, and said, "The Act of Parliament must be intended to reserve to the corporation the ordinary rights of corporations." It does not appear to me, as I said before, material; but I think it is quite clear that the decisions go to this—that the right of



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defending themselves from an attack of this kind extends not merely to property, not merely to their existence in its smallest sense, that is, to the continued existence of the corporation as such, but to existence also in the larger sense, that is, the existence of the corporation with all its rights and privileges, and that an attack on a substantial portion of its privileges, rights, and duties is as much within the provision of the cases as an attack on its property or its mere existence. Now, first of all, as regards authority. The strongest case on the part of the plaintiffs is certainly *Reg. v. The Mayor, &c., of Sheffield* (L. Rep. 6 Q. B. 652). I by no means say that that case is, in my own opinion, rightly decided, or that I have any occasion for criticising it adversely; but it does not go to the extent contended for on behalf of the plaintiffs. The judgment of the Lord Chief Justice goes very much upon the principle that I have mentioned. He says at p. 657: "With regard to the expenses incurred in opposing the Bill in Parliament, I think it is abundantly clear, and open to no doubt or question, that that was a purpose to which, looking at the words of the section, it was altogether beyond the municipal government, or anything to be done under that Act of Parliament, in a borough without a surplus fund, to apply the borough funds," altogether beyond the scope of the municipal government." That is the ground of his decision. I shall show presently in this case it is by no means beyond the scope of the municipal government. Then he goes into the reasons for coming to that conclusion, and justifies it; but he then goes on to comment on certain cases which had been decided, and upon which I must say the judges seem to have come to a different conclusion to a certain extent. I mean the case of *The Attorney-General v. The Corporation of Wigan* (Kay 268). But it is quite plain that the ground of the Lord Chief Justice's discussion is that the Act in question was beyond the scope of the municipal government. Now, when we come to Mr. Justice Blackburn's judgment, in giving his opinion he says this: "These are two separate questions: first, whether they might lawfully and properly do what they did; secondly, whether they might charge the borough fund for the purpose." Then, after explaining the object of Act somewhat in the way that I have stated it, he says this, at p. 663: "Now, can we say as to these two matters, which do concern the interests of the inhabitants, and as to which the town council cannot be considered as impertinent intruders—can we say that these are matters which come within the terms of sect. 92 of the Act, as being expenses necessarily incurred in carrying into effect the provisions of the Municipal Corporations Act? There are some things which are obviously so, though they are not here enumerated. We have already decided more than once that when there is property belonging to the corporation, estates of their own, and anybody attempts to take away those estates, although there is no express enactment, yet the very fact that the corporation are owners of the property which is put into the borough fund, would make any litigation concerning it a purpose for carrying out the objects of the Act within the general terms." So that his decision comes to this: that, inasmuch as the income of the property is applicable to the borough fund, the preservation of that property must be considered a

purpose of the Act. This is one way of putting it; but he finds it a purpose of the Act by inference. It is not within the express powers; it consequently comes to this, that any necessary incident to property (and there is no distinction in the world that I can see between "property" and "powers" for this purpose) is a purpose of the Act. Again, I will go back to the illustration which is very germane to this case, the regulations of the markets. The regulation of the market is part of the municipal government of the town; it is part of the rights and privileges enjoyed by the corporation, and it is as much within the judgments of the Lord Chief Justice and Blackburn, J. as actual property in the market itself. It is vested in the corporation for the benefit of the town, as part of the government of the town; and he who seeks to interfere with the privileges and duties connected with the regulations must be resisted, and, of course, resisted at the expense of the corporation. It does not appear to me that that judgment at all prevents a corporation defending an attack upon such a portion of the privileges of a corporation. Now I come to a case which does not appear to have been cited, and I am sorry it was not, in *Reg. v. Sheffield*. It is a case which of course, as far as I am concerned, is of higher authority than the judgment of the Queen's Bench, because it is a judgment of the Lord Chancellor. It is the well-known case of *Bright v. North* (2 Phill. 260). When I come to read that case I find this. There was an Act of Parliament providing for the better conservation of the river Ouse. "The lands adjacent to the banks at each side were divided into six districts, and it was provided that the portion of the banks comprised within each district should be maintained by commissioners appointed from among the owners of lands of a certain quantity within such district by means of funds to be levied by a district rate not exceeding 3s. an acre in each year; and the fund so raised was to be applied in making, doing, constructing, and executing all such works, acts, matters, and things as by such commissioners should from time to time be deemed necessary, proper, or expedient for putting so much of the bank as was situate in their respective districts into, and for maintaining the same in, a permanent state of stability." As I read the report [of the case, and as I know from experience, as regards other similar Acts of Parliament, there is no pretence for saying that the ownership of the banks was taken away from landowners and put in the commissioners. They were conservators and nothing more. Now the Lord Chancellor says this: "The commissioners of each district are bound by the Act to protect the lands adjacent to the banks." So they were: they were as much bound to protect the lands adjacent to the banks as to keep the lands in order "from inundation; and they were authorised by the Act to levy a rate on the proprietors of the district for the purpose of defraying these expenses." Again, the lands adjacent to the banks of course did not belong to them. Then it was alleged that the works which were to be undertaken by the promoters of the Bill in Parliament which they were opposing might be injurious to the banks; and the question was, whether the commissioner was authorised, having no special power for this purpose, to oppose the Bill in Parliament. The Lord Chancellor says: "The Bill therefore raises



this proposition as to the construction of the Act; that, however injurious the works may be, the commissioners are not authorised to expend one farthing of the money entrusted to their care in preventing them. That being all that is alleged in the pleadings, and the rule being to take the case as strongly against the pleader as his statements will justify, I must assume that the means are likely to be injurious. Now, it is clear that, if actual injury was done and proper measures had been taken by the commissioners to prevent it, they would be entitled to their expenses so incurred. For every trustee is entitled to be allowed the necessary and proper expenses incurred in protecting the property committed to his care." But, if they have the right to protect the property from immediate direct injury, they must have the same rights where the injury threatened is indirect and probable. Then he goes on: "I wish it to be understood that I proceed entirely on the pleadings, and assume that they state a case in which the works contemplated are likely to be injurious to the banks of this district, and on that assumption, although there is no direct authority in the Act for the application to the proposed purpose, I think it is incident to the powers which are given to the commissioners, and to the duties imposed upon them." It comes therefore to this, that a Bill promoted in Parliament which the commissioners thought would injure the lands might be opposed by them on the ground that it was their duty to protect the banks and the lands adjacent, and not on the ground of their having any right of property either in the banks or in the lands adjoining. It is therefore a decision that a proposed interference by Act of Parliament with the powers of the commissioners and with their duties, is such an interference as fairly entitles them to appear before a committee of either House to oppose the Bill. Now, when we come to look at the case which was very much commented on in the case of *Reg. v. The Corporation of Sheffield*, viz., the case of *The Attorney-General v. The Corporation of Wigan*, which is reported in Kaye's Reports, whatever view we take of the construction of the Act of Parliament put by Wood, V.C., afterwards Lord Chancellor Hatherley, we shall see that he simply founds himself on *Bright v. North*. He does not decide at all on the notion of injury to property. He reasons out in a way which has not been satisfactory to the judges of the Queen's Bench, and, if I may humbly say so, is not altogether satisfactory to me, a power in the corporation to restrain nuisances generally. But having found that power and the duty to stop nuisances generally, he then goes on in this way. He says they have a plain duty of taking care there shall be no nuisance in the town. Now, assuming he is right so far, then I think there is no possible fault to be found with his judgment. The real difficulty in the judgment is, that you cannot find the power, without giving to the restricted words of the section which he commented on a very much larger meaning than they fairly bear. That really is the criticism on the judgment of the Court of Queen's Bench, or at least by three of the judges of that court. But, if you once arrive at the same conclusion as the Vice-Chancellor did, as to the true construction of the section, that there was power to abate nuisances generally,

and the duty to prevent it, I think his reasoning is, as he says it is, exactly in accordance with *Bright v. North* (*ubi supra*). He says: "It seems to me very strange to say, if it be a corporate duty to prevent nuisances, and to prevent them by bye-laws, yet if an enormous and gigantic nuisance was about to be perpetrated, and the corporation was to take steps by applying to this court, through the medium of the Attorney-General, for an injunction to restrain such nuisance, that they would not be allowed the costs of such a proceeding." And then he goes on describing this nuisance, of taking away 800,000 gallons of waters: "It would be a strange thing to say in the case of a continued nuisance of that description, although the corporation are under at least a moral obligation to protect the town from all petty nuisances, yet that they shall not lay out a farthing to prevent a large nuisance like that to all the inhabitants of the borough." And so I think it did. That is, if his construction of the previous portions of the Act of Parliament could be supported. Then, as he says, it is a case of duty, which is interfered with by the proposed legislation. It is a case, in effect, of attempted deprivation of the corporation of a part of their powers and duties, and they ought to be entitled to prevent it. I am quite aware that, when the case came on for appeal, the judgment is by no means so clear. The appeal case is reported in 5 De G. M. & G. 52, and Knight Bruce, L.J. says: "The costs in question were incurred by measures which, in effect merely defensive, were taken by the corporation of Wigan, not unsuccessfully or uselessly, for the purpose of preventing or diminishing the mischief to the town of Wigan, that certain intended proceedings (reasonably considered as likely to interfere materially with its drainage, and so to render the air less pure, and cause general inconveniences there) were, not without probable grounds, thought likely to occasion mischief, which (not solely of a public nature) might well have been expected to be also prejudicial to the property of the corporation." Now, although there is no statement in the report in Kaye of any injury being alleged by the bill, I see it was alleged in the argument that the corporation possessed houses and property within the borough likely to be injured, and I gather from this that Knight Bruce, L.J. was not satisfied with the reason of the Vice-Chancellor as to there being a general duty to prevent nuisance imposed on the corporation, and he took hold of this, which does not appear from the report to be in the Bill, that there was a probability of injuring property. Certainly, the judgment proceeds on no other ground, and the same remark may be made as to the shorter, but by no means less clear judgment of Turner, L.J. He says: "The Municipal Corporations Act contains no express provision authorising the application of the funds of corporations to the payment of expenses incidental to the protection of the corporate property. That has been left to the general law which sanctions such expenditure if reasonably and properly incurred." He takes the other view, that is, that the Act is silent, but leaves the general law to take effect, not limiting it to the words "necessary expenditure." "The expenditure in question here was, as it seems to me, incurred *bonâ fide*, for the protection of the corporation property. My present impression is

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that it was reasonably and properly incurred." Therefore the judgment in the appeal court proceeds simply on the protection of the corporate property. It does not, as far as I can gather, in the slightest degree touch the judgment in the court below, so far as regards the latter portion; but I think the appeal court doubted whether the former part of it, viz., the proposition that it was a duty of the corporation to restrain nuisances generally, should be supported. Therefore they confined their judgment to the question of property. It seems to me, therefore, looking at the authorities, that whether we take the one view or the other, whether we consider that under the words "necessary expenditure," or similar words used under the Act, this incidental expenditure is included; or whether we consider that the general law, as to the rights of trustees defending their property and privileges remains unaffected, that, in either way, if there is an attack by proposed private legislation on the rights, privileges, and duties of a corporation, that corporation is entitled to defend itself before Parliament. Now, before concluding what I have to say as to the law, I should like to say a word or two as to the recent Act of Parliament. As I read that Act of Parliament, it very much increases the responsibility of corporations who choose to act in opposing Bills in Parliament without obtaining the sanction of the ratepayers, because, if unsuccessful, it will be more difficult for them now than it was formerly to show that the expenses ought to have been allowed, inasmuch as they could have readily obtained the sanction which would have protected them from all consequences of want of success. But still I must read the Act as I find it; and I find in the 8th section of the Act these words: "Nothing in this Act shall extend or be construed to alter or affect any special provision," and so forth; "or to take away or diminish any rights or powers now possessed or enjoyed by any governing body, or which are or shall be vested in or exercisable by the inhabitants of any district under any general or special Act." The result therefore is, that if the municipal corporation had a power prior to the passing of this Act to oppose this Bill in Parliament, that power is certainly not taken away, and, to use the words of the Act, diminished by the recent statute. I now come to the circumstances of the case, and I must say I think it is a very strong case, quite distinguishable from all the cases to which I have been referred, because, in this case, the corporation had a special series of powers and duties which were very much interfered with. It is only necessary to say a few words as to the history of this markets company and the corporation. It appears that in 1838 an Act of Parliament was passed empowering the corporation to buy lands in the borough of Brecon, and to make markets, and giving them all sorts of authorities and so forth. Then, notwithstanding the powers so conferred on the corporation, this market was not made, or not satisfactorily made; and, in 1862, an Act of Parliament was obtained authorising the company to make a new market place instead of the corporation, and transferring the market place, and the property which the old corporation acquired under the Act of 1838 or otherwise, to the company. Then the markets and fairs, and the market house, market places, and all the works

connected with it, are, by the 21st section, vested in the company, i.e., they are taken away from the corporation. Then certain powers are reserved to the corporation which appear to me very important, and certain compensations given. By the 43rd section the sum of 210*l.* a year is by the Act charged on the market places, and the tolls in favour of the corporation, and then by a subsequent section of the Act, sect. 65, the company is empowered with, but not without, the consent of the corporation, to provide and maintain slaughter-houses; and then, by the 80th section, "the company shall not at any time lower, raise, or alter any of the tolls, rents, stallages, and dues specified in the 3rd and 4th schedules to this Act annexed respectively, without in every case the consent of the corporation. By the 82nd section the company has power to let the markets for three years only. Then by sect. 89, "the company and the corporation from time to time may enter into and carry into effect all such contracts with respect to any of the purposes of this Act, and in accordance with the provisions thereof, and all matters incidental or necessary thereto as they may think fit." Then the 90th section saves the rights of the corporation, except where they are expressly taken away. Well now, in that position of matters, the corporation had both rights and duties; e.g., it was an important power of the corporation that they had a veto on the erection of slaughter-houses. Slaughter-houses are not agreeable things as a general rule, and no doubt it was considered not desirable to vest in a private company the right to put slaughter-houses anywhere they pleased in the town of Brecon. Again, the powers of altering tolls and rates is a very important power as regards the regulation of a market, and that again was not left to the company, but a control was given to the corporation of Brecon. Under these circumstances, the company, not having the power to erect slaughter-houses, or to use them rather, without the assent of the corporation, erected them, and then the corporation refused to assent to the use of the slaughter-houses. And to obtain, amongst other things, the right to use the slaughter-houses they had erected, they presented a Bill to Parliament, and this Bill in Parliament, presented by the company, contained, amongst other clauses, a power to use the slaughter-houses already erected, without any consent of the corporation. That is the 2nd section of the Bill in Parliament. It was for power to them "to use and maintain the slaughter-houses already erected by them on the site selected by the corporation as aforesaid without any further consent from the corporation," and that they should be deemed to be part of the market-place. That was as the Bill was brought in. Then the Bill also proposed that they should have power to lease the market for ten years instead of three, and it also proposed that they should have power to lower the tolls without the assent of the corporation. Lastly, it proposed that they should be empowered to sell the property of the company to the corporation, that the corporation should have borrowing powers conferred on it to raise the money to pay. This Bill the corporation opposed, and not altogether unsuccessfully, because as regards the slaughter-houses the first amendment made was that it should be sent to a referee to certify whether the slaughter-houses were fit for use or not. I am stating it shortly. Then in the House

of Commons it was not sent to the named referee, but to a person to be appointed by the Local Government Board—I think at the request of the corporation or of the company—so that, instead of giving the company power to use the slaughter-houses, effect was given to the objection of the corporation that they were not fit for use. For the committee must have come to the conclusion on the evidence that they were not to be used until they were certified to be fit for use by the person nominated. That appears to me to be a very important success—so important that it does not matter whether they did succeed or did not succeed on all the grounds of their opposition, because on some of the other points they were not so successful. That being so, is it tolerable that an individual or private company shall take away from the corporation the right conferred on it by a private Act of Parliament to object to erection or use of slaughter-houses which the corporation consider unfit or improper for use, and shall say to the corporation, “You shall not be entitled to oppose my Bill in Parliament; I will pass it in spite of you behind your back?” I think such a decision would be perfectly irrational. Such a privilege is a valuable privilege conferred on a corporation. Then there is a minor point, but still that is a very important point. The corporation has a security on the market rates amongst other things—no doubt only for 210*l.*; but the corporation has a right to say, “You shall not lower the market rates without my consent.” Is an individual or private company to take the right to lower the market rates, which may actually diminish the property of the company in the 210*l.*? That is a very small point; but it may be a material point. As regards the keeping up of the market, and the welfare of the inhabitants of the town, it by no means follows that lowering the market rates may be beneficial to the town. It may so lower the interest of the company as to prevent the markets being kept in an efficient state; and it appears to me that the privilege or right of the corporation to assent to the lowering of the market rates is one which ought not to be interfered with by any individual or any company without giving the corporation the option of opposing it in Parliament. Then we come to the third ground, which is very important—that the general power of contracting given by the first Act is limited to the purposes of that Act. We have now a new company imposed on the corporation, and a power to buy on the terms fixed by the Act, the power to borrow the money to complete the purchase. I know that it is an option, but a very serious option. Is not the corporation to be heard as to the reasonableness of the terms? They did object to one of the terms. If it is not to be heard this might happen, that it may become very desirable to purchase, and although the terms are not fair terms, the corporation having no other means of purchasing, must purchase on those terms. But if the corporation can be heard before the committee of the House of Commons or the House of Lords, the corporation can then insist on the terms being fair: “Give me the power, but give it me on fair terms.” And I think for myself, it is the very heart of the interest of the corporation, if I may say so, that, as to the terms of the purchase, they are entitled to be represented. It is such an

interference with the corporation, *qua* corporation, both as regards its rights and duties, and as regards its property, that I cannot imagine it can be fairly said it is not connected with the purposes for which the corporation exists. I say nothing about the three years instead of the ten. That is a very small point. I think I have said enough to show that this is the kind of active interference with the corporation itself, and with its rights, duties, and property, which entirely puts the case out of the class of cases I have been considering. It really comes much closer to the other class of cases, *viz.*, an action to recover from the corporation a part of its property or to deprive it of a part of its privileges. It appears to me, rightly considered, that the corporation has by law the right to apply its funds in opposing such a Bill as this; and that therefore the information fails, and must be dismissed. I ought to have noticed before an argument addressed to me about the assent of the ratepayers. I did not notice it for this reason. They said a majority of the ratepayers are in favour of the Bill. That may be so now, but the corporation is governed by its town council, which is a representative body of all the ratepayers, and I am not aware of any means by which the town council can be controlled by the ratepayers, except by the system of not re-electing them when their time comes round, which system is very likely to be enforced in the present instance if the town council do not carry out the views of the ratepayers.

Solicitors: *Wilkins, Blyth, and Fanshaw*, for *Cobb and Tudor*, Brecon; *Gear and Son*, for *John Williams*, Brecon.

Saturday, Feb. 15.

(Before JESSEL, M.R.)

Re FRESHFIELD'S TRUSTS. (a)

*Equitable assignment—Priority of assignees—Notice.*

*The rule of Dearle v. Hall (3 Russ. 1), that the second assignee of an equitable interest without notice of a former assignment of which the trustees have received no notice, obtains by giving notice to the trustees priority over the first assignee, holds good where the first assignment was made by the person originally entitled, and the second by his executor or administrator, or other person claiming through or under him.*

ADJOURNED SUMMONS.

The question in this case for the decision of the court was one of priority between two assignees, each of whom claimed to be entitled to the share of the debtor in the estate of a testator.

Frederick Freshfield, by his will dated 1st April 1864, bequeathed certain shares in his residuary estate to Philip William Freshfield and Allen Freshfield, who were carrying on business as surgeons at Harwich.

By an indenture, dated 18th March 1874, for the valuable consideration therein mentioned, the said Allen Freshfield assigned to Philip William Freshfield all his furniture, effects, book and other debts, and chattels of every kind whatsoever and wheresoever, upon trust for his creditors as in the said indenture mentioned.

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

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No notice of this assignment was given to the trustees of Frederick Freshfield's will.

On the 8th Aug. 1874 Allen Freshfield died, and his widow, Mary Freshfield, was his executrix.

By an agreement, dated the 7th May 1878, Mary Freshfield assigned her late husband's interest under Frederick Freshfield's will to Theophilus Hulme in consideration of 75*l*.

Hulme gave notice of this assignment to Frederick Freshfield's trustees.

Philip William Freshfield also died, and his estate was being administered by the court in a creditor's action of *Durrant v. Freshfield*, to which his executors were defendants. They now claimed Allen Freshfield's share under Frederick Freshfield's will, by virtue of the indenture dated 18th March 1874.

*Crosby* for Philip William Freshfield's executors.

*Everit* for Hulme.—The want of notice is fatal to the claim of the executors. See

*Dearle v. Hall*, 3 Russ 1;

*Lloyd v. Banks*, L. Rep. 4 Eq. 222;

And the cases cited in 2 White & Tudor L. C. p. 783 (5th edit.)

JESSEL, M.R.—It is very remarkable that the exact point raised by this summons seems never to have been decided. I must now, therefore, decide it on principle. The rules of law applicable to this case are laid down by Sir Thomas Plumer in the case of *Dearle v. Hall*, which is reported in 3 Russ. 1. Looking at that case, I find Sir Thomas Plumer expresses himself thus, p. 13: "Whatever diligence may be used by a puisne incumbrancer or purchaser; whatever inquiries he may make in order to investigate the title, and to ascertain the exact state of the original right of the vendor and his continuing right, the trustees, who are the persons to whom application for information would naturally be made, will truly and unhesitatingly represent to all who put questions to them that the fund remains the sole absolute property of the proposed vendor. These inconveniences and mischiefs are the natural consequences of omitting to give notice to the trustees, and they must be considered as foreseen by those who, in transactions of that kind, omit to give notice; for they are the consequences which, in the experience of mankind, usually follow such omissions. To give notice is a matter of no difficulty, and whenever persons treating for a chose in action do not give notice to the trustee or executor, who is the legal owner of the fund, they do not perfect their title; they do not do all that is necessary in order to make the thing belong to them in preference to all other persons, and they become in some respects responsible for the easily foreseen consequence of their negligence." Then when the same case came before Lord Lyndhurst on appeal, he expressed himself (Ib. p. 58) to the same effect, and held that notice was necessary in order that third parties might not be deceived by the apparent possession and ownership remaining in a person who was not in fact the owner, and that the act of giving notice was in a certain sense and degree a taking possession of the fund, inasmuch as after notice given the trustee of the fund became trustee for the assignee. I will state shortly the facts of the present case. A man mortgages his equitable interest in a trust fund; the mortgagee gives no

notice to the trustees; the mortgagor afterwards dies, and his widow and executrix sells the property to a purchaser for value, who has no notice of the prior assignment; the purchaser gives notice of his assignment to the trustees. It has been argued before me that after the first assignment the executrix took nothing, and had therefore nothing to sell; that argument, however, applies to every case where there are two assignments. But the rule laid down in *Dearle v. Hall* (*ubi sup.*), does not depend upon that, but upon the power of the assignor, who has concealed the prior assignment, to carry his title into the market as a *bona fide* title, and selling or assigning it again. In my opinion the case of the executor or administrator of an assignor is exactly the same as that of the assignor himself, and Sir Thomas Plumer's observations apply as aptly to the one case as to the other. The negligence of the first assignee enabled the executrix to come before the world as absolute owner, and the second assignee believed that she was so. In my opinion this is exactly what was intended to be guarded against. I decide, therefore, that the rule in *Dearle v. Hall* applies, and that the second assignee is entitled to the fund.

Solicitors: *Batty and Whitehouse*; *H. W. Christmas*.

Jan. 27 and 28.

(Before MALINS, V.C.)

NEWINGTON LOCAL BOARD v. COTTINGHAM LOCAL BOARD, W. H. WILKINSON, AND THE HULL BOTANIC GARDEN COMPANY (LIMITED). (a)

Local authority—Public Health Act 1875, sect. 22  
—Discharge of contract by statute.

By a deed, dated 1874, local board A. agreed with local board B. to allow B. to cause the sewers of B. to communicate with a sewer of A., provided that the sewage of other places should not be permitted by B. to pass into the sewers of B., so as to discharge into the sewer of A. Persons in other places constructed sewers, connected with sewers of B., and discharging through them into the sewer of A. B. made no attempt to restrain them. A. claimed an injunction restraining B. and the persons in other places from causing or permitting the flow of sewage from any of such other places into sewers of B., so as to discharge as aforesaid.

On demurrer,

Held, that, by the effect of the Public Health Act 1875, sect. 22, the contract made by the proviso in the deed of 1874 was discharged, and the persons in other places had a right to connect with the sewer of B., without making any application to A.

DEMURRER.

By a deed dated the 18th July 1874, to which the Local Government Board was a party, the Newington Local Board agreed to allow the Cottingham Local Board and the Hull Local Board of Health to cause the sewers of the district of the Cottingham Local Board, and of part of the district of the Hull Local Board of Health, to communicate with a certain outfall sewer of the Newington Local Board's district, to be constructed by that board, for the purpose of the outfall of sewage. The deed contained the following proviso:

(a) Reported by W. M. HARRIS, Esq., Barrister-at-Law.

Provided always and it is hereby further agreed and declared, that so far as practicable all storm waters from such districts respectively shall be prevented from flowing into the said outfall sewer of the said Newington Local Board, and that the sewage of any other districts or places shall not be permitted by the said Cottingham Local Board and their successors and the said Hull Local Board of Health and their successors to pass into their respective sewers so as to discharge into the said outfall sewer of the said Newington Local Board without the consent in writing of the said Newington Local Board first had and obtained.

The plaintiffs duly constructed the said outfall drain or main sewer.

Two roads called Princes Avenue and Spring Bank were parts of the boundary of the district of the Cottingham Local Board. Sewers were constructed under each by that board, that under the former discharging into that under the latter, and the latter into the plaintiffs' main sewer. The Hull Botanic Garden Company (Limited), hereinafter called the Hull Garden, owned a piece of land not in the district of the Cottingham Local Board, nor within the part of the district of the Hull Local Board of Health intended to be drained in accordance with the deed of 1874. On part of this land they intended to lay out a lake and build villa residences. They had laid down sewers for draining the piece of land and carrying away the overflow of the lake and the sewage of the villas, which sewers, with the consent of the surveyor of the Cottingham Local Board, they had connected with the sewer under Spring Bank. In spite of the plaintiffs' remonstrances, the Cottingham Local Board and the Hull Garden were allowing these sewers still to remain so connected. Surface water was flowing from the land of the Hull Garden through their sewer into the Spring Bank sewer and thence into the plaintiffs' main sewer. Wilkinson owned land, also not within the above-mentioned district or part of district. He intended to erect buildings on it, and had laid down sewers for draining his land and buildings, and intended to connect them with the sewer under Princes Avenue. He applied to justices to assess the compensation to be paid by him to the Cottingham Local Board on making such connection. The Cottingham Local Board appeared by their clerk, and neither assented to nor opposed the application. The compensation was assessed at 175*l.*, and paid. It was alleged that, if sewers not within the district of the Cottingham Local Board should be connected with such of that board's sewers as discharged into the plaintiffs' main sewer, the main sewer would be overcharged and in great danger of bursting. The plaintiffs had not given any such consent as mentioned in the deed of 1874. They claimed an injunction restraining the defendants from causing or permitting any sewage or surface water, other than any arising in or flowing from the district of the Cottingham Local Board, to flow or pass into any of the sewers of that board, so as to discharge into the plaintiffs' main sewer; and from causing or permitting to be made any new outfall into any of the sewers of the Cottingham Local Board which communicated, either directly or indirectly, with the plaintiffs' main sewer, whereby any surface or sewage water, other than as aforesaid, might flow or pass into any of the sewers of the Cottingham Local Board, so as to discharge into the plaintiffs' main sewer. Each of the defendants demurred.

*Higgins, Q.C. and Macnaghten* for the Cottingham Local Board.—The proviso does not operate to prevent such communications as at the date of the deed were authorised by statute to be made (Public Health Act 1848, sect. 48; Sanitary Act 1866, sect. 9), and as are now authorised by sect. 22 of the Public Health Act 1875. At the time of the deed any owner or occupier could as a matter of right connect with the drain; and so now. Having, by reason of the statute, no power to refuse the communication, we have not contravened the clause, for we do not allow what we cannot prevent.

*Glasser, Q.C. and W. Hatfield Green* for the plaintiffs.—The parties to the deed must take the proviso as qualified by sect. 28 of the Act of 1875. As to the effect of sect. 22, we say an Act only prevents effect from being given to a contract where it makes the execution of the contract impossible:

*Baily v. De Crespigny*, 19 L. T. Rep. N. S. 681; L. Rep. 4 Q. B. 185.

So far from the contracts being now impracticable, the Act gives the defendants all the power that they can want: (sects. 15, 27, 173, 175.) *Hest v. Gill* (27 L. T. Rep. N. S. 291; L. Rep. 7 Ch. 699), on the effect of threatening, is the same as this case.

*Higgins* in reply.—The proviso was taken from the Public Health Act 1872, sect. 32. Sect. 28 of the Act of 1875, and the sections of the earlier Acts from which it is borrowed, apply to agreements between local authorities. Sect. 22 of the same Act, and the corresponding sections of earlier Acts, apply to other cases, viz., cases where communication is required by other than local authorities. *Baily v. De Crespigny* is in my favour; for it decides that a covenantor is equally disabled from preventing a third party from doing what he is empowered, or as what he is required by statute to do, and therefore is equally relieved from liability in either case.

*J. Pearson, Q.C. and Borthwick*, for Wilkinson.—I had only to deal with the Cottingham Local Board, and had nothing to do with any agreement between them and the Newington Local Board. Assume that at the time of the deed there was no enactment equivalent to sect. 22 of the Act of 1875, still, when that Act came, it repealed the agreement in the deed as to Wilkinson:

*Brewster v. Kitchell*, 1 Salk. 97, 197, 198; 1 Ld. Raym. 317, 321.

*Glasser* for the plaintiffs.

*Ford North, Q.C. and B. B. Rogers*, for the Hull Garden.—It is said that the words in sect. 22 of the Act of 1875, "local authority," mean all the local authorities through whose land the sewer passes; but it would be preposterous to suppose that a man opening a sewer has to negotiate with all such authorities; he has only to deal with the one immediately near to him.

*MALINS, V.C.*—The injunction is sought upon the ground of the contract entered into between the two local boards by the deed of the 18th July 1874. The meaning of the proviso, I think, is plain enough, that the Cottingham board are not to give their consent; so far as they can, they are not to permit any persons who have property not within the district to drain into the Cottingham sewer, thereby increasing the quantity of sewage to be thrown into the Newington district,

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without the consent of the Newington board. [His Lordship then stated the facts above given as to Wilkinson.] As far as Wilkinson is concerned, there has been no breach of the undertaking according to the express words; because it says that the sewage of any other district or place shall not be permitted by the Cottingham board to flow into their sewer so as to discharge into the Newington sewer. As they have not given their consent, but have remained indifferent, there has not, according to the strict letter of the contract, been any breach of it. They have neither assented nor dissented, but have stood by and allowed the authorities to decide what they thought was right according to the law. In the part of the statement of claim relating to the Hull Garden, there is an allegation of a breach of contract, because the Cottingham board are stated to consent, and consenting is permitting. Under these circumstances it is contended that there has been such a breach of the contract entered into as entitles the plaintiffs to an injunction. To this statement of claim each of the defendants has demurred. The defendants mainly rest their cases on the 22nd section of the Public Health Act 1875, and if that Act does apply, then the plaintiffs are wrong and the defendants right. Before I read the section, I may say it appears that all persons within the local district have an absolute right, under the 21st section, to drain into the sewer, without consent being given, or without any terms being imposed upon them. An owner or occupier of premises within the district is not bound to make any compensation whatever. But the right of Wilkinson and the Hull Garden, who are without the Cottingham district, depends on the 22nd section. It was urged that, whatever may be the effect of the contract of the 18th July 1874, it is superseded by the Act of 1875. On that subject, the law cannot be better put than in *Brewster v. Kitchell* (1 Salk. 198), though it is an old authority: "Where the question is, whether a covenant be repealed by Act of Parliament? this is the difference, viz., where H. covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after, and compels him to do it, the statute repeals the covenant; so, if H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed. But if a man covenants not to do a thing which then was unlawful, and an Act comes and makes it lawful to do it, such Act of Parliament does not repeal the covenant." That is also followed by the recent case of *Baily v. Crespiigny* (*ubi sup.*). There it was held, "that the defendant was entitled to judgment; for the defendant was discharged from his covenant by the subsequent Act of Parliament, which compelled him to assign to the railway company, and so put it out of his power to perform the covenant, on the principle of the maxim, *lex non cogit ad impossibilia*, and that it could make no difference whether the company were only empowered or were compelled to build the station on the paddock." Now, assuming that in the present case there was a covenant between these parties, originally binding between them, yet, if the Act has authorised every member of the community to do that which the Cottingham board bound themselves by the covenant not to permit anyone to do, when the Act says what the 22nd section of the Act of

1875 says, it seems to me that the case falls strictly and literally within those decisions, that a later Act of Parliament discharges the covenant between the parties. Mr. Higgins put it correctly, that the defendants could not prevent, and therefore did not permit. That is, they could not prevent the owner from doing it, because Parliament conferred the right upon him; and if they could not prevent him, it is not their permission, but that of the law. Mr. Glasse argued that the covenant is absolutely binding, and that the consequence of a repeal of it would be to throw great inconvenience upon the Newington board, by overcharging their drainage and rendering it impossible for them to work their sewer properly. The answer is, that at the date of the deed of 1874 there already existed the 9th section of the Sanitary Act 1866 and the 32nd section of the Public Health Act 1872, and that in view of those sections, when the Newington board entered into this arrangement, they were bound to consider what under the existing law was the chance of the drainage being increased. They were bound to make their sewer of the size which was calculated, not to dispose only of the actual sewage, but of that sewage which would be added to it in the exercise of that power which then existed and undoubtedly exists under the later Act. It is an inconvenience which they were bound to prepare for. It is the right of every owner without the district to consider what will be most convenient to him. [His Lordship then pointed out that the map showed that the most convenient sewer for the Hull Garden was the sewer of the Cottingham board, which also was the convenient sewer for Wilkinson.] Another topic of Mr. Glasse was that Wilkinson and the Hull Garden were bound to apply, not only to the Cottingham board, but to the Newington board. I cannot agree with that, because the Act gives them this right. [His Lordship read from the 22nd section of the Act of 1875, and continued:] The local authority mentioned in this section is the local authority of the district adjoining; that local authority's is the drain into which the sewage is to be poured, and no other. The section prevented the Cottingham board from objecting to the making of the connection by the other defendants. The question whether the Newington board may be entitled to a portion of the compensation paid by Wilkinson to the Cottingham board is a matter between the two boards that has nothing to do with the questions raised in this action. Therefore it appears to me that the Cottingham board have not done anything which by law they were not bound to do. Wilkinson has done nothing which by law he was not entitled to do, and the same observation applies to the Hull Garden. The three demurrers will be allowed with costs.

Solicitor for the plaintiffs, *C. A. Wright*, agent for *J. B. W. Eldridge*, Hull.

Solicitor for the Cottingham Local Board, *A. E. Oldman*, agent for *J. Seymour Moss*, Hull.

Solicitors for Wilkinson, *Frankish and Buchanan*, agents for *Frankish and Kingdon*, Hull.

Solicitors for Hull Garden, *Miller, Smith, and Bell*, agents for *Tenney and Dawber*, Hull.

Jan. 17 and Feb. 5.

(Before BACON, V.C.)

ADAIR v. YOUNG AND OTHERS. (a)

*Practice*—*Patent action*—*Admission of evidence in reply*—*Particulars of objection*—*Injunction against master of a ship using pumps, an infringement of patent, as well as against manufacturers*—*Costs*.

*Action claiming an injunction against the master of a ship in which a set of pumps, alleged to be an infringement, was used, as well as against the makers. Plaintiff brought evidence at the trial in support of the case raised by his pleadings and particulars of infringement, and to meet the case raised by defendants on their pleadings and particulars of objections. The defendants went into evidence on a much wider issue than that raised by the pleadings, &c. The plaintiff applied to adduce evidence in reply by adducing instances of infringement other than those mentioned in the particulars of infringement, and which he had obtained during the course of the trial.*

*Held, that under the circumstances he was entitled to bring in this evidence.*

*Injunction granted against the master of the ship, as well as against the manufacturers, the manufacturers being ordered to pay the costs.*

THIS was an action to restrain the infringement of the plaintiff's patent for the manufacture of ships' pumps. The plaintiff's specifications, filed on the 4th Oct. 1867, stated that the patented invention consisted in constructing, as therein described, a double-acting pump, chiefly intended for use on board ship, the chief characteristic of which was a movable cylinder cover, and which the specification described as follows:

The top of the closed cylinder consists of a metal cover fitting closely round the plunger rod, yet so as to allow of its slipping upon it when forced upwards by the water to be discharged during the ascending stroke, at the conclusion of which it again descends to its ordinary position, and rests upon the flange or rim at the top of the cylinder. It therefore acts both as a cover to the cylinder and as a valve to allow of the discharge of the water.

The plaintiff discovered that pumps which he believed to be an infringement of his patent rights were in use on board the British ship *Polynesian*, and in Sept. 1877 he commenced an action against James Young, the master of that vessel, to restrain him from using any pumps that were constructed according to his invention, or only colourably differing therefrom. The makers of these pumps, Messrs. Wallace and Co., of Govan, were subsequently added as defendants during the course of the action, and the plaintiff, by his amended statement of claim, after alleging that the defendants, Wallace and Co., had manufactured and sold in considerable numbers pumps made according to the plaintiff's invention, or only colourably differing therefrom, in addition to the relief already claimed against the defendant Young, claimed an injunction against the defendants Wallace with accounts and the relief usual in such actions.

The defendants Wallace, by their statement of defence, admitted that they had supplied the pumps used on the *Polynesian*, but denied that the said pumps, or any pumps manufactured by them, were constructed according to the plaintiff's

invention, or that they had in any way infringed any patent right belonging to the plaintiff, and took objections to the plaintiff's specifications. Particulars of breaches complained of were (under 15 & 16 Vict. c. 83, s. 41) delivered in due course, in which eight vessels were specified as being furnished with pumps made and sold by the defendants, and that in each case such pumps were furnished with a loose metal cover to the pump cylinder, fitting loosely round the plunger rod, and capable of acting both as a cover to the cylinder and as a valve. Particulars of objection in support of their defence were also delivered by the defendants Wallace and Co. in due course.

The evidence was all taken *vivâ voce*, and the plaintiff at the trial adduced evidence in support of the case made by his pleadings and particulars of breaches, and to meet issues raised by the defendants Wallace and Co. on their statement of defence and particulars of objections. The evidence went particularly to prove that the cylinder covers in the vessels specified were movable, and an infringement of the plaintiff's. After the close of the plaintiff's evidence, the defendant Robert C. Wallace stated in his examination that these cylinder covers, when the pumps went off his premises, were fastened down, and that he never constructed a pump in which the cylinder cover was not fastened down in some way or other, and in which the cylinder cover was not heavier than a valve described during the trial as "the No. 4 valve." With reference to this valve it had been shown by the plaintiff that if the loose cylinder cover were lighter than the valve, the former would act as a valve in the manner claimed by the plaintiff.

After this evidence, and during the course of the trial, the plaintiff applied for leave to adduce evidence in reply by giving instances of ships other than those included in the particulars of breaches, and which had recently come into port, in which pumps alleged to be infringements were fitted.

*Kay, Q.C. and Chadwyck Healey, for the plaintiff.*—The evidence of the defendants is much wider than the issue raised by them in their pleadings. Not content with meeting our particular cases of infringement, the defendant R. C. Wallace states that he never made a pump in which the cylinder cover was not fastened down, or with a cylinder cover lighter than 11lb. in a 6in. pump, that is lighter than the No. 4 valve. Where a defendant in the course of the trial raises such new issues the plaintiff has a right to bring rebutting evidence:

*Penn v. Jack*, 14 L. T. Rep. N. S. 405; L. Rep. 2 Eq. 314;

*Wright v. Wilcos*, 9 C. B. 650;

Taylor on Evidence, 357.

*McClymont (Aston, Q.C. with him) for the defendants Wallace and Co.*—There is no affidavit as to the nature of the evidence they propose to adduce. We did not know the substance of this application until the matter was opened in court; the only notice we received was a letter stating that an application for leave to adduce fresh evidence would be made this morning. This is an attempt to set up an entirely new case, or to set up new particulars of breaches; as the instances which will be given in evidence in reply are not included in the particulars, such evidence is inadmissible. In *Penn v. Jack* (*supra*) the evidence in reply related to one of the ships

(c) Reported by W. C. DAVIES, Esq., Barrister-at-Law.



mentioned in the particulars; that is not the case here.

Sir H. Jackson, Q.C., for the defendant Young, took no part in this argument.

BACON, V.C.—Nothing can be clearer than Mr. McClymont's statement, and he does not need to make any apology for himself, still less to ask for any indulgence from me, because all his points have been put with the most perfect distinctness, and it would be impossible for me not to understand what he said. But consider what the nature of the application is. It is made in the course of the trial. I must consider it as if there had been no interval between the last day when I had this case before me, and the present day when the present discussion goes on. The suggestion that there must be an affidavit is made under the stress of the case, I suppose. Whoever heard of counsel desiring to adduce further evidence by producing an affidavit. It is enough if at his own peril he says, "Let me bring this evidence." The court never requires to be satisfied, by the oath of the parties, that there is some evidence to be adduced. It is enough if the court finds, in the existing state of the trial pending before it, circumstances have happened which justify the introduction of further evidence. It is a matter of right, and justice, and obligation on the court to permit that further evidence to be adduced. Whatever may be the result of it will of course be hereafter considered. That observation covers the objection which has been taken that the statute requires that whenever the plaintiff has to allege infringement, he must furnish particulars of it, and is not allowed to travel beyond the particulars he has given. This has nothing to do with the plaintiff's allegation of infringement. The plaintiff has proved as well as he can, or thinks he has proved, an infringement. The defendant answers him in the plainest possible manner. He says: "What you call a fastened down valve is an old pot-lid cylinder cover that all the world knows about. I never made a cylinder cover that weighed less than 11lb.," and the plaintiff desires to adduce evidence (having already given evidence) more particularly to disprove those two facts. If they remain without answer or explanation, they, added to the other evidence, will be conclusive, for if it be true that he always did fasten down the cylinder cover [Kay.—Never made one that was not fastened down.] I mean the same thing, but your expression is more accurate than mine. If it remains with the evidence in that state that he always did fasten down the cylinder cover, there is an end of the case alleged by the plaintiff, and also if it be true that he never made one that weighed less than 11lb., surely, in common sense and reason, the plaintiff can only disprove it by means of the pumps upon the ships which have been mentioned, and by having an opportunity of adducing evidence on that subject. He does in his particulars state all he can state. What he endeavours to prove is met by the suggestion of two new important facts proved by the defendant upon his oath. It would be a total denial of justice, and a miscarriage of that duty which is imposed upon the court to investigate the truth of the facts alleged before it, if I shut my ears to the allegations of the plaintiff's witnesses in this respect, and more so if I prevented them from coming into court. It would be so plainly unjust

that unless there were some positive law compelling me to inflict that injustice, nothing in the world would induce me to do it. Now as to the cases which have been referred to, the case of *Penn. v. Jack* (*supra*) at least is an instance in which the court, actuated by the motives I have been endeavouring to point out, said, "I will not have a new trial about this, I will not put the parties to that expense; adduce the evidence, and we will deal with it when it becomes necessary." Who was hurt by that? But the other case, *Wright v. Willcox* (*supra*), is most distinctly and perfectly in point. A man is charged with stealing chaff, and the answer is, "This chaff is not yours." It might be difficult to identify chaff. The defendant said, "This cannot be your chaff, for, see, there is a lot of linseed mixed with it," and that seemed to be a perfect answer; for if all that was found in the defendant's possession was chaff and linseed, it was impossible to identify it as being the plaintiff's chaff; and the plaintiff said, "I will undertake to show you that this man deals in linseed as well as chaff, and that he has mixed his own linseed with my chaff." The court thought it was quite right that evidence should be adduced, and the observations of Wyld, C.J., upon that occasion as to the extent of the court's discretion are worthy of all attention, and are of great value, because it is no privilege that the court exercises. It has no right to say arbitrarily, "I will let in this or the other evidence." But, it being necessary for investigating the facts and attaining the ends for which the litigation is proceeding, the court says, "I will not be a party to deciding a case in which some evidence, which may or may not be material, is excluded from my notice." And then the time at which the application is made, is also, I think, unobjectionable. The evidence is to be adduced from ships which are about to sail. No delay ought, therefore, to take place. Some delay has taken place; but it is nobody's fault, not even mine. In the present imperfect condition of the case as it stands before me, I think I should be very wrong if I prevented the plaintiff, upon any question about notice or regularity, or any such thing as that, from now proceeding to adduce the evidence which he desires to lay before the court, and I am certain the defendant cannot be injured by it—I mean injured in any sense that I can attend to. The subject is one with which he is perfectly well versed. It is not open to any suggestion that the witnesses may have been tampered with, or that there may be any advantage gained behind the back of the defendant. There is no such thing in the case. It is a mere matter of fact as to the construction of the pumps on board certain ships. I think I must allow the plaintiff to adduce this evidence.

The evidence in reply was then taken.

The case was commenced on the 21st Nov. 1878, and continued for many days during November, December, and January. Judgment was reserved.

Feb. 5.—BACON, V.C. delivered judgment, in which, after carefully considering the evidence, specifications, models, &c., he held that the defendant's objections to the plaintiff's specifications were not proved, and that the plaintiff's specification was sufficient and the letters patent were valid; that the pumps made by Wallace and

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Re SOUTH DURHAM IRON COMPANY; SMITH'S CASE.

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Co., would not have been an infringement of the plaintiff's patent had they kept to their original plan of a fixed cylinder cover, or cylinder cover heavier than the No. 4 valve, but that as from the instances adduced by the plaintiff (chiefly on admission of further rebutting evidence) it appeared that all the covers were not fixed, and were lighter than the defendant had stated (i.e., lighter than the No. 4 valve) there had been an infringement. An injunction was, therefore, granted in the terms asked for by the plaintiff, against both the defendants, Young and Wallace and Co., with an account of profits directed against the defendants Wallace and Co., who were also ordered to pay the costs.

Solicitors: *W. W. Wynne; Morten and Outler.*

Tuesday, Dec. 17, 1878.

(Before HALL, V.C.)

Re SOUTH DURHAM IRON COMPANY; SMITH'S CASE. (a)

*Company—Director—Mortgage by director—Companies Act 1862, s. 43.*

*When a firm, one of whose members was a director of a company in course of winding-up, had advanced money to the company on the security of a transfer of delivery warrants of iron, and the warrants were transferred to the director partner, but it was established, on the evidence, that the security ensured to the benefit of the firm, and there was no entry of the transaction on the register of mortgages of the company as required by the 43rd section of the Companies Act 1862; it was*

*Held, that the doctrine of Ex parte Valpy and Chaplin (26 L. T. Rep. N. S. 228; L. Rep. 7 Ch. 289), and Re Natin Iron Ore Company (34 L. T. Rep. N. S. 777; L. Rep. 2 Ch. Div. 345), did not apply, and that the security was not forfeited.*

#### ADJOURNED SUMMONS.

In April 1874 the South Durham Iron Company were authorised to borrow money which should be a first charge on their lands, buildings, and fixed plant; and on the 1st May 1875 Thomas Taylor Smith, Brothers, a firm of colliery owners, one of the members of which, Thomas Taylor Smith, was a director of the company, lent money to the company.

The company gave their acceptance to the draft of the firm for the money and interest due in Oct. 1875. The bill was twice renewed for six months, and the second bill was on the 4th Oct. 1876 retired by T. T. Smith, in whose favour the renewed acceptances were drawn, in consideration of the directors passing a resolution to give him a receipt for 990*l.* due from him upon shares held by him in the company, and of their giving him warrants for 2500 tons of pig iron belonging to the company to secure the balance due on the bills.

Entries were made in the company's books crediting T. T. Smith with the 990*l.*, and leaving the amount due to him on loan account at 5198*l.* 10*s.* The warrants were indorsed and delivered to him.

In March 1876 T. T. Smith received part payment of this sum, and returned some of the war-

rants. The company was ordered to be wound-up, and he then had warrants for 1500 tons of iron to secure a debt of 3393*l.* 10*s.* and interest. No entry was made on the register of mortgages of these transactions, and the iron had been placed upon the premises of the Cleveland Iron Stone Company, whose warrants had been issued and indorsed by the South Durham Iron Company, and handed to T. T. Smith, who was the managing partner of his firm.

T. T. Smith deposed that part of the firm's funds was invested in the iron company's shares, and that in Sept. 1872 a payment had been made in respect of these shares by the firm's cheque. But the shares were in his name personally because he intended to become a director, but all the members of the company knew that the money was the firm's money. Other payments in respect of shares were made in 1874 in the firm's name, and payments made to T. T. Smith were placed to the firm's credit, as also were the payments of interest in respect of the loan.

T. T. Smith had renewed the drafts, and generally managed the above transactions in his own name, because he was the managing partner of the firm, and claimed that he was entitled to be put into possession of the iron.

The liquidator applied that T. T. Smith might be ordered to deliver up to him the warrants for the 1500 tons of iron, inasmuch as he was a director, and had not procured or seen to the registration of his charge on the register of mortgages, he being a director of the company, and specially charged with that duty.

*Osborne Morgan, Q.C. and Procter* for the liquidator.—The case is exactly governed by *Ex parte Valpy and Chaplin* (26 L. T. Rep. N. S. 228; L. Rep. 7 Ch. 289). It was the duty of Mr. T. T. Smith to see that the charge was registered according to sect. 43 of the Companies Act 1862, and he cannot set up his charge as against creditors. That case has been followed by a series of authorities all in the same direction, and being the decision of a court of appeal is binding upon your Lordship. The Court of Appeal decided the same way in the case of the *Natin Iron Ore Company* (34 L. T. Rep. N. S. 777; L. Rep. 2 Ch. Div. 345). See also *Re Wynn Hall Coal Company* (23 L. T. Rep. N. S. 348; L. Rep. 10 Eq. 515.)

*Dickinson, Q.C. and Caldecott* for T. T. Smith and Co.—We are the legal and equitable holders of the iron, and are treated as such by the warehouseman who considers himself our agent. No doubt the Act of Parliament says that the charge ought to be registered, but it cannot be said that the security is invalidated. (Lindley on Partnership, p. 472.) In the two cases before the Court of Appeal the act was the act of the whole firm. In *Ex parte Valpy and Chaplin* they were the solicitors of the company in that transaction. In the other case the only question was between no registration and insufficient registration. The Master of the Rolls says he is bound by the decisions in the Court of Appeal so far, and so far only, as the exact circumstances of those cases exist. See the case of

*Knowle's Mortgage* (37 L. T. Rep. N. S. 351; L. Rep. 6 Ch. Div. 556.)

*Morgan, Q.C.* in reply.

HALL, V.C.—This case is certainly novel, and not without difficulty in reference to the authorities

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

CHAN. DIV.]

LAX v. THE MAYOR AND CORPORATION OF DARLINGTON.

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referred to. I must consider the origin of this transaction. There was a loan by several persons constituting a firm: they were the persons who lent the money. Having lent the money originally it does not appear to me to be fair on a reasonable construction of the Act of Parliament that this should be considered a case in which at least those persons who were members, but not directors, can have imputed to them individually or constructively any negligence or anything in the nature of omission in their duty. That being so, the security being such as I have described it, as to which there is nothing in the passage which has been cited from Mr. Justice Lindley's book, it seems to me there is nothing to justify me in extending the operation of the section so as to apply against a person guilty of no omission of duty or personal neglect. There is nothing to entitle the liquidator as against those members who were not the original lenders, there is nothing against them individually. It must be shown that there is proof of omission of duty against them personally. It appears to me, however, that the other members of the firm did not personally or otherwise authorise the partner who lent the money to do or omit anything with respect to perfecting the security. I cannot extend the operation of the Act of Parliament to them. This being a security in its original inception in favour of the firm, I may observe that there is another consideration which leads to the same conclusion. It could not be said that the partner who was not a director acted independently of the Act of Parliament. There might be omission of duty, where a penalty was imposed, on the part of those who ought to have performed the duty. But the non-registration of the security was not intended in any way to operate against or prejudice any of the partners who were not directors. That being so, the section could only come into operation by process of dividing the security, by some means of establishing to what extent the benefit really belonged to the partner who omitted to register. If the liquidator desired to establish such a case, if he wished to deprive the partner who was a director of his beneficial interest, it appears to me that it was incumbent upon him to show that there really was some beneficial interest accruing to him. So much for the original security as it stood when the advance was first made. But it is said that things have changed; that as it stood, it became the security of the partner and of him only—a security to the partner only who was a director. But, in my view, there is nothing to show that the partners other than the director partner have done anything to extinguish their claim further than this—that on the renewal of the original loan their acceptances were taken, not in the name of the firm, but of the partner who was a director, who managed the business, which was entirely left to him. Those bills of exchange were retired, and mere renewals of the original bills were granted. This view is borne out and confirmed very much by the mode in which the account was kept. There was no change of account. There is nothing to justify me in saying that there was anything in the nature of novation as to the creditors or directors. And the introduction of the 990l. into the account does not assist the liquidator in his claim. There is no break in the account, and the mere item of the 990l. makes no difference. It is clear upon

the affidavit that the money, in fact, belonged in equity to the firm, though it was entered into the individual partner's account. Hence, the moneys are ultimately brought into the firm's account. This shows, as it appears to me, that the whole account was the account only of the firm. The claimants, therefore, are entitled to the benefit of the iron deposited, and the liquidator's claim is not established. The summons must, therefore, be dismissed with costs.

Solicitors: *Bower and Cotton*, for *Dodds and Co.*, Stockton; *Shum, Crossman, and Crossman*, for *Kidson, Son, and Mackenzie*, Sunderland.

### QUEEN'S BENCH DIVISION.

Saturday, Dec. 21, 1878.

(Before LUSH, J.)

LAX v. THE MAYOR AND CORPORATION OF DARLINGTON. (a)

*Negligence—Public market—Liability of lord of market for misfeasance—Frequentation of market not a mere license.*

*The defendants were the owners of a market which is held for the sale of cattle at D. In the market place defendants had erected spiked railings round a statue which had been placed there. This railing the jury found was dangerous for cattle with a propensity for leaping. A cow which the plaintiff had brought to market attempted to jump the railings, and was killed in so doing. The plaintiff sought to recover from the defendants the value of the cow.*

*Held, that the defendants were liable, as, by erecting the railings, they had done a wrongful act, whereby a safe market had been rendered unsafe; and that the plaintiff had not been guilty of contributory negligence, inasmuch as, having paid toll for the use of the market there, he was not a mere licensee placing his cattle at his own risk, but was entitled to a safe standing place for them.*

#### FURTHER CONSIDERATION.

This was an action tried before Lush, J., at Newcastle, whereby plaintiff sought to recover compensation for the loss of a cow which had been killed by attempting to jump certain spiked railings erected by the defendants in the market place of Darlington. It was contended on the part of the defendants that the plaintiff was a mere licensee who was bound to take the market as he found it; that the danger was not concealed, and therefore the plaintiff should have guarded against it, and that there was no obligation upon the defendants to make the market absolutely safe.

*Cave, Q.C. and Edge* for plaintiff.

*Herschell, Q.C. and Shield* for defendants.

The following written judgment was delivered by LUSH, J.—This action is brought to recover compensation for the loss of a cow, which came to its death from an attempt to leap over a spiked fence, placed by the defendants round a statue which they had erected in the market place of Darlington. The defendants are the owners of the market which is held for the sale of cattle, and the plaintiff had for many years brought his cattle there for sale. The market is held in the public street. The plaintiff had regularly occupied with his cattle a given site, for which he paid toll, and the statue had been erected

(a) Reported by A. H. POYSE, Esq., Barrister-at-Law.

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near to that site between two and three years before the accident happened. The only point contested at the trial was, whether the spiked railing was or was not of sufficient height from the ground. The top of the spikes was 2ft. 6in. from the stone in which the bars were set, and this the jury found was insufficient, and the railing being spiked, was consequently dangerous to cattle having a propensity to leaping. It was not contended that the plaintiff was guilty of any negligence in not properly looking after or managing his herd. The point made at the trial, and which has since been argued before me, was that the corporation was under no obligation to have the fence of such a height as that cattle could not or would not be tempted to leap it; that the plaintiff was a licensee who must take the market as he found it; that there was plenty of room for him to stand his cattle elsewhere (which for aught that appeared was the fact); and that as the danger was not concealed, but one obvious and apparent, he placed the cattle there at his peril. I am of opinion that neither of these objections is tenable. The franchise of a market, like that of a port, is granted for the benefit of the public, and everyone has as good a right to frequent the market for selling and buying the marketable commodities as he has to traverse a public highway. The grantee of a market, especially when he takes a toll for his own benefit, does, I think, incur an obligation to maintain the market in a state reasonably fit for the purpose for which it was granted. (See the observations of Bayley, J., in *Prince v. Lewis*, 5 B. & C. 371.) I see no reason why, if he erects in the market place which he appropriates to the market any dangerous obstruction which causes danger to the property or the persons of those who frequent the market for a lawful purpose, he should not be liable to an indictment as much as the person who places a dangerous obstruction in a public highway. Of course, where the danger is, as it was in this case, obvious and apparent, a person who heedlessly and without reasonable care to avoid it incurs damage, cannot maintain any action, because he is the author of his own wrong. But he is not a contributor to his own wrong by going to the market. The owner or the person who, in legal phraseology, is lord of the market, has no right to say to him, "You might have gone to some other market, and as you chose to come here with your cattle, you elected to run the risk." Nor can the owner of a port excuse himself for erecting a dangerous obstruction to the navigation by saying to the shipowner, "You might have gone to some other port." The subject using a port or a market is not a mere licensee, he is exercising a right as one of the public for whose benefit the port or the market was erected, and is entitled to have a free and safe passage in the one case, and a safe standing place in the other. I was impressed at the time with an argument urged by Mr. Herschell. Suppose, he said, that the market was situate on the bank of a river or lake, is the man responsible if the cattle brought there run into the water and drown themselves? If the specific spot were designated in the charter by which the market was granted, so that the grantee had no option to hold it elsewhere, I am inclined to think he would, even in that case, be bound to fence for the protection of cattle; but if no place was designated, and he voluntarily selected so dangerous a spot, I should say cer-

tainly he would. This case, however, does not require that question to be answered. The charge against the corporation is of misfeasance, not of nonfeasance. The erection which constituted the danger in this case was an artificial erection by them, by which they rendered a safe market an unsafe one; that was a wrongful act. Nor do I think it is competent to the defendants to object that the plaintiff chose to continue standing his cattle in the place he had been accustomed to use long before the statue was erected. Every part of a market place is open to buyers and sellers, subject to the reasonable control and regulation of the lord of the market, and the selection of the spot in question was as much the act of the corporation as of the plaintiff, for they regularly charged and received toll for the use of that specific site. Besides, it is impossible to say that the damage would not have happened if the herd of which the cow formed part had been stationed at some other part. But whether it would or not is not in my judgment material. The defendants had done a wrongful act in placing the spiked rails in the cattle market so low as to be dangerous to the cattle; this was the immediate cause of the injury, and they cannot say the plaintiff was guilty of negligence in using that part of the market which they assigned to him, though it was in proximity to the danger, he not being guilty of any negligence which immediately conduced to the accident. See *Clayards v. Dethick* (12 Q. B. 439; 11 L. T. Rep. O. S. 222); *Thompson v. North-Eastern Railway Company* (2 B. & S. 106; 6 L. T. Rep. 127; 31 L. J. Q. B. 194.) I therefore give judgment for the plaintiff for the agreed amount—22l. 14s. 6d., and costs.

Solicitors for plaintiff, *Chester, Urquhart, and Co.*

Solicitor for defendants, *Scott Lawson*, agent for *Dunn and Watson*, Darlington.

#### COMMON PLEAS DIVISION.

Friday, Nov. 22, 1878.

(Before GROVE and DENMAN, JJ.)

REDDISH v. HITCHINOR. (a)

*Magistrates' clerk — Fees — Liability of person giving prisoner into custody*—5 Geo. 4, c. 83, ss. 4, 6—5 & 6 Will. 4, c. 76, ss. 78, 92.

*An inhabitant of a borough, who gives into the custody of a police constable suspected persons, and gives evidence against them before the borough magistrates, is not liable to the clerk of the magistrates for his fees in respect of the conviction of such persons, under the Vagrant Act, as rogues and vagabonds.*

*Seemle, that the borough fund is liable for such fees.*

THE plaintiff, who is clerk to the borough magistrates at Stockport, sued the defendant (the station master of the London and North-Western Railway Company at Stockport), in the County Court of Cheshire, holden at Stockport, for 22s., the amount of fees to which he claimed to be entitled as magistrates' clerk under the following circumstances:—On the 18th Jan. last the defendant, whilst station master at the said railway station at Stockport, gave two persons into the custody of a police constable on the charge of

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

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picking pockets at such station. The defendant followed them to the police office, and afterwards appeared and gave evidence as prosecutor before the borough magistrates, who convicted the prisoners under the Vagrant Act (5 Geo. 4, c. 83) of the offence of frequenting a place of public resort with the intent to commit a felony. In respect of such conviction the plaintiff claimed, as such magistrates' clerk, to be entitled to the fees the subject of this action. The plaintiff is paid a salary, but he receives all the fees that are payable by virtue of his office as magistrates' clerk, out of which he retains the amount of his salary, and pays the balance to the borough fund. The County Court judge found a verdict for the plaintiff for 15s., according to the schedule of fees of justices' clerks made by the justices with the approval of the Secretary of State. A rule nisi was afterwards obtained on behalf of the defendant to set aside this verdict, against which

*F. Clerk*, for the plaintiff, now showed cause.—The defendant is liable to pay the fees of the magistrates' clerk. In *Oke's Magisterial Synopsis* (p. 109, 12th edit.), it is laid down that "the party liable to the clerks to the justices, however appointed, for the amount of their fees allowed or sanctioned for the particular business, is, except where otherwise directed by statute, the person who made the application or instituted the proceedings in respect of which the fee is due, and the proper way is not to give any credit, but insist upon the payment at the time, and refuse to do the act required until payment." In *Reg. v. Coles* (8 Q. B. 82), Coleridge, J. says: "Whoever wants the thing in respect of which the fee is made payable, must pay the fee; the prosecutor if he takes out a warrant, the defendant if he enters an appearance." In *Wray v. Chapman* (19 L. J. Rep. 155, M.C.) the same learned judge says: "It must be admitted that ordinarily the clerks have a right to fees for their services, and ordinarily the party applying is bound to pay these fees." He also cited

*Reg. v. Mayor of Gloucester*, 5 Q. B. 862.

*Collins, Q. C.*, in support of the rule, referred to 5 Geo. 4, c. 83, ss. 4, 6, which provide (*inter alia*) that "every suspected person or reputed thief, frequenting any river, canal, or navigable stream, dock or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or place adjacent, with intent to commit felony . . . shall be deemed a rogue and vagabond" (s. 4); and "that it shall be lawful for any person whatsoever to apprehend any person who shall be found offending against this Act, and forthwith to take and convey him or her before some justice of the peace, to be dealt with in such manner as is hereinbefore directed, or to deliver him or her to any constable or other peace officer of the place where he or she shall have been apprehended, to be so taken and conveyed as aforesaid; and in case any constable or other peace officer shall refuse or wilfully neglect to take such offender into his custody, and to take and convey him or her before some justice of the peace . . . he shall on conviction be punished in such manner as is hereinafter directed" (s. 6). He also cited

*Reg. v. Inhabitants of Chelmsford*, 5 Q. B. 58.

[He was stopped by the Court.]

GROVE, J.—I am of opinion that this rule should

be made absolute. Looking only at the provisions of the Vagrant Act (5 Geo. 4, c. 83), I do not think that the defendant in this case would be liable for the fees payable to the magistrates' clerk. The defendant is not a constable, he is to be considered only as a witness after having given the prisoners to a constable; I do not see, therefore, how he could be held liable in this action. But further, I think that the 78th and 92nd sections of the Municipal Corporations Act 1835 (5 & 6 Will. 4, c. 76) apply here, and that the borough fund is liable for these fees. That Act provides, by sect. 78, "that it shall be lawful for any constable during the time of his being on duty, to apprehend all idle and disorderly persons whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of intention to commit a felony, and to deliver any person so apprehended into the custody of the constable appointed under this Act, who shall be in attendance at the nearest watch-house, in order that such person may be secured until he can be brought before a justice of the peace, to be dealt with according to law, &c.;" and by sect. 92, that the borough fund "shall be applied towards the payment of" certain specified expenses, and "all other expenses not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of this Act." The fees which are sought to be recovered in this action were expenses incurred in carrying the Municipal Corporations Act 1835, into effect, and therefore the case is within that Act. On these grounds I think that the defendant is not liable.

LINDLEY, J.—I am of the same opinion. It may be that the plaintiff can recover these fees, as has been suggested by my brother Grove; but I do not see how he can recover them from the defendant. No doubt, a person who wants anything to be done for him by the justices' clerk must pay him his fees; but here the defendant did not employ the plaintiff—he simply gave the prisoners into custody, and left the law to take its course.

*Rule absolute.*

Solicitor for the plaintiff, *E. Reddish*.

Solicitor for the defendant, *R. F. Roberts*.

Thursday, Nov. 28, 1878.

(Before Lord COLERIDGE, C.J., GROVE and LINDLEY, JJ.)

BENNETT v. ATKINS. (a)

APPEAL FROM REVISING BARRISTER.

*Parliament—Borough vote—Payment of rates by landlord—Allowance of deductions—Notice in writing—Condition precedent—Waiver—32 & 33 Vict. c. 41, ss. 3, 4, 7—30 & 31 Vict. c. 102, s. 3.*

*The Poor Rate Assessment and Collection Act 1869 provides that (sect. 4) "The vestry of any parish may from time to time order that the owners of all rateable hereditaments to which sect. 3 of this Act extends, situate within such parish, shall be rated to the poor rate in respect to such rateable hereditaments, instead of the occupiers, on all rates made after the date of such order; and thereupon, and so long as such order shall be in force, the following enactments shall have effect: 1. The overseers shall rate the owners instead of the occupiers, and shall allow to them*

(a) Reported by A. H. BRITTON, Esq., Barrister-at-Law.

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an abatement or deduction of 15 per cent. from the amount of the rate. 2. If the owner of one or more such rateable hereditaments shall give notice to the overseers, in writing, that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly; and allow to him a further abatement or deduction not exceeding 15 per cent. from the amount of the rate during the time he is so rated." (Sect. 7) "Every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which as regards rating depends upon the payment of the poor rate."

*Held*, that a notice in writing by the owner that he was willing to be rated in respect of his hereditaments, whether occupied or not, was a condition precedent to the overseers allowing him an abatement further than 15 per cent. from the amount of the rate, and could not be waived by the overseers. Where, therefore, in the absence of such notice the owner had been allowed an abatement of 25 per cent. from the full amount of rate paid by ordinary occupiers:

*Held*, that, that allowance not being one which the overseers were empowered to make, the payment of such rate by the owner could not be deemed a payment of the full rate by the occupier for the purpose of preserving to the occupier the franchise.

CONSOLIDATED appeal from the decision of the revising barrister appointed to revise the list of voters for the borough of New Windsor. The respondent duly objected to the name of the appellant being retained on the list of voters for the parish of Clewer, in the said borough. The description of the appellant on the said list was as follows: Bennett, Charles, 91, Victoria-cottages, house, 91, Victoria-cottages. The appellant occupied during the qualifying period a house, No. 91, Victoria-cottages, and he stated that by agreement with the owner of the house the owner paid the poor rate thereon.

The rating of the said house, No. 91, Victoria-cottages, was as follows:

Parish of Clewer. Rate made in the month of October 1877. No. 263; name of occupier, Bennett, Charles; name of owner, R. E. Gardner; description of property rated, cottage; name or situation of property, 91, Victoria-cottages; estimated extent, three perches; gross estimated rental, 10l.; rateable value, 8l.; rate at 6d. in the pound, 4s.; amount of rate assessed upon and payable by the owner instead of the occupier by virtue of the statute or statutes in that behalf, 3s.; allowed to owner, 1s.; total amount to be collected, 2l. 9s. 6d. (bracketed with other names); amount actually collected, 2l. 2s. 6d.

The assistant overseer of the parish of Clewer produced the minute book of the vestry of the parish of Clewer, from which it appeared that, at a vestry meeting of that parish, held the 11th Nov. 1869, it was proposed by Mr. Foster, seconded by Mr. George, and ordered, that the owners of all rateable hereditaments in that parish to which the

4th section of the Poor Rate Assessment and Collection Act 1869 applied, be rated to the Poor Rate in respect of such rateable hereditaments, instead of the occupiers; under which order of the vestry owners of property were entitled to an allowance of 15 per cent. from the full amount of rate payable by ordinary occupiers. The assistant overseer stated that neither he nor the overseers had received any notice in writing, as required by the 4th section, sub-sect. 2, of the Poor Rate Assessment and Collection Act 1869, from the owner of the cottage No. 91, Victoria-cottages, that he was willing to be rated and to pay the rates made in respect of the said cottage, whether the same was occupied or not; and, although such notice had not been given, the owner had been allowed a further abatement or deduction of 10 per cent., making together an allowance of 25 per cent. from the full amount of rate paid by ordinary occupiers. It was objected to the appellant's right to be on the list of voters that the extra 10 per cent. was illegal, as no notice in writing had been given by the owner to the overseers that he was willing to be rated and pay the rates in respect of cottage No. 91, Victoria-cottages, whether the same was occupied or not, and that he had not paid an equal amount of rate in the pound to that paid by an ordinary occupier, as required by the People's Representation Act 1867, sect. 3, sub-sect. 4.

On behalf of the appellant it was contended that the rate having been paid by the owner, he being rated instead of the occupier, pursuant to the order in vestry, such payment by the owner must be considered as that of the occupier, by virtue of the 7th section of the Poor Rate Assessment and Collection Act 1869. The revising barrister held that there was no proof or evidence that any written notice had ever been given by the owner to the overseers, as required by sect. 4, sub-sect. 2, of the Poor Rate Assessment and Collection Act 1869, to entitle him to the further abatement or deduction of 10 per cent., that had been allowed to the owner by the overseers, and therefore the owner was not entitled to the extra deduction of 10 per cent., and the extra allowance of 10 per cent. allowed by the overseers to the owner was an illegal allowance; and that the appellant had not therefore, on or before the 20th July last, *bonâ fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that had become payable by him in respect of the premises occupied by him up to the preceding 5th Jan.; and the revising barrister expunged the name of the appellant from the said list. Sect. 4, sub-sect. 2, of the Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41) is as follows:

The vestry of any parish may, from time to time, order that the owners of [rateable hereditaments of a certain value] situate within such parish, shall be rated to the poor rate in respect to such rateable hereditaments, instead of the occupiers, on all rates made after the date of such order; and thereupon, and so long as such order shall be in force, the following enactments shall have effect [*inter alia*, sub-sect. 2]:

If the owner of one or more rateable hereditaments shall give notice to the overseers, in writing, that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly; and allow to him a further abatement or deduction not exceeding 15 per centum from the amount of the rate during the time he is so rated.

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Sect. 7 of the same Act is as follows:

Every payment of a rate by the occupier, notwithstanding the amount thereof may be deducted from his rent as herein provided, and every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier, or with the overseers, to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which, as regards rating, depends upon the payment of the poor rate.

The 3rd section, sub-sect. 4 of the Representation of the People Act 1867 (30 & 31 Vict. c. 102) is as follows:

Every man shall, in and after the year one thousand eight hundred and sixty-eight, be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in Parliament for a borough, who is qualified as follows: (that is to say) [*inter alia*, sub-sect. 4] Has on or before the twentieth day of July in the same year *bond fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that have become payable by him up to the preceding fifth day of January [in respect of the premises occupied by him].

If the court should be of opinion that the amount paid by the owner, after deducting the extra allowance of 10 per cent., was a legal amount without any notice being given to the overseers, and was a sufficient payment of the rate by the appellant within the meaning of the 4th section of the People's Representation Act 1867, sub-sect. 3, the name of the appellant was to be inserted in the said list. The names of 230 other persons whose qualifications were similar to those of the appellant, and who were objected to on the same ground, were also expunged by the revising barrister, and their appeals were consolidated with the principal case.

The *Solicitor-General* (Lewis Coward with him) for the appellant.—The question is whether the absence of notice in writing to the overseers makes the deduction of the extra allowance of 10 per cent. illegal. The object of the Poor Rate Assessment and Collection Act 1869 was to allow the parish to enter into arrangements with the owners of certain houses, by which the rates shall be paid by the owner instead of by the occupier. As a consideration for the owner doing so, 15 per cent. is to be allowed him for collecting the rate from the tenant, in the shape of rent, so saving the parish the trouble of collecting it; and as a further consideration, if the owner will undertake to pay the rate, whether the house be vacant or not, an additional deduction not exceeding 15 per cent. is to be allowed him. Can the mere omission of a notice in writing disfranchise the tenant, who is no party to the arrangement between the parish and the owner, and cannot, therefore, tell whether the statute has been complied with or not? The giving of the written notice may be waived. The consideration for the deduction is not the giving of the notice, but the agreeing to pay the rate whether the house be vacant or not. [LINDLEY, J.—You say that the decision of the revising barrister amounts to this, that the notice cannot be waived.] Yes. He cited

*Reg. v. The Mayor, &c., of Kidderminster*, 20 L. J. 281, Q. B.

Kingdon, Q.C. for the respondent.—The question is, whether a notice in writing is not a condition precedent to the authority to make the allowance.

A notice in writing is very necessary to protect the overseers and parish. It is not, therefore, a mere formal requirement. And it is not the less necessary to be in writing because it happens to be preliminary to an agreement. The section says, "If the owner . . . shall give notice to the overseers, in writing . . . the overseers shall . . . allow to him a further abatement," &c., which is equivalent to, No abatement shall be allowed, unless there is notice in writing. Why should that provision not be enforced, if it can be shown to have a reasonable ground, viz., to protect the overseers and parish? *Durant v. Withers* (2 Hop. & Colt. 202; L. Rep. 9 C. P. 257) is practically the same case as this. The deduction made in this case was unauthorised by the statute, and was consequently not one which is referred to in the 7th section as an allowance the overseers are empowered to make, and does not therefore come within the protection of that section.

The *Solicitor-General* in reply. — Here the notice was expressly waived. [LINDLEY, J.—Has a parish overseer, acting on behalf of the parish, power to waive such a notice? Lord COLERIDGE, C.J.—There need be no agreement here; a notice alone is necessary under this section. A rich man might not care whether any further deduction was made or not, and might make no agreement. What power has the overseer to rate unequally?] Only the power given him by this statute. But the notice here is merely preliminary. Deductions authorised to be made are any deductions made by agreement between the owner and the parish, subject to a limit as to the amount. [COLERIDGE, C.J.—The statute might easily have said so. GROVE, J.—By sect. 3 there may be a voluntary agreement between the owner and the parish that the owner shall be liable for the poor rates, and shall pay them whether the hereditament is occupied or not, and that the parish shall allow him a commission on the amount; and such agreement is to be "in writing." Surely that is not optional. And if that is not, why should the provision that the notice is to be in writing be optional? The words "in writing" would become meaningless.] The whole purview of the Act shows that the intention of the Legislature was to preserve the franchise to the occupier, where the owner agrees to pay the rates. By sect. 8 the occupier may pay them and deduct the amount from his rent, where the owner has omitted to pay, after agreeing or becoming liable to do so. By sect. 19, the overseers are to insert the name of the occupier in the rate book, whether the rate is collected from the owner or occupier, and the occupier, notwithstanding his name has been omitted, is to be entitled to every qualification and franchise depending upon rating in the same manner as if his name had not been so omitted. If the full rate has not been paid, then notice of the rate in arrear should have been given to the occupier, for, by sect. 10, "Section twenty-eight of the Representation of the People Act 1867, with respect to notice to be given of rates in arrear, shall apply to occupiers of premises capable of conferring the parliamentary franchise, although the owners of such premises have become liable for the rates assessed thereon under the provisions of this Act." He cited

*Fletcher v. Boodle*, Hop. & Phil. 238; 11 L. T. Rep. N. S. 630.



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LORD COLERIDGE, C.J.—The question whether the deduction in this case was properly allowed depends on what is the correct construction of sect. 3, sub-sect. 4, of 32 & 33 Vict. c. 41, which enacts as follows: [reads the section, *vide sup.*]. It might be urged that the person affected was the occupier and not the owner, and that to take away the franchise from the former would be punishing him for what it was out of his power to prevent. The courts, however, have nothing to do with the effect of an Act of Parliament; their only function is to construe it, and Parliament can then make any alteration which may seem desirable. But there is another answer to such a contention; the Act gives the voter certain privileges depending on rating which he would otherwise not have been entitled to, and as he gets the benefit he must accept the accompanying burden. I am of opinion that, according to the correct construction of the Act, our judgment must be for the respondent. Sect. 4 provides that the owner of occupied tenements of a certain value may be compulsorily rated instead of the occupiers, and sub-sect. 2 allows an extra deduction where the owner gives a notice in writing of his willingness to be rated in respect of unoccupied tenements. In my opinion the notice here mentioned must be in writing just as much as the voluntary agreement for the same purpose, mentioned in the preceding section (sect. 3), must be in writing; and I think that its being so is a condition precedent to allowing the deduction. The words of the Act are plain, conferring a power on the overseers in a particular event, which event has not arisen. As to the contention that the overseers had power to waive the notice in writing, there is nothing in the Act to warrant it, and, as the overseers occupy a public character, there are good reasons why they should not have such a power given them. This view is supported by sect. 7, which says that the occupier shall be entitled to the franchise when the owner pays the rates, notwithstanding any allowance which the overseers are "empowered to make." The word "empowered" must mean legally empowered. The Act says that rating may be unequal under certain conditions, and, those conditions not having been complied with, the overseers were not empowered to allow the abatement, and the decision of the revising barrister ought to be affirmed.

GROVE, J.—I am also of opinion that the decision of the revising barrister ought to be affirmed. For a long time during the argument I was of a different opinion, the reason being that I thought that it was assumed by the learned counsel on both sides that the agreement, mentioned in the 3rd section of the Act, might be a verbal agreement. Looking only to the words at the beginning of that section as to the hereditaments to which it is to apply, and, passing over the intermediate words, to those at the end, "the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow to him a commission not exceeding 25 per cent. on the amount thereof," the agreement there referred to might be a verbal one. If that had been the case, then it might be contended that sects. 7 and 8 would preserve the franchise to the occupier wherever there was an understanding that the owner should pay the rates, and would not depend upon any preliminary

matter such as a notice having been given in writing. If the agreement in the 3rd section need not be in writing, then the 7th section says that "every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise," &c. Now, if the words "agreed to" there referred to a verbal agreement, it would show that the substance and not the formalities were to be looked to, and that, therefore, the notice in writing was a preliminary, and its absence could not affect the franchise of the voter. But, upon reading the 3rd section through, I find that the agreement there provided for is expressly to be "in writing." So that it was the intention of the Legislature that there should be in the one case a definite agreement in writing, in the other a definite notice in writing, before any deduction is made by the overseers. That that is the construction of sect. 3 is clear. The words are: "In case . . . the owner of such hereditament is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay the poor rates whether the hereditament is occupied or not, the overseers may," &c. There can be no "such agreement" except the agreement previously mentioned which is to be in writing. In that way, all the words of the sections become sensible, and read into one another. The fair reading of the 3rd section, is that if the overseers are willing they may enter into an agreement in writing with the owner, for any term not less than one year from the date of such agreement, to allow him a commission in consideration of his becoming liable for the rates. On any other construction, you give no meaning to the words "such" and "in writing." Then sect. 4, sub-sect. 1, enacts that "the overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of 15 per cent. from the amount of the rate." And by sub-sect. 2, "If the owner of one or more such rateable hereditaments shall give notice to the overseers in writing that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow to him a further abatement or deduction not exceeding 15 per cent. from the amount of the rate during the time he is so rated." Under the 3rd section, it is optional with the overseers to agree or not, and the agreement must be in writing. Under the 4th section, all that the overseers are to do is imperative, except as to the amount of the abatement which they will allow, and the notice by the owner is required to be in writing. In the first instance, where the matter is optional, there is to be an agreement in writing; in the second, where it is imperative, the owner is to give a notice in writing. The notice becomes much more, therefore, than a mere preliminary, or a merely formal matter, its object being to enable the overseers to have a voucher for the abatement which they are

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compelled to allow. "The overseers shall . . . allow," &c., but, on a condition, viz., that "the owner . . . shall give notice to the overseers in writing;" that is a substantive requisite, and one to which a meaning can be attached. I think such a requisite as that cannot be waived by a parish officer acting on behalf of the parish.

LINDLEY, J.—I am of the same opinion. The question is, whether the landlord has paid the rates in such a manner as to entitle the occupier to vote. That depends upon two questions: first, upon the true construction of the Act of Parliament (32 & 33 Vict. c. 41); and, secondly, upon the power of the overseers to waive the notice in writing by the owner provided for by that Act. As to the first point, I do not think that there can be any doubt. I have heard no explanation of the words "willing to enter into an agreement in writing" in the 3rd section; but I can have no doubt that the subsequent words of that section, "from the date of such agreement," refer to an agreement in writing. Then, by sect. 4, a "notice in writing" is clearly to be given by the owner before any allowance is made to him by the overseers. But it does not follow to my mind that such a notice could not be waived. Apart from the power of waiving, the provision is quite clear; and additional light is thrown upon sects. 3 and 4 by sect. 7. Then, as to the second question, whether it is competent for the overseers to waive the giving of a notice in writing, at first I certainly thought that this might be waived, and that the giving of the notice in writing was merely preliminary, and could be dispensed with. But the answer to that is, that the overseers are not acting for themselves, but are public officers. Unless they could in every case produce either an agreement in writing or else a notice in writing, the parish for which they act might be involved in endless disputes and endless lawsuits. It is true that in *Leonard v. Alloways* (48 L. J. 81, C. P.), we held the other day that overseers could waive compliance with the condition of 6 Vict. c. 18, s. 5, as to sending in a claim before the 20th July; but the language is very different here, and I am of opinion that the overseers cannot waive this matter, and that this appeal must be dismissed.

*Appeal dismissed with costs.*

Solicitor for the appellant, *C. T. Phillips.*

Solicitor for the respondent, *T. Durant*, agent for *B. C. Durant*, Windsor.

## HIGH COURT OF JUSTICE IN IRELAND.

### EXCHEQUER DIVISION.

Nov. 16 and 18, 1878.

(Before PALLES, C.B., FITZGERALD and DOWSE, BB.)

QUIN v. HESSION. (a)

*Practice—Pleading—Counter-claim—Connection which must exist with original cause of action—Counter-claim for prior slander in action for slander—Irrelevance.*

*In an action for oral slander the defendant delivered a defence and counter-claim, claiming damages from the plaintiff on account of slanderous words*

*alleged to have been spoken on a distinct and prior occasion to that on which the words of which the plaintiff complained were uttered. On motion to strike out the counter-claim on the ground that the slander alleged in it was not connected in any way with the original cause of action:*

*Held, that the slander alleged in the counter-claim was properly made the subject of the counter-claim.*

*One paragraph of the counter-claim alleged that frequent quarrels had taken place between the wives of the plaintiff and the defendant.*

*Held, that this paragraph should be struck out as irrelevant and embarrassing.*

*Padwick v. Scott* (2 Ch. Div. 736), distinguished on the ground that in that case relief was sought by the counter-claim not merely against the plaintiff but also against a third party.

THIS was an action for slanders alleged to have been uttered by the defendant, to the effect that the plaintiff had stolen a watch, and that he kept improper characters in a hotel of which he was proprietor. The defendant, by his defence, traversed the speaking of the words complained of, and the defamatory sense, and denied the innuendoes placed upon the words. He also delivered the following counter-claim:

1. The defendant resides in the town of Ballinrobe, in the county of Mayo, and the plaintiff resides in a small hotel, which is situated in the same street, and nearly opposite the defendant's said dwelling.

2. The defendant formerly carried on business in a very small way—as a dealer at fairs and markets—and used also to sell corn.

3. On divers times and occasions quarrels have taken place between the plaintiff and the defendant, and between their wives, but more frequently between the latter, and these are the divers times and occasions mentioned in the plaintiff's statement of claim.

4. Upon the divers times and occasions mentioned in the last paragraph, or upon some of them, the plaintiff falsely and maliciously spoke and published of the defendant the words following, that is to say, "Go along; you robbed Mr. Levington. The scales and weights could tell a good deal."

5. The defendant, by way of a separate cause of action, says that the plaintiff falsely and maliciously spoke and published of the defendant the words in the last paragraph mentioned, and meant thereby that the defendant had used false scales and weights in selling goods to Mr. Levington (who had been a customer of the defendant), and had thereby defrauded him. The defendant claims 500*l.* damages.

The present motion was that the third, fourth, and fifth paragraphs of this counter-claim should be struck out on the ground that the statements contained in the third and fourth paragraphs were irrelevant and embarrassing, and that the cause of action alleged in the fifth paragraph was irrelevant, and not connected with the original cause of action, and that these two causes of action could not be conveniently tried together.

*F. Nolan* for the plaintiff.—The third paragraph of the counter-claim is objectionable, because it brings in a number of quarrels irrelevant to the matters and even to the persons mentioned in the statement of claim. It is impossible for the plaintiff to tell what he may have to meet at the trial. The fourth paragraph is open to the same objection. It is evidently introduced as a link to endeavour to establish some sort of connection between the slander complained of in the statement of claim and that attempted to be set up in the fifth paragraph of the counter-claim. These

(a) Reported by J. GORDON McCULLAGH, Esq., Barrister-at-Law.

slanders are perfectly distinct from those alleged in the statement of claim, and should not be allowed to be made the subject of a counter-claim in this action at all. The pleader has tried to knit the occasions together in order to meet some English cases. For instance, in *Lee v. Colyer* (W. N. 1876, p. 8) a counter-claim, in an action for assault, of breach of agreement to repair was struck out as not being sufficiently connected with the subject-matter of the original claim, though the assault was alleged to have taken place during a dispute as to the breach of the agreement. [DOWSE, B.—Under the rule a discretion is allowed to the judge. The attention of the jury may very well first be directed to investigate the slander alleged by the plaintiff, and to determine the amount of damages which will compensate it, and then to that alleged in the counter-claim, and a verdict entered for the excess of one over the other.] In *Naylor v. Farrer* (W. N. 1878, p. 187), to an action brought for the dissolution of a partnership in the manure trade between the plaintiff and defendant, a counter-claim was set up for services rendered by the defendant to the plaintiff in the building trade and this counter-claim was struck out. The same course was pursued in *Nicholson v. Jackson* (W. N. 1876, p. 38), where an action had been brought by a director of a company for libel, and a counter-claim set up by the defendant for damages for loss sustained in respect of shares bought on false representations, Lindley, J. remarking, "This is one of those cases where it would be very difficult to keep the jury from mixing up the two claims." [DOWSE, B.—That the alleged slanders were not uttered at the same time may tend in the present case to facilitate their being kept distinct by the jury. But in such an action as one against a director for issuing a fraudulent prospectus I should regard a counter-claim for seduction as very inconvenient and awkward. PALLES, C.B.—I am of opinion that, if we were to strike out a counter-claim merely on the ground that it was unconnected with the subject-matter of the original action, we should be frustrating the Judicature Act.] I submit that the proper construction of the rule is, that if either the claim or counter-claim is a liquidated demand, one can be set up against the other, even though they may be disconnected; but, if both be claims for damages, they cannot be so set up, unless they arose out of the same occurrence, for this reason, that the intention of the rule was to extend to all claims the old rule as to set-off, which only allowed a set-off to be pleaded to an action for a liquidated demand. [PALLES, C.B.—Schedule r. 22 (Eng. O. XIX., r. 3) contains a clear general enactment that the right to set up any claim by the defendant against the plaintiff subsists, subject to judicial discretion to strike it out.] That only works out the enactment contained in the 3rd sub-section of the 27th section of the Act (Eng. Act of 1873, sect. 24, sub-sect. 3), and the sub-sections are all governed by the introductory words which express the intention of the sub-section—namely, that an equitable right may be set up against a legal right, or *vice versa*, so as not to render necessary any application to Chancery to restrain an action. The case of *Padwick v. Scott* (2 Ch. Div. 736) was one for breach of covenant, to which two counter-claims against the plaintiff and a third party were set up by the defendant, claiming the execution of certain alleged trusts; and it was held by Hall, V.C., that both counter-claims must be excluded as

not being sufficiently connected with the subject-matter of the action, and as calculated unduly to embarrass and delay the plaintiff. [DOWSE, B.—No case has been cited to us in which it is laid down that, where the claims are disconnected, that *per se* renders them unfit to be tried together. If we are to lay down the principle that there must be some connection between claim and counter-claim, what is that connection to be? Is it that the occurrence must have taken place the same hour, the same day, or the same year? Again, if that principle is established, in every case where it is desired to set up a counter-claim we shall have a colourable connection established between it and the original claim, and then we shall perhaps end by having three trials—first on the claim, then on the counter-claim, and lastly on whether there was sufficient connection between them to allow of one being counter-claimed against the other. If a connection is necessary, and some sort of connection is made out by the pleadings, the question will arise, is that connection so material that the counter-claim can be properly set up? That point can be put in issue by the reply to the counter-claim, and it would have to be left to the jury to try whether there was sufficient connection. This seems to me the crucial test of the question.] I contend that, on the true construction of sect. 27, sub-sect. 3 (sect. 24 of Eng. Act of 1873, sub-sect. 3), the words "all such relief relating to or connected with the original subject of the cause or matter" are to be read as qualifying the entire section, whether the counter-claim bring in a third party or not.

*A. Meldon*, for the defendant, *contra*.—The terms of the 7th sub-section of sect. 27 of the Judicature Act (English Act of 1873, sect. 24, sub-sect. 7), that the court shall grant "all such remedies whatsoever as any of the parties may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them," together with the provisions of sub-sect. 3 of the same section, that the court shall grant to any defendant, in respect of any equitable or legal right claimed by him, all such relief against any plaintiff as might have been granted in any suit instituted for that purpose by the same defendant against the same plaintiff, raise a strong presumption that no limit was intended to be put on the nature of the relief which a defendant might claim from a plaintiff. Neither in the schedule rule (Eng. Ord. XIX., r. 3) nor in r. 9 of Order XXI. (Eng. Ord. XXII., r. 9), which regulates the practice as to setting aside counter-claims, is there a suggestion of any limitation on the right of the defendant to set up any claim whatsoever, unless in the opinion of the court the counter-claim cannot be conveniently disposed of. In no case cited on the other side did the decision rest upon the want of connection between claim and counter-claim further than to the extent that the want of connection might form an element of convenience. In *Bartholomew v. Rawlings* (W. N. 1876, p. 56) a counter-claim for return of money paid as deposit on a sale induced by false representation made by the defendant and a third party, was allowed in an action to recover the balance of purchase-money, Archibald, J. stating that, although some delay might be caused, he could not say that the claims were of such an incongruous kind as to be unfit to be tried together. [PALLES, C.B.—That was a case in which

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a third party was brought in. The remarks of Archibald, J. in that case do not apply to such a case as the present. Those cases in which a third party is brought in are not exactly in point. If the defendant had to bring in a third party as a defendant to his counter-claim, he would be in a much worse position than he is.] In *Atwood v. Miller* (W. N. 1876, p. 11) a counter-claim for damages as tenant from year to year of the plaintiff, and for specific performance of an agreement to grant a lease, was allowed against the plaintiff's claim for rent; and in *Cappeleus v. Brown* (W. N. 1875, p. 231), to a claim for the price of timber a counter-claim was allowed for insufficient delivery in respect of other cargoes delivered under a different and prior contract. As to the fifth paragraph, it only draws the innuendo. The quarrels between the wives of the plaintiff and the defendant are only brought in as part of the narrative; just so are the addresses of the plaintiff or defendant. We admit that they are surplusage, but in the forms in the appendix to the orders there are numbers of statements which are only introduced as part of the narrative, and are really immaterial to the issue. [PALLES, C.B.—In that respect all the forms might be said to be embarrassing. Dowse, B.—The forms are by no means obligatory.] According to the titles of the counter-claims given in the forms, the counter-claim seems to be regarded as an entirely new action; for instance, Form 10 (Eng. F. 14), "between R. W., plaintiff, and O. S. and J. B., defendants (by original action); and between the said O. S., plaintiff, and the said R. W. and J. W., defendants (by counter-claim)." The words "by original action" are contrasted with "by counter-claim," as if they indicated a claim of a co-ordinate nature.

*F. Nolan* in reply.—As to the question of sufficient connection between claim and counter-claim being a matter of embarrassment at the trial, the judge can then, if he likes, strike it out. [PALLES, C.B.—That does not seem clear, as schedule rule 22 (Eng. Ord. XIX., r. 3) says, "on the application of the plaintiff before trial," and Order XXI., r. 9 (Eng. Ord. XXII., r. 9), mentions the order as being applied for "at any time before reply."] In *Cappeleus v. Brown* (*ubi sup.*) Quain, J. says: "It was the scandal of the past procedure that A. might have a liquidated demand against B., and B. a claim for damages against A., and yet B. could not set up his claim in an action by A., but must bring a fresh one."

PALLES, C.B.—The third and fourth paragraphs of this counter-claim must be struck out. They are obviously introduced by the pleader to make out some connection between the cause of action in the statement of claim and counter-claim, but they bring in matters, such as the disputes between the wives of the plaintiff and defendant, wholly immaterial. Their immateriality is admitted, and they could not but prove embarrassing upon the trial, because they would lead to the introduction of irrelevant evidence. As regards the fifth paragraph, upon which arises the principal question in the case, whether a defendant in an action of slander can bring a counter-claim claiming damages for slanderous words uttered on another occasion, Mr. Nolan has contended for two propositions: first, that in accordance with the provisions of the Judicature Act nothing can be the subject

of a counter-claim which is not connected with the subject-matter of the original action; and, secondly, that on the ground of convenience these actions for slander ought not to be tried together. This is I believe the first time that such a question has been brought before any Irish court since the Judicature Act, except in the case cited at the bar of *Morissy v. Cosgrave*. We have been referred to a good many English decisions, but I think that they were all decided upon special facts, except one, *Padwick v. Scott* (2 Oh. Div. 736), a case which does seem to support the contention of the plaintiff. This I shall mention more particularly presently. I am of opinion that, upon the true construction of the Judicature Act, and the rules for carrying it into effect, any claim of a defendant against a plaintiff, whether connected or disconnected with the original subject-matter of the action can be made the subject of a counter-claim, and if it be embarrassing or inconvenient, the only remedy is by applying to strike it out. This opinion I ground upon the 3rd sub-section of the 27th section of the Judicature Act (English Judicature Act 1873, sect. 24, sub-sect. 3), and the 22nd schedule rule (Eng. Ord. XIX., r. 3). On reading the section of the Act it might at first sight appear that the relief against the plaintiff mentioned in that section as given to a defendant "in respect of any legal estate, right, or title claimed or asserted by him," was something connected with land, and if so, we would have no jurisdiction to allow this counter-claim before us. But by schedule rule 22 (Eng. Ord. XIX., r. 3), which is part of the Act, the remedy is extended, and a general right is given to a defendant to counter-claim against a plaintiff. The words of the Act to which I refer are these: "The said courts respectively, and every judge thereof, shall also have power to grant and shall grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title, claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading; and as the said courts respectively, or any judge thereof, might have granted in any suit for that purpose by the same defendant against the same plaintiff or petitioner." So far there is no limitation to the relief which may be claimed by counter-claim; but a limitation is contained in the words which follow: "And also all such relief relating to or connected with the original subject of the cause or action, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim, pursuant to any rule of court or any order of the court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose." It has been contended that these words, "relating to or connected with the original subject of the cause or matter," qualify the nature of the relief which may be sought by counter-claim by a defendant against a plaintiff alone, as well as against a plaintiff "and any other person;" and in support of this contention the case before Hall, V.C., which I have mentioned (*Padwick v. Scott*), and that before the Master of the Rolls, have been cited. I think, however, that the words qualify

only that portion of the section with which they are in immediate connection, namely, a counter-claim which seeks relief against a third party as well as against the plaintiff. This construction is strengthened by schedule r. 22 (Eng. Ord. XIX., r. 3), than which it is impossible to conceive wider phraseology: "A defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff any right or claim, whether such set-off or counter-claim sound in damages or not;" and also by the concluding words, "The court or judge may, if in the opinion of the court or judge such set-off or counter-claim cannot be disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof;" clearly showing that the power of counter-claiming by the defendant against the plaintiff was to be limited by convenience, and by convenience alone. No case has been cited in which a different rule has been laid down. The case before Hall, V.C. is distinguishable on the ground that in it the counter-claim sought relief against other parties as well as against the plaintiff, and the case before the Master of the Rolls was heard on affidavit, and was decided on general facts, and did not determine the general principle. Then comes the second question, whether in the present case the counter-claim is of such a nature that it cannot conveniently be disposed of at the same time as the original claim. On this point I am of opinion that there is nothing to hinder both being disposed of at the same time, but, on the contrary, that it will be doing complete justice to both parties to have them tried together.

FITZGERALD, B. concurred.

DOWSE, B.—I agree with the judgment of my Lord Chief Baron. I think that, in order to carry out the intention of the Legislature, it is incumbent upon us to give a liberal construction to the Judicature Act and rules. It appears to me only to be necessary to read the schedule rule and the rules made by the judges in pursuance of the Act to come to the conclusion that a counter-claim was contemplated to be to all intents and purposes a cross action. This is apparent even from the title of the defence and counter-claim in form 10 of Appendix C. (Eng. App. C. form 14), to which we have been referred by Mr. Meldon. A counter-claim then, being a cross action, is not affected by the considerations which limit claims of set-off, and need not therefore be *ejusdem generis* with the subject-matter of the original action. Since, accordingly, by schedule r. 22 (Eng. Ord. XIX., r. 3) and by Order XXI. (Eng. Ord. XXII.) a counter-claim is to be dealt with as if it were a statement of claim in a cross action, the defendant is entitled to set up anything by way of counter-claim for which he might have brought an action against the plaintiff, subject to judicial control on the ground of convenience. This control might be well exercised if the counter-claim was on entirely different lines from the claim of the plaintiff, or was, in the opinion of the court, calculated to unduly dominate or overshadow the case of the plaintiff, in a somewhat similar way to the control which was formerly exercised in the case of joinder of causes of action under the Common Law Procedure Acts. The question is in each case one of justice and of propriety, and no hard and fast line can be laid down.

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In the case before us the fact of each of the causes of action being distinct and independent appears to me to facilitate their being satisfactorily dealt with by a jury simultaneously; because, where there are slanders and cross slanders uttered at the same time, the jury are apt to mix them up, and to experience a difficulty in estimating the respective injuries inflicted, but, where they are disconnected and separate, the jury can form an estimate of each without any disturbing influence, and the balance can then be struck in favour of the plaintiff or the defendant as the case may be. There is no English authority to the contrary of this, and, even if there were, I should not be disposed to follow it, if by a court of only co-ordinate jurisdiction.

Order accordingly.

## House of Lords.

Nov. 8 and 12, 1878.

(Before the LORD CHANCELLOR (Cairns), Lords O'HAGAN and SELBORNE.)

WARD v. HOBBS. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Contagious Diseases (Animals) Act—Sale of goods—Implied warranty—Sale "with all faults"—Breach of statutory duty.*

*The Contagious Diseases (Animals) Act (Stat. 32 & 33 Vict. c. 70) enacts, sect. 57: "If any person exposes in a market or fair, or other public place . . . any animal affected with a contagious or infectious disease, he shall be deemed guilty of an offence against this Act, unless he shows . . . that he did not know of the same being so affected, and that he could not with reasonable diligence have obtained such knowledge."*

*Held (affirming the judgment of the court below), that the mere fact of exposing for sale in a market animals which were to the knowledge of the vendor suffering from such disease did not, in the absence of an express warranty, and of any fraud or concealment on the part of the vendor, create an implied warranty under the statute which would make him liable to the purchaser for damages sustained by him in consequence of the condition of the animals.*

*A breach of a statutory duty does not necessarily give a right of action to the person wronged by such breach.*

THIS was an appeal from a judgment of the Court of Appeal (Bramwell, Brett, and Cotton, L.JJ.), reported in 37 L. T. Rep. N. S. 654, and 3 Q. B. Div. 150, reversing a decision of the Queen's Bench Division (Mellor and Lush, JJ.), reported in 36 L. T. Rep. N. S. 511, and 2 Q. B. Div. 331, in favour of the plaintiff.

The plaintiff and defendant were both farmers near Newbury. In Sept. 1875 the defendant sent some pigs to be sold by auction at Newbury market. Among the conditions of sale were the following:

4. The lots, with all faults and errors of description, if any, to be paid for and removed at the buyer's expense immediately after the sale.

6. No warranty will be given by the auctioneer with any lot, and as all lots are open to inspection previous to the commencement of the sale no compensation shall be made in respect of any fault or error of description of any lot in the catalogue.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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The plaintiff purchased the pigs for 44*l.*, which was admitted to be a fair price; but immediately after the sale they showed symptoms of typhoid fever, and all but one died, and they infected other pigs of the plaintiff, which also died. The plaintiff then brought this action for the damage he had sustained.

The case was tried before Brett, L.J. at the Berkshire Summer Assizes in 1876, when the jury found a verdict for the plaintiff, finding expressly that the defendant was aware that the pigs were infected with the disease when he sent them to the market.

The learned judge reserved leave to move to enter a verdict for the defendant, but the rule was discharged by the Queen's Bench Division. This decision was reversed by the Court of Appeal, as above mentioned, on the ground that the defendant did not by taking the animals to a public market represent that they were free from disease.

The plaintiff then appealed to the House of Lords.

*H. Matthews, Q.C. and Bros* appeared for the appellant.—The arguments urged appear sufficiently from the judgments of their Lordships. In addition to the cases mentioned in the judgments, the following were cited or referred to in the course of the argument:

*Hill v. Balls*, 27 L. J. 45, Ex.; 2 H. & N. 299;  
*Cooke v. Waring*, 9 L. T. Rep. N. S. 257; 32 L. J. 332 Ex.;  
*Reg. v. Bernard*, 7 C. & P. 784;  
*Hill v. Gray*, 1 Stark. 424;  
*Jones v. Bowden*, 4 Taunt. 847;  
*Bichols v. Bannister*, 34 L. J. 105, C. P.; 17 C. B. N. S. 708;  
*Peto v. Blades*, 5 Taunt. 657;  
*Shepherd v. Kain*, 5 B. & A. 240;  
*Blakemore v. Bristol and Exeter Railway Company*, 8 E. & B. 1035;  
*Brass v. Maitland*, 6 E. & B. 470;  
*Durnby v. Bollatt*, 16 M. & W. 644;  
*Emmerton v. Matthews*, 7 H. & N. 586.

*Benjamin, Q.C. and H. D. Greene*, who appeared for the respondent, were not called upon to address the House.

Nov. 12.—Their Lordships gave judgment as follows:

The LORD CHANCELLOR (Cairns).—My Lords, in this case the respondent sold a certain number of pigs by auction at Newbury market, and the appellant became the purchaser of those pigs at the auction. There were conditions of sale under which they were sold, and the fourth and sixth of those conditions ran in these words: [His Lordship read the conditions set out above, and continued:] It turned out that almost immediately after the sale the pigs, in the hands of the purchaser, showed symptoms of being affected with typhoid fever, a contagious and infectious disease; they rapidly died off, and nearly all of them ultimately died. If the finding of the jury, that the pigs were infected with this disease at the time of the sale, and that the respondent knew it, is a correct inference from the facts of the case, then, beyond all doubt, the respondent was, both morally and legally, highly culpable. But the question is, Is there a right of action on the part of the appellant? In his claim he puts the case in this way: he says that by warranting the pigs to be free from any infectious disease, the defendant induced him to buy them; and

then he alleges that "even if the defendant did not warrant the pigs, the plaintiff says that the defendant, either knowingly, or having good reason to believe that the pigs were suffering from an infectious disease, offered them for sale at a certain open and public market held at Newbury, and sold thirty-two of them to the plaintiff for 44*l.*;" and then he says that "the defendant knew that the plaintiff was a farmer, and that the pigs would be placed with other pigs, and would also be turned into certain stubble fields." Now with regard to the allegations in the statement of claim, undoubtedly there was no warranty, and the case in that respect is unsupported. As to the other allegation, that simply from the fact of sending the pigs to the market when they were in this state a right of action arises, that was not the ground on which the case was mainly rested at your Lordships' bar. The counsel for the appellant contended that, from what took place at the trial, and afterwards, any technicality founded upon the claim was out of the question, and the appellant might succeed by showing that, on the facts as they were proved, there was any right of action on his part on any ground whatever. The appellant's contention at your Lordships' bar was this, that the respondent had made a representation which was untrue in point of fact, and that the action lay as in the nature of an action for deceit. Now, I apprehend there can be no doubt of this proposition, that if a man expressly states upon a sale that he gives no warranty, and that the goods sold must be taken with all their faults, but goes on to say expressly in addition to that, that so far as he knows, or believes, or has reason to believe, the goods are free from any particular fault, and that the animals (if it be animals that are sold) are free from any disease, if he expressly states that, and if it can afterwards be proved that the animals were tainted with the disease to which he referred, then there can be no doubt that, notwithstanding the negation of warranty, an action would lie for deceit for the false representation. There is no difficulty in reconciling the two express statements—one that he does not warrant, and that the property must be taken with its faults, and the other that, so far as he knows or believes, the article sold is free from a particular fault. Upon that part of the case there can be no controversy. But the question here is, not how two express statements of the kind that I have described are to be made to stand together, but whether, in addition to the express negation of warranty which I have described, there was any other representation at all. Now, any representation in words there clearly was not in this case. The only statement actually made was the one contained in the two conditions of sale which I have read. Beyond that not a word was said, or is alleged to have been said, on the part of the auctioneer; and the respondent never in any way came in contact with the appellant. But what was contended at your Lordships' bar was this, that, although there was no express representation made in words, yet there was conduct on the part of the respondent which amounted to a representation; and it was endeavoured to make that out in this way: it was said the Contagious Diseases (Animals) Act (32 & 33 Vict. c. 70), s. 57, enacts that any person who sends an animal, having at the time upon it an infectious or con-

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tagious disease, to any public or open place, shall be guilty of an offence under this Act, unless he shall prove that he was not aware that the animal was so tainted with disease. And it was said, therefore, that the respondent here, from the mere fact of sending his pigs into a public market, must be taken (being of course held to be aware of the law upon the subject) to be representing that he was complying with, or, at all events, not infringing the law, and that the animals were not tainted with any infectious or contagious disease. I think it always desirable to abstain, as far as possible, from expressing an opinion upon a case which is not actually the case under consideration, and I desire here to be held free from expressing any opinion as to what, in a case in which there was no negation of warranty, no statement such as I have read from the two conditions of sale in this case, ought to be the law as to a man who sent his pigs to a public market, knowing them at the time to be tainted with disease. I observe that in the case of *Bodger v. Nichols* (28 L. T. Rep. N.S. 441), in the Court of Queen's Bench, Blackburn, J. seems to have thrown out an opinion that, in a case of that kind, there being nothing upon one side in the shape of statement or negation, and there being simply the fact of a man sending diseased animals to a public market to be sold on the other, that must be held to be a representation by conduct that the animals were free from disease, and that the person so sending them might be liable for the consequences of that representation if it turned out to be untrue. I desire, so far as I am concerned, to hold myself unpledged, if such a case had to be considered. But that, as it seems to me, is not the case which your Lordships have now to consider. You have here to consider an actual, clear, unqualified statement in writing, on the one hand, and no statement whatever, even in mere words, on the other hand, but an attempt to raise a conclusion as to an implied statement from conduct. The words of the statement on the one side are perfectly clear; they are that the vendor will not warrant the goods—that they are open to inspection, that the purchaser might inspect them, and that the purchaser must take them with all their faults. Now I hold that, in order to countervail or qualify that, and to cut it down, there must be something as clear in statement in an opposite direction. If there had been that representation in words which I began by supposing, namely, that notwithstanding that negation of warranty, the vendor said that he believed the animals were free from disease, that might be the foundation of an action for deceit; but it seems to me that there is no authority and no principle upon which, in the face of a clear and unqualified statement on the one hand, such as I have described, that the purchaser must take the articles with all their faults, you are to raise, from the mere circumstance of his sending the animals to the market, the implication of a representation on the other hand that the animals were, in the belief of the vendor, free from disease. I therefore, on this part of the case, entirely agree with the unanimous conclusion of the Court of Appeal. But there were some minor points in the case suggested as arguments upon which the appeal might be sustained, and I will refer to them very shortly. The first of them was this: It was said that there was here a breach of statutory duty,

and that wherever you have a breach of statutory duty and any person wronged by it, the person wronged has a right of action. Now, I do not stop to consider how far that can be supported as a general proposition. A good deal might be said upon that subject, but it is sufficient to point out to your Lordships that the statutory duty here is of this kind; it is a duty not to send infected animals into a public place—for an obvious reason, lest they should by contact or neighbourhood taint other animals, and thereby occasion injury to the public. If in that state of things some person had come forward and said, "You, the respondent, sent tainted animals into this public place, and my animals in that public place, by contact or neighbourhood, were infected, and I suffered a loss," then I could understand the argument. But that is not what occurred here. What occurred in the public place was the buying and the selling, and no tainting of other animals, although it is said that after the pigs became the property of the purchaser, and were taken to his farm, they tainted other animals which were there. But that is not the gist of the enactment, and therefore it appears to me that this argument altogether fails. The next point was this: It was said that that which was sold here was not really a lot of pigs, but a mass of disease—of typhoid fever. To that all I can say is, that a pig having typhoid fever appears to me not to lose its identity any more than a man having typhoid fever ceases to be a man; and therefore the thing sold was that which it was professed to sell. Then again it was said that what was sold here was not merely infected by disease, but was a noxious and a dangerous thing, certain not only to be useless in itself, but to be a source of evil and of danger wherever it might be carried, and it was likened to the case of a person selling explosive substances without any warning being given to the purchaser, and without its being known or made clear that the possession of the substance was attended with danger. There again I should not wish to express any opinion as to how far that argument might be urged in a case where there was no express statement upon the subject of the thing sold; it is sufficient to say that it seems to me that where you have an article sold with a statement, not merely that the vendor does not warrant it, but that the purchaser must take it with all its faults, this point really becomes a branch of the first point to which I have referred; and you cannot therefore contend that the purchaser is afterwards to be at liberty to turn round and say, "There was this fault in the article which I bought which makes it a dangerous article for me to become the possessor of." Those were the arguments which your Lordships heard urged with great skill and ingenuity by the counsel for the appellant; but it appears to me that they all failed, and that the decision of the court below ought to be affirmed. I move your Lordships, therefore, that the appeal be dismissed with costs.

LORD O'HAGAN.—My Lords, I do not regard this case as free from difficulty; but, on the whole, I see no sufficient reason for declining to concur with the Court of Appeal. The matter, as presented by the appellant, is of the first impression; no authority supports his contention, and its success would involve the establishment of a new principle, and the recognition of a legal presump-



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tion heretofore unknown. The statement of claim relies upon a warranty, but makes no case of deceit, or fraud, or failure of consideration, and contains no averment that the plaintiff was misled by any representation of the defendant. Warranty there was none; but, on the contrary, the conditions of sale expressly declined the giving of any, and purchasers were informed that they might make what inspection they pleased before the commencement of the sale, and that no compensation would be given "in respect of any fault or error of description of any lot in the catalogue." The very ingenious and exhaustive argument of the counsel for the appellant addressed itself to several points which, as I observe, were not made in the pleadings, and were dealt with sufficiently by the Lord Chancellor; but the real question is that which alone seems to have been raised and considered in the courts below, whether the offer for sale in open market, of itself, under the circumstances proved in evidence, amounted to a representation of soundness imposing responsibility on the defendant for the loss which the plaintiff undoubtedly incurred? I assume, for the purpose of the argument, according to the verdict of the jury, that the defendant knew of the diseased condition of the pigs when he sent them to market, although for my own part I am more than doubtful of the correctness of the finding in that respect. But, taking it as proved that the animals were known by the respondent to have disease, I should not be prepared to say, even in the absence of the conditions of sale on which he relies, that the non-disclosure of the fact would, without more, have cast liability for loss upon him. We must deal with the law as we find it, even though we might desire, in cases of bargain and sale, to compel more full and candid statements on peril of grave responsibility; and that law is stated thus by Judge Story in his book on Contracts (at p. 511): "The general rule, both of law and equity, in respect to concealment, is that mere silence with regard to a material fact which there is no legal obligation to divulge will not avoid a contract, although it may operate as an injury to the party from whom it is concealed." And again (p. 551): "Although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee, yet, under the general doctrine of *caveat emptor*, he is not ordinarily bound to disclose every defect of which he may be cognisant, although his silence may operate virtually to deceive the vendee." I take it that this is a correct statement, and, if so, as there was not in the present case any legal obligation to divulge the knowledge assumed to belong to the defendant, his simple failure to divulge it did not nullify the contract, and could not be taken, as the appellant insists, either as a representation of the soundness of the animals or as a representation that he did not know them to be unsound. If the vendee bought at his own risk and in reliance on his own inspection, without requiring a warranty, which he might have made the condition of his purchase, and if there was not—and no one says there was—any artifice or disguise on the part of the vendor, for the purpose of concealment, then I should be disposed to hold, if it were necessary to decide upon such a state of facts, that the mere "ence, which he was not asked to break, did not

impose responsibility. However, the case of the respondent is different and stronger, and we are not required to pronounce such a decision. The argument of the appellant rests upon implication, and inference arising from conduct; and no doubt conduct may amount to representation as clearly as any form of words. But the express declaration made in the conditions of the sale, in my opinion, forbade the implication and repelled the inference. The purchaser was informed that he would have no warranty, and that he was not to expect compensation for any fault. He was told to inspect for himself and to judge for himself, and warned that he must take the consequences of any error he might commit in making a bad bargain. He had the clearest intimation that the vendor, whatever might be his state of knowledge, expressly refused to give any help to a right decision or make any disclosure of any kind. The legal result is stated very plainly by Lord Ellenborough, in the case of *Baglehole v. Walters* (3 Camp. 154), the authority of which has never, so far as I know, been called in question: "Where an article is sold with all faults I think it is quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser. The very object of introducing such a stipulation is to put the purchaser on his guard, and to throw upon him the burden of examining all faults, both secret and apparent. I may be possessed of a horse which I know to have many faults, and I wish to get rid of him for whatever sum he will fetch. I desire my servant to dispose of him, and, instead of giving a warranty of soundness, to sell him with all faults. Having thus laboriously freed myself from responsibility, am I to be liable if it be afterwards discovered that the horse was unsound?" Now the defendant in this case did precisely what was held by Lord Ellenborough to protect a vendor against liability for all faults, "secret or apparent." And, I repeat, it has not been pretended that he was guilty of any contrivance to conceal or to deceive. The conditions of sale, by declining to compensate, suggested that there existed, or might exist, a state of things which, but for the condition, would entitle to compensation. It at once challenged inspection, and aroused attention to the probable necessity of making it, and so left the purchaser without reason to complain. How is the force of this authority sought to be evaded? Only, so far as I understand the argument, by reliance on the Contagious Diseases (Animals) Act. It is said that this Act, making the exposure in a market of animals affected by contagious disease a criminal offence, warrants purchasers in presuming that persons so exposing them intend to represent them—and represent them, in fact—as free from such disease; and that therefore responsibility attaches as on a warranty created through a representation by conduct. This is very subtle and not very tangible reasoning, and it has failed to satisfy my mind. In the first place, the condition of sale, by its express refusal of warranty or compensation, appears to me to negative the existence of any representation of the kind. It is distinct notice to all the world that there may be faults which the vendor does not care to disclose, for which he will not be accountable. Next the assumption, and the gratuitous assumption, is, that vendors and purchasers

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generally know not merely of the existence but of the terms of the Act, and of its penal operation, and of its effect in probably deterring the owners of unsound cattle from bringing them to sale. There may have been no such knowledge; and even if it existed, what reason have we for supposing that men will not violate the law, and brave its penalties, taking the risk of discovery and the chance of escape? What right or reason has anyone to presume that the dealer, by the fact that he offers to sell, demonstrates, or intends to demonstrate, his compliance with the Act, and consequently affirms the soundness of the animal? In this case, if the finding of the jury was correct, the defendant, knowing that he would be guilty of a breach of the statute subjecting him to punishment, ventured on it notwithstanding, and got off scot free, for his pigs passed the inspector, and were pronounced to be without disease. Many similar transactions may and must take place, for obedience to the law cannot always be expected when evasion of it may be the source of profit; and I find it impossible to hold that the mere appearance of animals in a market can be reasonably presumed to imply their immunity from contagious illness in any case, and certainly not in a case in which the owner negatives any such implication by refusing to warrant, and insisting on an acceptance "with all faults." I cannot see any real relation between the penal statute and the contract we are considering; and I agree with Brett, L.J. that the attempt to connect them is illusory. The Act was passed for the benefit of the general public; it has nothing to do with the bargains of particular persons. Under such circumstances as are now before us the presumption on which the appellant rests his claim to recover the compensation which the conditions of sale forbade him to expect, seems to me to have no foundation in fact or law; and I concur with my noble and learned friend that the appeal should be dismissed with costs.

Lord SELBORNE.—My Lords, I feel compelled to agree in the judgment moved by my noble and learned friend on the woolsack, though I confess I do so with some reluctance. Upon the question of implied representation I have never felt any doubt. Such an implication should never be made without facts to warrant it; and here I find none, except that in sending for sale, though not in selling, these animals, a penal statute was violated. To say that every man is always to be taken to represent in his dealings with other men that he is not to his knowledge violating any statute is a refinement which, except for the purpose of producing some particular consequence, would not, I think, appear reasonable to any man. The argument which for some time most weighed with me was, that for a man to sell to another, without disclosing the fact, an article which he knows to be positively noxious, and the other man does not know to be so, even though he expressly negatives warranty, and says that the purchaser must take his bargain with all faults, is an actionable wrong. I confess I should not be sorry if the law were so; but I know of no authority for the proposition that such is the law, even with respect to the particular case of infectious disease in animals sold. The very nature of the condition that the buyer is to take the animals with all faults implies that they may be diseased, without any distinction between infectious and non-infectious

disease, and I cannot think that the legislation which has recently taken place in the public interest against particular acts tending to propagate such disease can make that an actionable wrong as between the parties to a private contract, which would not be so without it.

*Judgment appealed from affirmed and appeal dismissed with costs.*

Solicitors for the appellant, *Abbott, Jenkins, and Abbott*, for *Lucas*, Newbury.

Solicitors for the respondent, *Rickards, Walker, and Maude*, for *Cave*, Newbury.

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT LINCOLN'S INN.

Nov. 15, 16, 19, 22, and Dec. 2, 1878.

(Before JAMES, BAGGALLAY, and THESIGER, L.JJ.)

THOMAS V. ATHERTON. (a)

*Partnership—Loss arising from negligence of managing partner—Suit for contribution—Arbitration—Assent of copartners to arbitration—Charge of fraud—Costs.*

*Where the managing partner of a colliery works beyond the limits of the partnership colliery without proper inquiry as to such limits, and, after notice from the adjoining proprietor, continues his workings without consulting his copartners, when it is evident that his right to work in the disputed area is extremely doubtful, and the utmost possible profits very small, his copartners are not liable to contribute to the damages awarded to the adjoining proprietor in an action against the managing partner; and the fact that they have assented to the action being referred to arbitration does not in any way affect their liability.*

*The copartners, in their defence to his suit, alleged that the managing partner had wilfully and knowingly trespassed upon the adjoining colliery but failed to prove that allegation:*

*Held, that, as no additional costs had been occasioned by the allegation, the plaintiff could not be relieved from any part of the costs.*

*Decision of Bacon, V.C. affirmed on different grounds.*

THIS was an appeal from a decision of Bacon, V.C.

The suit was instituted by the managing partner of certain coal workings in the Forest of Dean against his copartners for contribution in respect of damages awarded by reason of a trespass on the coal property of an adjoining proprietor.

The facts of the case were stated as follows by James, L.J. in delivering the judgment of the Court of Appeal.

Adjoining the copartnership workings there was a colliery called the Hopewell Colliery, and adjoining that was a colliery belonging to a Mrs. Lucy Loxley, and called the Thatch or Independent Colliery. These collieries are formed under what are called "gales" in the Forest of Dean. The coal mines in the Forest of Dean belong to the Crown subject to customary rights of remote antiquity in certain persons called "Free Miners" to take and hold and work portions of the coal

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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field. Two of those portions were the Hopewell and Thatch collieries, which were and had been in existence at the time of and long previously to the passing of the Dean Forest Act 1838 (1 & 2 Vict. c. 43). That Act was passed for, amongst other purposes, the objects mentioned in the 24th and 26th sections of the Act, and which may be briefly stated thus: The commissioners were to ascertain who the persons were who were entitled to any existing gales or any estate or interest therein, and were to cause a plan or plans to be made, upon which the situation of the gales was to be delineated, and were to make a schedule or description of the gales to accompany the plans. All persons interested, or claiming to be interested, in any gale were to send in claims in manner therein mentioned, and all persons not sending in claims as therein mentioned were to be barred from all right to any such gale, and all benefit or interest therein.

By their award, dated the 8th March 1841, the commissioners awarded the Thatch or Independent colliery to certain persons under whom Lucy Loxley derived title thereto. And they awarded the Hopewell colliery to certain persons under whom one Peter Teague and others derived title. Teague and some of his co-owners, but not all, formed a working partnership under the name of Peter Teague and Co. The plaintiff Thomas was a co-owner to the extent of one-twelfth, but was not a member of the firm of Peter Teague and Co. Peter Teague and Co. worked that colliery and other coal properties similarly situated, under an understanding with their co-owners as follows, viz., the coal was considered as worth so much royalty, and Peter Teague and Co. divided the royalties on the workings between themselves and their co-owners. Peter Teague and Co. being then owners of the greater part of the colliery and permitted on that understanding to work the shares of the others, in the year 1859 entered into an agreement with the plaintiffs' firm of Trotter Thomas and Co. as follows:

Memorandum of an agreement entered into the 22nd day of February 1859, between Trotter Thomas, and Co. of the one part, and Peter Teague and Co. of the other part.

Trotter Thomas and Co. agree to take and work the unworked coal in Hopewell, in Wimberry colliery, on the east and west of the ridge in Hopewell Bottom in the north-eastern direction, and cut on the eastern side of the ridge a new deep level according to the terms of the award, working the coal on each side of the ridge in a workmanlike manner, rendering and paying to Peter Teague and Co., the proprietors of the colliery, sixpence per ton for all large coal sold, and threepence per ton for all small or lime coal sold. They also agree to pay all poor rates and the Crown royalty of twopence per ton. Peter Teague and Co. hereby agree to let to the said Trotter Thomas and Co. the above award of coal upon the terms above mentioned, and in addition to allow the use of the plates now laid in the roads of the level now in work excepting one hundred yards which are required for the Bush pit. Should Trotter Thomas and Co. wish to give up the said colliery at any time, they shall be at liberty to do so by giving three months' notice to Peter Teague and Co., and leaving the then workings open and free to Peter Teague and Co. without demanding any compensation for opening the levels or pits. All castings, &c., laid down by the said Trotter Thomas and Co. may be reserved by them if not taken to at a valuation at the close of the term by Peter Teague and Co.

The plaintiff Thomas, who was the managing partner of Trotter Thomas and Co., and had the sole superintendence of the operations of that company with regard to the Hopewell colliery,

worked that colliery under the agreement of the 22nd Feb. 1859, and, in doing so, worked into certain coal which Mrs. Loxley claimed as part of the Thatch or Independent colliery.

The plans annexed to the award of the commissioners under the Dean Forest Mines Act 1838 showed this disputed area of coal as part of the Thatch colliery. The plaintiff contended that the inaccuracy of the plans was notorious in the district, and that the letterpress, which accompanied and explained the plans, showed that the area in question lay within the limits of the Hopewell colliery. Bacon, V.C., held that this contention was established, but the Court of Appeal arrived at a different conclusion.

Long before the passing of the Dean Forest Mines Act 1838, an agreement, dated the 27th Oct. 1802, had been entered into between James Teague the elder and three persons named Bennett, Lewis, and Morse, who were at that time co-owners with him of the Thatch colliery, the agreement being in substance one for a partition of the colliery, a certain part of which was to belong to James Teague the elder in severalty; but, under another agreement made about the same time, Isaiah Birt was to have one-third share of that part of the colliery.

Both James Teague the elder and Isaiah Birt were dead at the time when the commissioners under the Act investigated the titles to the mines, and no claim on behalf of their representatives was carried in, and the whole of the Thatch colliery was awarded to the persons who, under the partition agreement of 1802, were entitled to the other parts of it.

In 1864, the plaintiff, having carried the workings on behalf of Trotter Thomas and Co. into the disputed area, Mrs. Loxley, gave formal notice to the plaintiff and Peter Teague that they were trespassing, and required an account of coal gotten, and called on them to desist from encroaching on the Thatch colliery.

The plaintiff and Peter Teague thereupon took counsel's opinion, and were advised that they might possibly be able to establish that the persons under whom Mrs. Loxley derived title were by the agreement of 1802 made trustees for James Teague the elder and Isaiah Birt of that part of the colliery which was agreed to be given up to them, and which was said to include the area now in dispute.

The plaintiff and Peter Teague were the persons principally interested in such right, if any, as could be established in this way, and a bill was prepared on their behalf to enforce this equitable title, but the bill was never filed and no proceedings were actually taken.

In answer to Mrs. Loxley's notice the plaintiff claimed title under the agreement of 1802, and alleged that possession had ever since been held according to that agreement. Peter Teague and the plaintiff also served on Mrs. Loxley a counter-notice by which they claimed to be "owners" of the coal in the disputed area, and warned her not to trespass upon it.

In Nov. 1869 Mrs. Loxley commenced an action against the plaintiff and Peter Teague for trespass on her colliery.

On the 12th Aug. 1870, by an agreement in writing between Mrs. Loxley of the one part, and the plaintiff and Peter Teague of the other part, the matters in dispute were referred to arbitration.

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After reciting that Mrs. Loxley claimed to be the owner in fee of the Thatch Pit colliery, the agreement proceeded: "And whereas the said John Trotter Thomas and Peter Teague for themselves and others claim to have been, and to be entitled at law or in equity to certain parts of the said colliery, and to work or get the coal which may have been or may be found or got from within a certain area or certain limits thereof. And whereas the said Lucy Loxley alleges that large quantities of coal have been wrongfully worked and gotten by the said John Trotter Thomas and Peter Teague from within the area or limits of the said colliery so as aforesaid claimed by them, and in parts of the said colliery beyond such limits or area, and they also allege that large quantities of coal have been wrongfully worked or gotten by the said Lucy Loxley from within the said area or limits, and disputes and differences have arisen between the said Lucy Loxley, and the said John Trotter Thomas and Peter Teague in respect thereof, and in respect of the right, title, and claim of either party to have worked and gotten, and to work and get the coal lying within the said area and limits, the said Lucy Loxley contending that the whole of the coal within such limits belongs absolutely to her, and the said John Trotter Thomas and Peter Teague claiming to have been and to be entitled on behalf of themselves and others, either at law or in equity, to work and get the coal within the said area and limits." The agreement then recited the action and the contemplated suit in equity, and then witnessed that the parties agreed to refer the matters in dispute to arbitration.

The other partners in the firm of Trotter Thomas and Co. were not informed of the action or of the reference to arbitration till the 11th Dec. 1870, when the plaintiff wrote a letter to Nathan Atherton, one of the partners, saying: "There is an action coming off in a matter between Mrs. Loxley, of the Independent colliery, and the Hopewell Colliery Company. We are only implicated as tenants, and the whole concern is not worth the lawyers' expenses. Of course we are right, as all expenses we may be put to will come out of the royalty. I shall have to run up to London on Monday evening, the 2nd Jan., and must return on Tuesday after giving my evidence. I have kept the royalty in hand by permission of Messrs. Teague and Co. to secure our expenses. I have now about 40*l.* in hand."

Atherton communicated this intelligence to the Crowdys, the other partners, and Atherton and a solicitor on behalf of the Crowdys attended to watch the proceedings under the reference, which began on the 1st Feb. 1871, and they made no objection to the reference.

On the 25th July 1871 the arbitrator by his award determined the boundary line between the two collieries, and awarded that Peter Teague and the plaintiff should pay Mrs. Loxley 6000*l.* as damages for the coal gotten beyond the boundary line.

Atherton and the Crowdys having denied their liability to contribute towards the payment of this sum, the plaintiff in Nov. 1871 filed his bill in this suit against them, praying that the partnership might be dissolved and wound-up, and that it might be declared that the 6000*l.* and the share of the costs of Mrs. Loxley awarded to be paid by the plaintiff and Peter Teague to Mrs.

Loxley, and the plaintiff's costs of the action, reference, and award, or so much thereof respectively as was or might be payable by the plaintiff, constituted a debt of the partnership, and that the partners might contribute rateably with the plaintiff.

By their answers several of the defendants alleged that the plaintiff had knowingly and wilfully worked beyond the boundaries of the colliery.

BACON, V.C., before whom the cause was heard in July 1877, gave judgment as follows:—The main point which I have to decide is whether under the award which was made in July 1871, the defendants, who were the plaintiff's partners in the trade carried on by them, are liable to contribute according to their proportionate interests in the partnership. It cannot, I think, be disputed that the authority of a partner to refer to arbitration cannot be exercised without the consent and knowledge of his partners. I agree also that there may be such conduct on the part of the other partners as would imply or supply the deficiency of any express authority. What my attention has been particularly directed to is what took place between Nov. 1869 and the termination of the proceedings in July 1871, viz., whether what took place in that interval does supply the acquiescence which would be necessary to complete the authority of Thomas, the plaintiff, to enter into the arbitration. Referring to the evidence, it is not disputed that the agreement to refer was entered into by Thomas without any communication with his partners, without any explanation to them of the nature of the reference that he proposed to submit, and it was not until his letter of the 11th Dec. 1870, that he announced the fact of the arbitration having been agreed on to Atherton. It was upon that intimation, and there was no other explanation than that which was in that letter, that Atherton came to attend the arbitration. What took place before the arbitrator is left in some obscurity. The only witnesses, as I gather, examined before the arbitrator on behalf of the plaintiff, were the plaintiff and his son, and I gather from the evidence that a Mr. Huxham was examined on behalf of Mrs. Loxley. Upon the evidence I cannot hold that there has been such an acquiescence on the subject of the arbitration as to impose any liability upon the defendants in this suit. So far as I have at present tried the case, I am bound to say that there is no case on which the defendants, as partners in the firm of Trotter Thomas and Co., could be held liable to pay any of the money awarded against the plaintiff and Peter Teague; but it is by no means upon that point only that this case is to be decided, for I think it is clear upon the evidence—written evidence, not the opinion of parties, but upon plain written evidence—that there was never any question referred to arbitration in which the partnership *quæ* partnership had a particle of interest. Not only are they nowhere named in it, but in every one of the letters, and upon the other written evidence in the case, it is clear that they were left entirely out of sight. Nothing can be clearer, in my judgment, than that the dispute between Mrs. Loxley and the plaintiff, and Peter Teague, was confined entirely to her, on the one side, and those two persons on the other. It was under these circumstances that in August 1870 the agreement to

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refer was entered into. That agreement shows distinctly what were the limits of the reference, and what were the subjects to be submitted to the judgment of the arbitrator. [His Lordship read the recitals in the agreement, and continued:] Can it be said after that, that any question had been raised between Mrs. Loxley and the firm of Trotter Thomas and Co.? Is it possible to give any other meaning or signification to those recitals which state the subject of the reference, than that Peter Teague and Thomas, owners of the mine, were insisting not only upon their rights by way of defence against Mrs. Loxley, but were asserting that they had rights against her in respect of trespass committed by her upon the land of which they claimed to be the owners? Then it was agreed that it should be referred to determine "all questions of law and equity as to whether the said John Trotter Thomas and Peter Teague were and are entitled to work and get the coal within any part of the area aforesaid, and, if so, to fix the limits." That was the state of things when the agreement of 1870 was entered into, or in Dec. 1870, when the letter was written which announces to Mr. Atherton the pendency of the arbitration. The arbitration goes on, and in the result the arbitrator finds that there is no foundation for the claim of Thomas and Peter Teague against Mrs. Loxley, and he finds that the damage which Mrs. Loxley has sustained by the workings within the area which was in dispute amounted to the sum of 6000*l*. I cannot find upon the evidence that there were any questions submitted to the arbitrator in which Trotter Thomas and Co. were in any degree interested. The agreement of 1859 is clear and explicit in its terms. There is no reason to doubt that Teague and Co., the commercial firm, had taken upon themselves to act as owners, not, as it is said, without the knowledge of Thomas, but they undertook to let to Trotter Thomas and Co. the mines which are within the disputed area. I think I cannot, upon such evidence as is before me, adopt that part of the defendants' construction of the agreement of 1859 which seeks to show that Thomas, being co-owner of one-twelfth of the Hopewell colliery, and therefore entitled to the benefit of the agreement of 1802, although he was acting two parts—for if Teague and Co. represented all the owners, then he was represented by Teague and Co., and if they were only a commercial trading company having the benefit of the agreement by which some assignment was made to them, then his character as the manager of Trotter Thomas and Co. was perfectly distinct—I say I cannot adopt the argument which has been addressed to me, founded upon the common law cases, that Thomas did enter into a warranty, and, that warranty not having been fulfilled, he has come under the liability of which the defendants avail themselves. But upon the other point, even if the acquiescence had been more clearly proved than I think it has been, upon examining what was the subject of the reference, who were the parties to the reference, and what was the thing to be determined in the reference, I am forced to the conclusion that the partnership had nothing whatever to do with it, and that their presence, or such presence as they did afford to the proceedings under the award, does not at all fix upon them that liability which is sought to be fixed upon them. I wish I could have done with the case there, because up to that point I desire to

pronounce my decision without any kind of hesitation whatever. I have endeavoured to show the ground for my decision, that it was an arbitration which did not concern Trotter Thomas and Co., and no presence of theirs could make them liable for what was done under it. But in that case, if that is the only question, and I believe it is, submitted for my decision, a quantity of subjects wholly unnecessary and unimportant, if the defendants are not bound by the award, have been introduced. They have, therefore, a plain legal defence; they had no doubt about that. They have not only imputed to Mr. Thomas dishonest intentions and dishonest practices, for which there is not a particle of foundation, but these gentlemen, who in their own persons and by their predecessors go back for fifty years in a trade which has been carried on profitably, viz., this mining partnership, find it right, now that this matter has become the subject of a quarrel between them, to impeach Mr. Thomas's conduct in a manner which I think is wholly unjustifiable. I can discover nothing in the cross-examination of Mr. Thomas or in his affidavits which would warrant such an imputation. I think he has properly discharged the duty which by common consent the defendants vested in him and placed upon him, and that he has done the best that could be done for the partnership in which he was interested. But what excuse is there for the defendants having raised the question upon the commissioners' award? What is it to them what the award is? The arbitration has ended, the award has been made; nobody can set aside that award, and nobody can properly canvass, criticise, or impugn it. I cannot, for I have no means of knowing what evidence was before the arbitrator, except, as I have already said, that there was upon the one side the plaintiff and his son, and upon the other side the evidence of a surveyor who has made an affidavit in this matter. The plaintiff thought that Mrs. Loxley's case could be pooh-pooh'd, that there was no foundation for it, and he relied upon his reading of the commissioners' award. I can only say that, if I had to deal with it as a matter undecided, reading the commissioners' award, reading the description of the tract of coal which is granted in the Hopewell colliery, and the tract of coal which is granted in the Thatch or Independent colliery, and finding that it is distinctly prescribed that the Thatch or Independent boundary is to be a certain level line, and that the owners are to keep to the west of it, I should not entertain any doubt that the boundaries, as Mr. Thomas believed them to exist, were the true boundaries. My doubts would not be removed by the evidence of Mr. Huxham, a gentleman from Swansea, who is brought to lay down the law in the Forest of Dean, where laws of very great antiquity, of great peculiarity and nicety, prevail. [After alluding to the evidence his Lordship continued:] Giving it the best consideration I can, it seems to me to prove the plaintiff's case, that there has been no trespass, and, but for this unfortunate award, it would be vain for Mrs. Loxley to say that, looking at the words of the award, and attending to the evidence of a man who points out where the old workings are made by a certain James Teague many years ago, a fixed boundary is easily ascertained. In my judgment there is no ground for saying that

any trespass has been committed. It is, however, much too late to bring that forward as a subject for decision, but I could not properly pass by it without saying what I have said. But upon the question of the costs of this suit it has a very great bearing. How can the defendants thrust upon Mr. Thomas, who comes here to ask that they may contribute, the charge that he has committed the trespass, when the question as between him and Mrs. Loxley was decided by the award of the arbitrator? For what possible reason or useful end could all that evidence have been gone into? I am unable to furnish an answer to that question. It did not concern the defendants in the slightest degree; the award has to do with the plaintiff. But for some reason which I can ascribe only to the unfortunate quarrel which had taken place between the parties, they think it right by producing models, by filing affidavits and examining witnesses, to try and get out of the thing which was in dispute between the parties, and to fix upon the plaintiff the costs of that part of the case to which they would be entitled generally in the costs of the suit. The plaintiff is liable, in my judgment, to pay the defendants the costs of so much of the suit as claims contribution under the award. They are entitled to no other costs, and no other costs ought to be included in the taxation. So much of the bill as seeks to charge the defendants with contribution to the sum awarded by the arbitrator will be dismissed with costs, and no other costs.

From this decision the plaintiff appealed.

*Benjamin, Q.C.* and *J. S. Wood* for the appellant.—The amount which the plaintiff has to pay under the arbitrator's award is a partnership debt, for the action was brought against him in his capacity of managing partner of the firm, and the other partners acquiesced in the arbitration. They could not have done so more decidedly than by appearing before the arbitrator. They are therefore bound by the result, and liable to contribute. But even if that be not so, we ought to receive so much of the costs of the suit as arose from the defence that we knowingly and wilfully trespassed on an area of coal to which we knew that we had no right. That allegation is completely disproved, and, the charge of fraud failing, we ought to be paid the costs occasioned by it.

*Kay, Q.C.*, *Sir Henry Jackson, Q.C.*, and *Stirling* for the respondents.—The loss sustained by reason of the plaintiff's conduct resulted from gross negligence on his part. The plans annexed to the commissioners' award showed clearly that the area of coal in question did not form part of the Hopewell colliery, and he was not justified in acting upon the assumption that the plans were incorrect. He was, at all events, guilty of gross negligence in going on with the workings, after he received notice from Mrs. Loxley, without consulting us, his partners. A loss arising from such negligence must be borne by the partner who causes it:

*Lintley on Partnership*, 3rd ed. pp. 780, 804;

*Bury v. Allen*, 1 Coll. 589;

*Campbell v. Campbell*, 7 Cl. & Fin. 166.

*Whitehorn*, for the representatives of a deceased partner of the respondents.

*Benjamin, Q.C.* in reply.

*Curr. adv. vult.*

*Dec. 2.*—*JAMES, L.J.* now delivered the following written judgment of the court:—This is a suit for contribution by the managing partner or co-owner of certain coal workings against his copartners or co-owners in respect of damages awarded by reason of a trespass on the coal property of an adjoining proprietor. An action was brought by such proprietor, Mrs. Lucy Loxley, against the plaintiff and one Teague, who agreed to refer all the matters in dispute to the late Mr. Osborne, Q.C., and on his declining to proceed with the arbitration, to Mr. Eddis, Q.C. The matters in dispute were, first, the question of title, viz., whether there had been in fact any such trespass, and if so, what was the amount of damages. The actual working was, beyond all question, by the copartnership of which the present plaintiff and defendants were members, and, as between Lucy Loxley and them, they were undoubtedly liable to answer for the trespass, if trespass there in fact was, and she, of course, had a right to sue any one of them without making the others co-defendants. But she did make Teague a co-defendant. Teague was one of the persons under whom the copartnership claimed title to work, and who were therefore the persons interested in the question of title, and who might be liable to indemnify the copartnership if they were cast in the action. After the action brought and the reference to arbitration made, the fact of such arbitration was for the first time brought to the knowledge of the copartners or their solicitors. The plaintiff alleges that they assented to such arbitration, and took an active part in it. The arbitrator decided that Mrs. Loxley had established that the workings were trespassed on her property, and that she was entitled to 6000*l.* damages in respect thereof, and he awarded the same together with the greater part of the costs of the arbitration to her. Hence this suit for contribution. The Vice-Chancellor decided against the plaintiff, on the ground that a partner has no right to refer to arbitration so as to bind his copartners without their concurrence, and that the acquiescence and assent, so far as there was acquiescence or assent to such arbitration, were given without the knowledge of certain material facts and circumstances connected with the litigation, which the plaintiff ought to have communicated to them, and, in fact, that there never was any question referred to arbitration in which the partnership, *quid* partnership, had a particle of interest. We are unable to concur in that view. The difference between the view taken by the Vice-Chancellor and ourselves is probably mainly due to the view which we take of what was the only legal and equitable effect of the arbitration as between the copartners themselves. If the assent to that arbitration created a liability, or amounted to an acknowledgment of a liability, we should probably have concurred with the Vice-Chancellor that they were not bound by the acts and communications relied on as evidencing such assent. But we are of opinion that no liability was thereby created as between the partners which did not previously exist, and no liability was thereby acknowledged. The only effect of the arbitration, according to our view of it, was to substitute the award of the arbitrator for the verdict of a jury, and the judgment of the court thereon. It was merely a matter of machinery. Such a mode of determining the questions in dispute was almost a matter of course.



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The defendants, the copartners, had every fact before them required to enable them to judge whether they would or would not assent to the arbitration proceeding. They were aware that they had or might have a very considerable interest in the action. The trespasses, or acts supposed to amount to such trespasses, were done by their agents and workmen. The nominal defendants were their managing partner and one of their lessors. What questions might afterwards arise as between them and the lessors, or between them and their managing partner, were wholly immaterial to the determination of the question whether, so far as they were concerned, they would assent to Mrs. Loxley's right and claim being determined and ascertained by an arbitrator. They assented under the supposition that they were in the ordinary position of copartners in respect of an action brought against their copartner for a partnership act—that is, under the supposition that they had the greatest possible interest in the machinery, by which that action was to be determined. It is scarcely possible to conceive that any sensible persons would have done otherwise than assent, and if they were aware of circumstances which would or might possibly or probably relieve them from all liability whatever in respect of the action, that certainly could have had no tendency to induce them to withhold their assent. They would, of course, have said, "If we are liable to contribute we assent to the machinery by which the amount is to be ascertained. If we are not liable, the machinery does not concern us." We are of opinion, therefore, that, so far as the arbitrator decided that the acts were trespasses, and that the damages were 6000*l.*, the copartnership is bound by that decision, in the same way and to the same extent as if the action had gone on to trial, and damages to that extent had been given by a jury. It must be added to this that beyond all question the only person liable to damages in Mrs. Loxley's action was Thomas. Teague might be liable to indemnify Thomas, and if the litigation had proceeded in its normal course, which would probably have been not only the action at law but a bill in equity, he would have been liable to costs; but in the mere action at law for the trespass he must have been entitled to a verdict of not guilty. We have then to consider the question whether Thomas would or would not have been entitled to contribution on a judgment against him for 6000*l.* for the trespasses. *Prima facie*, damages given against one partner for a partnership act are to be paid like any other partnership debt, but with this exception—that if the damages were occasioned by the personal misconduct or culpable negligence of one partner, he alone must bear the consequences. In this case the defendants do charge the plaintiff with such misconduct or negligence. To dispose of this charge it is necessary to go into the history of the circumstances under which the trespasses or acts found to be trespasses were committed. [His Lordship stated the facts of the case as above set forth down to the agreement of the 22nd Feb. 1859, and then continued:] Under that agreement Trotter Thomas and Co. worked in the Hopewell colliery, and, as was alleged by Mrs. Loxley, and found by the arbitrator, trespassed beyond the boundary into her coal. The plaintiff was the managing resident partner, and it is charged against him that such trespass could not

have occurred without very serious and culpable neglect on his part. Certain it is, that it is one of the most important duties of the manager of a colliery, not merely a duty to his neighbours, but to his principals, to keep carefully within his boundary. The consequences of not doing this are most serious. In the present case the profit at most could have been but very small—the net surplus of the selling price alone, after all the expenses of working and the royalty; while the owners, according to the law as then understood and applied, and as it was understood and applied by the arbitrator, would be entitled to the full value of the coal at the pit's or level's mouth, without any deduction for the costs of severance, or any other deduction, except the expense of conveying it after severance from the vein to the surface. To the commissioners' award were annexed plans of the Hopewell colliery and the Thatchor Independent colliery, and any one looking at those plans must have seen that the workings had transgressed the boundary line as there depicted. The plaintiff Thomas acted with culpable carelessness if he never looked at the plans, and with most culpable recklessness if, looking at the plans, he determined to disregard them. Before the arbitrator and at the hearing before us, it was strenuously contended that the inaccuracy of the plans was notorious in the Forest; that the commissioners could only have made them approximately; and that, correcting the plans by the written descriptions, it was reasonably clear that the Hopewell colliery, as awarded, did extend to and include the area in which the alleged trespasses were committed. And the Vice-Chancellor appears to have adopted this view, differing in that respect from the arbitrator. We have had a most minute examination of the plans and of the written descriptions by the counsel of both sides, and we find it impossible to adopt the plaintiff's contention. But, moreover, there being in existence plans made by the commissioners themselves in pursuance of the Act of Parliament, and made by law part of their award, nothing could be more rash or reckless than to take all the risk of disregarding those plans on the chance of establishing a construction of the letterpress against the plans, the utmost profit being so trifling and the loss risked so great. It was a speculation in which no partner had a right to involve his copartners without their full knowledge and concurrence. But the case does not stop there. It is manifest that this supposed error in the map and this supposed construction of the writing was a mere afterthought of the lawyers after the arbitration had been agreed on. It is not pretended that Mr. Thomas ever looked at the plans and letterpress, and came to the conclusion which was pressed before the arbitrator and in this suit. And it is manifest that even if he had examined the two he would have taken advice on the subject. But the matter does not stop there. After he had worked to some considerable extent, Mrs. Loxley discovered the fact, and in 1864 gave formal notice thereof, and required an account of the past trespasses and a discontinuance of them for the future. In answer to that notice we find that it was never suggested that the disputed coal was included in the Hopewell colliery, as awarded and set out by the commissioners. But a claim wholly inconsistent therewith was made to it as part of the Thatchor Independent colliery, under an



equitable, or supposed equitable, title under an agreement made as far back as the year 1802 between the then owners of the Thatch colliery for a partition. This agreement is in substance as follows: Three of the owners, named Bennett, Lewis, and Morse, agreed to resign and give up their shares and interest in a certain part of the coal then remaining ungot in a certain pit belonging to the colliery then at work to James Teague the elder, in exchange for and in consideration of his resigning and giving up to them his share and interest in a certain part of the coal which might be got by sinking a certain other pit then in sinking. It is difficult to see how any title under such agreement could have survived the statutory provisions and the commissioners' award; and even if there were any express equity or trust affecting the legal estate, it is difficult to see how such equity or trust could have survived all the changes or devolutions of title, or how Mrs. Loxley could have become under it a trustee for Peter Teague and Co. and their co-owners. In fact it is idle to treat that document as creating the relation of trustee and *cestui que trust*. It was a legal partition, giving one party one pit and workings, and the other party another pit and workings, and was precisely the right which was to be brought to the notice of the commissioners, and in default extinguished. At all events it is obvious that a right so doubtful, so apparently desperate, was not one under which the plaintiff had the slightest excuse for imperilling his partners, exposing them to the liability actually shown by the arbitration, and without any chance of substantial benefit. It is not immaterial that the plaintiff was himself one of the persons claiming title under this agreement. We do not think that this in any way impugns the honesty of his conduct, for we believe that throughout the whole of the proceedings down to the time of the award, the plaintiff really thought that his partners had no substantial interest in the matter; that the question was one of title between Mrs. Loxley on the one hand, and the owners of the Hopewell colliery on the other, and that the latter, under whose title the workings were held, were the persons really interested, and really bound to bear any loss. But that affords no legal excuse for the want of reasonable care which he showed as between him and his copartners. It was strongly insisted on before us that, at all events, we ought to draw a line at the time of the notice in 1864. We cannot accede to that contention. We think the carelessness and recklessness were only aggravated by persisting to work after notice. The action moreover was brought in Nov. 1869, the notice was in May 1864, and the Statute of Limitations was, with apparent success, insisted upon. And it is impossible to say how much the arbitrator was influenced in his findings by the fact that the trespass was deliberately persisted in after express notice. The damages given for such a trespass would probably be very different from those of a mere casual or accidental encroachment beyond the boundary. It is impossible to speculate what the result would have been to any one, if the plaintiff had, as he ought to have done, immediately on the notice, discontinued the workings in the disputed area. On these grounds we feel bound to affirm the Vice-Chancellor's decree. It was very strongly

pressed on us that we should make a distinction as to costs on the ground that actual fraud was imputed to the plaintiff, which was not sustained. But, however much it is to be regretted that any such imputation should have been made either in pleading or argument, all the evidence to support the imputation of fraud was really the evidence of the facts and circumstances on which we have come to the conclusion we have expressed adverse to the plaintiff, and we are unable to relieve him from any part of the costs which the Vice-Chancellor has directed him to pay. The appeal must be dismissed with costs.

*Appeal accordingly dismissed with costs.*

Solicitors for the appellant, *Rogerson and Ford*.  
Solicitors for the respondents, *Barnes and Bernard; Jones and Starling*.

Jan. 29 and 31.

(Before JESSEL, M.R., and JAMES and BRAMWELL, LL.J.)

*Re* EUROPEAN ASSURANCE SOCIETY ARBITRATION ACTS.

*Re* BRITISH NATION LIFE ASSURANCE ASSOCIATION.  
*Ex parte* YOUNG AND GARRATT. (a)

*Company—Winding-up—Proof—Redeemable annuity—Value of annuity after winding-up—Companies Act 1860, sect. 158.*

*A deed made in June 1860 contained a proviso that an annuity granted by the B. N. Association should be repurchasable by the association, its successors and assigns, for 6500*l.*, on giving six months' notice to the grantees, and paying, at the expiration of such notice or the time of repurchase, if subsequent thereto, all arrears and a proportionate part of any then current payment to the grantees. In Jan. 1872 the B. N. Association passed a resolution for a voluntary winding-up, which was continued under the supervision of the court. No notice to repurchase the annuity had been given. Upon the application of the grantees to prove for 10,480*l.*, the present value of the annuity, without regard to the proviso for repurchase:*

*Held (affirming the decision of Mr. F. S. Reilly, the arbitrator), that the value of the annuity must be taken to be 6500*l.*, as being the sum which the grantees bound themselves to accept on a repurchase, and which repurchase might have been effected at any time since the date of the grant without the consent of the trustees, and notwithstanding their dissent.*

THIS was an appeal by Messrs. Young and Garratt from a decision of Mr. F. S. Reilly, the arbitrator under the European Assurance Society Arbitration Acts 1872-3-5, respecting the proper mode of valuation of an annuity of 600*l.* on the lives of the purchasers granted by the British Nation Life Assurance Association. The annuity was granted by deed dated 21st June 1860. It recited that the directors of the British Nation had contracted to sell to Richard Dawes and John Wood an annuity, as therein mentioned, and that Richard Dawes and John Wood had paid, at the office of the association, 6500*l.* for the purchase of the annuity. The deed witnessed that, in consideration of that sum, the funds and other property of the British Nation should be liable, according to the provisions

(a) Reported by E. S. ROBIN, Esq., Barrister-at-Law.

CT. OF APP.] *Re* BRITISH NATION LIFE ASSURANCE ASSOC.; *Ex parte* YOUNG AND GARRATT. [CT. OF APP.]

of the deed of settlement, to pay R. Dawes and J. Wood, their executors, administrators, and assigns, during the lives of Henry Brinsley Sheridan and Elizabeth Frances his wife, and the life of the survivor of them, one annuity or clear yearly sum of 800*l.* sterling. The deed then contained various provisions of an ordinary character, and ended thus: "Provided, lastly, that the said annuity shall be repurchaseable by the said association, its successors and assigns, for 6500*l.* sterling, the said association, its successors and assigns, giving six calendar months' written notice to the said Richard Dawes and John Wood, their executors, administrators, or assigns, and paying at the expiration of such notice, or the time of repurchase, if subsequent thereto, to the said Richard Dawes and John Wood, all arrears of the said annuity, and a proportionate part of any then current payment thereof up to and including the day of repurchase."

The annuity was now vested in G. A. Young and G. Garratt as trustees appointed in succession to Richard Dawes and John Wood.

On the 18th Jan. 1872, the British Nation passed a resolution for a voluntary winding-up, which winding-up was continued under the supervision of the court, and was proceeding in the present arbitration. No notice to repurchase the annuity had ever been given. The British Nation Association was insolvent.

On the application, before the arbitrator, by summons taken out on behalf of E. A. Young and G. Garrett as trustees of the annuity, raising in substance the question of the proper value of the annuity,

*Cookson*, Q.C. and G. A. Young, in support of the application, contended that the option to repurchase at a fixed sum, which was to be done in a particular way by a previous notice, not having been exercised before the winding-up of the British Nation Assurance Association, could not be exercised as from the date of the winding-up. In *Walberg's case*, Lord Westbury laid down the general rule with regard to annuities, that every policy and annuity should be admissible to proof, according to the value of the policy and annuity as of the date of the order to wind-up. What was the state of things at the winding-up? The option was dead and could not be exercised, and therefore it was just as if it were struck out of the deed. They submitted, on the question of principle, that an option to repurchase not exercised before the winding-up could not affect the provable value of an annuity, and that it was a misconception on the part of the liquidator to contend that the parties had in any sense agreed that this annuity should for all time be valued for 6500*l.* as between the company and the grantee. They referred to

*Joy v. Birch*, 4 Cl. & Fin. 57.

*Romer*, for the official liquidator, submitted that there was no ground for the assumption that the option was dead at the commencement of the winding-up. The question was not whether the option was exercised, but was the contract subject to the option at the date of the winding-up. Whether it was exercised or not was wholly a matter of indifference, because all the authorities went to show that you must value your damages on your contract by referring to the circumstances as they stood at the commencement of the wind-

ing-up. Suppose there were a mortgage with a proviso for redemption on giving six months' notice, could it be said that directly the winding-up took place the mortgagees could say, "You can never redeem because you did not give the six months' notice, and you cannot do it after the commencement of the winding-up?" The contract here was a contract with a special clause in favour of the company, and the applicants could not come forward and ask to prove on that contract and disregard in their favour the most favourable clause for the company. Practically the applicants had to show all the damage they suffered by reason of that contract not being fulfilled, and their damage never could have been more than the sum to be repayable for repurchase. They could never have complained if the company had gone on and repaid them that amount on giving notice, and therefore the utmost damage they could have suffered was the 6500*l.* Something was said about the value having to be estimated by referring to a sum which a purchaser would give, and that the purchaser would consider whether or no the option might be exercised; but that was a fallacious way of putting the question. Nothing was clearer than this, that you could not estimate the damages a man had suffered from the contract by reason of the insolvency or otherwise of the company, with reference to any imaginary sum any imaginary purchaser might give under any imaginary circumstances.

*Cookson*, Q.C. in reply.

Mr. F. S. Reilly, the arbitrator.—I am of opinion that the summons taken out by the trustees should be dismissed. It is in substance an application for a revaluation of the annuity. I have listened attentively to the arguments for it, but I think that they fail. At the same time I should prefer taking a little time to put my opinion into writing, and I propose to do so.

The arbitrator afterwards delivered the following memorandum, which was in effect his judgment:

Mr. F. S. Reilly.—On the 18th Jan. 1872 the British Nation passed a resolution for a voluntary winding-up, which winding-up was continued under the supervision of the court, and is proceeding in this arbitration. In the liquidation the claim under the annuity deed of the applicants, the present trustees, had been admitted, and I had directed that the value of the annuity should be taken at 6500*l.* and no more, and dividends had been paid to the applicants on that amount. The actuarial value of this annuity, that is of an annuity of 600*l.* for the lives named, would be considerably more than 6500*l.* if the grant were not subject to a proviso for repurchase at 6500*l.* After hearing fully the arguments of counsel for the applicants I remain of opinion that my direction respecting the value was right. It seemed to me that the annuity was in its origin defeasible by repurchase for 6500*l.*; that it has always remained so defeasible, and that therefore its capital value on the day of the resolution to wind-up could not be taken to be more than 6500*l.* Notice to repurchase it was urged had never been given, but that circumstance is immaterial. The value depends, not on the exercise of the option, but on the existence of the option. Then it was said that the existence of the option should be wholly disregarded, because at the time as at which the valuation is to be made—that

is, the time of the resolution for winding-up—the option was dead, that is, had ceased to be exercisable. This view was maintained on two grounds. First, it was said that the six months' written notice required could not be given by the British Nation, not having been given six months before the resolution. But it appears to me that the right to give the notice passed to the liquidators, and they might have used for that purpose the seal of the British Nation (sect. 95, sub-sect. 4, of Companies Act 1862). The second ground was, that if the notice had been given, the British Nation, being insolvent, could not have paid the 6500*l.* at the expiration of the notice, and that the term prescribed by the proviso conferring the option must be strictly pursued, and for this *Joy v. Birch* (*sup.*) was referred to as an authority. But I think, in the case of this liquidation, that the rule there laid down as to the time of payment does not apply, and that the payment required is made by payment of dividends, which is, for this purpose, in the words of the Lord Chancellor in that case, "equivalent in law to payment;" as Lord Westbury used to say in this arbitration, proof is payment. For these reasons I consider that the option is not dead, but was exercisable at the date of the resolution to wind-up, and has ever since been exercisable, and that therefore, so far from the option being disregarded in the valuation, it is the determining datum in the valuation. This direction as to the value of the annuity does not in the least deviate from the rules which were laid down by Lord Westbury in *Wallberg's case*, and which I am bound to follow. The effect of the decision there was, as regards the present question, this: first, to adopt the rules of valuation contained in the first schedule to the Life Assurance Companies Act 1872, which rules were not under that Act of themselves binding in this arbitration; and, secondly, to fix as the time at which a valuation under those rules is to be made, the date of the order or resolution to wind-up, on which point the rules are indeterminate. But I am of opinion that Lord Westbury in that case did not contemplate the case such as we have here, of an annuity granted with an option for repurchase at a fixed price; that therefore *Wallberg's case* does not apply here, and that I have then to resort to sect. 158 of the Companies Act of 1862, containing the general direction respecting valuations applicable to insurance cases, under which I have to make a just estimate of the value of the particular claim, as a claim subject to a contingency, and according to its own circumstances. That being so, I think it is just to estimate the value of the claim at 6500*l.* That is the amount which the original grantees bound themselves to accept on a repurchase, which repurchase might have been effected at any time since the date of the grant, without the consent of the trustees, and notwithstanding their dissent. That is also, I think, the highest amount that any reasonably prudent purchaser from them in the open market would have given before the liquidation. He would only have bought on such terms as would keep him safe in all events, including the event of the option being exercised. He would not have speculated (as it was suggested in the argument he would) on the greater or less probability of the option being exercised. This last, although it does not supply a legal principle for

determining the case, may serve as a fair criterion of the justice of the estimate. The value cannot have been increased by the resolution to wind-up, or by the insolvency. These are the reasons which led me to say, at the conclusion of the argument, that the summons must be dismissed. I was asked in effect, on behalf of the applicants, in case I decided against them, to certify that an appeal may properly be brought; but I think, on consideration, that it will be more convenient to let the case take the ordinary course in that respect; that is, that the applicants, if so advised, should make a subsequent application for a certificate.

On the 31st Dec. 1878, an application for a certificate having been made, the arbitrator certified, in the terms of the Arbitration Act of 1875, that an appeal might properly be brought.

On the appeal,

*Benjamin, Q.C.* and *G. A. Young*, for the appellants, referred to

*Floyer v. Sherard*, Ambler, 18;

*Bullock v. Atley*, Phillips, 422;

*Sugden on Powers*, 8th edit. 588;

*Buckland v. Popham*, 15 L. T. Rep. N. S. 378; L.

Rep. 2 Ch. App. 67.

*Higgins, Q.C.* and *Bomer*, for the official liquidators, were not called on.

*JESSEL, M.R.*—This is an appeal from a decision of the arbitrator in the case of the European Assurance Society, and it raises undoubtedly a very short point. An annuity was granted by the British Nation Assurance Association, and that annuity, which was for 600*l.* a year, was repurchasable at any time for 6500*l.* on giving six months' notice. The assurance company being wound-up, the owners of the annuity, or the trustees for them, who are the grantees of the annuity, seek to prove for more than the 6500*l.* and the arrears of the annuity, and allege that they are entitled to prove for the value of the annuity to be estimated in the same manner as if there were no clause for repurchase. The arbitrator has decided they could only prove for 6500*l.* Now that appears to me clearly right. In the first place the annuity was repurchasable for that sum at the time the liquidation commenced, which is the time at which it is to be ascertained and valued. It was attempted to be argued in this way. It was said: True it is, the right to repurchase remains, and indeed it passes to the liquidator under the liquidation, but, in fact, it is impossible, because he has not assets which he can dispose of for the repurchase of the annuity. The answer is, that is not the question. Under bankruptcy and in liquidation you prove on the assumption of solvency, not of insolvency. If a man in very insolvent circumstances gives a bill of exchange for 100*l.* at a month's date and discounts it for 50*l.*, which is by no means impossible, and he becomes bankrupt at the end of the month, the holder of the bill proves for the 100*l.* It is no answer to say that the man was in such a hopeless state of insolvency that the bill was not worth the 50*l.* which the holder gave for it. The real test is, what he owes as a solvent man. Now, if the British Nation were a solvent company, there is no doubt they could redeem this annuity for the 6500*l.* It appears to me that the appeal fails and should be dismissed.

*JAMES, L.J.*—I am of the same opinion.

BRAMWELL, L.J.—I am of the same opinion. I entertain it very clearly, but I think it only due to the arbitrator, and to Mr. Benjamin, and to Mr. Young, to show why I do so. If you look critically at this matter, this claim is not for an annuity merely, it is a claim for an annuity or a sum of 6500*l.* at the option of the grantors of the annuity, the company. Now the fallacy of Mr. Benjamin's argument, as it appears to me, was this—that he treated the case as though the question was one, not what the debtor, or person liable, or company liable, had a right to do, but what they did do. Now to my mind the question is, what they had a right to do, because, if they had a right to reduce the debt, then the debt provable is the sum to which they could reduce it; and it appears to me that otherwise two consequences would follow, either of which would show that the argument must be erroneous. One consequence would be this, that before the insolvency the thing was worth 6500*l.* only, but upon the insolvency, according to the argument, it became worth 10,480*l.* Now that cannot be. Another impossible consequence would follow. Suppose it should turn out that the assets of this company will pay 15*s.* in the pound—for aught I know they may—15*s.* in the pound upon 10,000*l.* would be 7500*l.*, and it would be worth the liquidator's while to avail himself of the option; so that, according to that, you would get into this ridiculous consequence: that the claim would be of less value according as the assets of the company were greater, for if they come to 15*s.* in the pound it would be worth while for the liquidator to redeem. That is an impossibility, but I think the case can be tested in another way. Suppose there had been a surety for the payment of this annuity, or obligation on the part of the company—that is, a solvent surety now—and suppose it would be worth his while to pay 6500*l.*, what could he prove for? Only for 6500*l.* But if the surety paying off could only prove for that, it seems to show that that must be because the debt or liability is 6500*l.* It seems to me that these are very obvious remarks, but I have made them out of respect for the argument that has been addressed to us by Mr. Benjamin and Mr. Young.

JAMES, L.J.—Is this a test case? Are there other cases of the same kind?

Higgins, Q.C.—No, my Lord; I must ask for costs here. I might say the special case was settled in the most favourable way for Mr. Sheridan's trustees. Something was said about this being an *ex parte* case, but nothing could be more favourable. A number of things which might be adduced on our side have been left out. I ask for costs.

JAMES, L.J.—You are entitled to the costs.

Solicitors: Lane and Andrews; Mercer and Mercer.

## SITTINGS AT WESTMINSTER.

Tuesday, Nov. 19, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

THE SHEFFIELD WAGGON COMPANY (LIMITED) v. STRATTON AND OTHERS. (a)

*Bankruptcy—Lease of chattels—“Leasehold interest”—Disclaimer—Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 23—Bankruptcy Rules July 1871, r. 28.*

*A lease of personal chattels is not a “leasehold interest” within rule 28 of the Bankruptcy Rules of July 1871; and a trustee in bankruptcy therefore need not obtain the leave of the court to disclaim such a lease.*

*Decision of Pollock, B. reversed.*

APPEAL from a decision of Pollock, B. on further consideration.

The action was to recover a sum of 603*l.* for the hire of certain railway waggons and damages for their detention.

In Nov. 1871 defendants hired from one William Sneezum ten coal waggons for a term of five years from 21st Jan. 1872. In Oct. 1872 Sneezum lent to the defendants twenty more coal waggons for a term of six years from 28th Sept. 1872. In Oct. 1872 he sold to plaintiffs his stock of waggons, including the thirty hired by the defendants.

By two agreements, dated 6th Nov. 1872 and 25th Nov. 1872 respectively, the plaintiffs let the stock of waggons to Sneezum on what are termed “purchase leases,” that is to say, on the terms that after a certain number of yearly payments the waggons should again become Sneezum's property.

In Feb. 1873 Sneezum became a bankrupt. His trustees continued to pay rent for the waggons, under the two agreements of 6th and 25th Nov. 1872 until the 25th June 1875. On the 7th Oct. 1875 they disclaimed these two agreements without having obtained the leave of the court under rule 28 of the Bankruptcy Rules of July 1871.

The plaintiffs sued the defendants for the rent of the waggons. At the trial, before Pollock, B. and a special jury, at York assizes, the foregoing were the material facts admitted or proved in evidence. Pollock, B., on further consideration, gave judgment for the defendants, on the ground that the trustees could not disclaim without the leave of the court, as the bankrupt's interest was a “leasehold interest” within the meaning of rule 28 of the Bankruptcy Rules of July 1871. (a)

(a) By 32 & 33 Vict. c. 71, s. 23, “where any property of the bankrupt acquired by the trustee under this Act, consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property which is unsaleable or not readily saleable, the trustee, notwithstanding he has endeavoured to sell or has taken possession of such property, or exercised any right of ownership in relation thereto, may, by writing under his hand, disclaim such property; and, upon the execution of such disclaimer, the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and, if the same is a lease, be deemed to have been surrendered on the same date, and, if the same be shares in any company, be deemed to be forfeited from that date.” By rule 28 of the Bankruptcy Rules 1871, “where any property of a bankrupt acquired by a trustee under the Bankruptcy Act 1869 shall consist of a leasehold interest, the trustee shall not execute a dis-

(c) Reported by W. APPELTON, Esq., Barrister-at-Law.

The plaintiffs appealed.

*Cave, Q.C. and Forbes for plaintiffs.*—The question is, whether a hiring of chattels is a "leasehold interest" within rule 28 of the Bankruptcy Rules of July 1871, which the trustee in bankruptcy must obtain leave to disclaim. It is submitted that it is not. Under sect. 23 of the Bankruptcy Act 1869 four classes of property are dealt with: (1) land of any tenure burdened with onerous covenants; (2) unmarketable shares in companies; (3) unprofitable contracts; and (4) any other property which is unsaleable or not readily saleable. This contract must come within either the first or third of these heads. It is within the third, and rule 28 does not apply to it. You can only have an absolute property in, or a right of possession to, a personal chattel. There is no tenure in it, which is implied in the expression "leasehold." There is no "holding" which can be applied to the lease of a personal chattel, and no incident of rent or reversion. [Brett, L.J.—Is there any reason why rule 28 should be applied to leaseholds of lands only? Yes, because leaseholds of lands are frequently subdivided, and all manner of complicated interests (as by settlements, &c.) are carved out of them. It is intelligible why the court's leave should be required in such cases. But derivative interests in chattels are not nearly so common, and the inconvenience of requiring the leave of the court in order to be allowed to disclaim every contract of hiring of personal chattels would be excessive. If you use the term "leasehold interest" as a legal expression, it does not apply to the case of a chattel; nor does it if used in a popular sense. A man in popular language would talk of hiring a waggon, not of taking a lease of it. The practice has never been to apply for leave in these cases, where the point must have frequently arisen. On this point they referred to

*Taylor v. Gillott*, 33 L. T. Rep. N. S. 795; L. Rep. 20 Eq. 682;

*Smyth v. North*, L. Rep. 7 Ex. 242.

Secondly, this was not a lease, but a contract to pay by instalments extending over seven years, there being an option of purchase at the end of that time. To constitute a lease the letting must be the primary object; here it was only subsidiary. Thirdly, if leave to disclaim ought to have been obtained, the absence of it does not affect the plaintiffs' right against the defendants. The defendants have had the use of the waggons, and must pay for them according to the contract.

*A. Wills, Q.C. and Bremner for the defendants.*—Leases of chattels are mentioned frequently in the text books and authorities. In Lyttleton's Tenures, for instance, and Platt on Leases, vol. 1, p. 26 (see also *Spencer's case*, 5 Co. 16 B.). The term "leasehold interest" is a general term, which may be applied to anything, and in legal phraseology is as well applied to a letting of goods as of land. In *Gordon v. Harper* (7 L. T. Rep. 9) Lord Kenyon speaks of the interest of the landlord in personal chattels as a reversionary interest. (See also *Jenkins v. Cook*, 1 A. & E. 374, note, and numerous other cases.) Rule 28 is arbitrary.

claimer of the same without the leave of the court first obtained for that purpose; and upon any application to the court for such leave, notice of the desire of the trustee to disclaim such interest shall be given to such person or persons as the court shall direct, and such order shall be made thereon as the court shall think fit."

No good reason can be given for not requiring the safeguard of leave as much in the case of a disclaimer of personal chattels as of land. Complicated interests are created as much in respect of personal property (shares and stocks, for instance) as in the case of real. As to the second point, this was certainly a lease, and not a mere contract to pay by instalments. [Bramwell, L.J.—We are with you on this point, Mr. Wills. If the "leasehold interest" referred to in rule 28 applies to a lease of personal chattels, then we are of opinion that this was such a lease.]

Counsel were not required to argue the third point taken for the plaintiffs.

Bramwell, L.J.—I cannot agree with the construction put upon this rule by the learned Baron. I do not think I ought to express myself with any very great confidence on the matter; but thinking, as I do, that a "lease of chattels" is an accurate expression, and agreeing, as I do, with Mr. Bremner that, if you were to ask a man who had a lease of chattels what his interest was, his answer might well be "a leasehold interest," I still think that it was intended by rule 28 to include only that which in popular language is called "leasehold," namely, lands, houses, and perhaps tithes, and similar kinds of property, to all of which rent and reversion are the usual incidents. I think so because sect. 23 of the Bankruptcy Act 1869 deals with various kinds of landed property, "land of any tenure" being one of the principal things dealt with in the section. I cannot help thinking that rule 28 was directed to that which is the ordinary subject of leasing, although it is true that rule 28 not only seems to apply to cases within sect. 23, but to cases where at once and without any injury having happened the trustee is entitled to disclaim. Sect. 23 only seems to apply where the trustee has done something which might fix him with liability; but rule 28 applies to cases where he has done nothing to fix himself with liability on any unprofitable contract or onerous kind of property, the words used being, "Where any property of a bankrupt acquired by a trustee," &c. But, however this may be, the grounds of my opinion are these: I think rule 28 is directed at leasehold property commonly so understood, i.e., leases of lands or houses as being likely subjects of such a rule as rule 28. I think that a termor's interest in chattels is not likely to be the subject of such a rule. I think also that the words "leasehold interest" are not, in popular language, applicable to a lease of chattels. I think a man may more properly be said to have "hired," than to have a "leasehold interest" in chattels. Treated as a popular expression, "leasehold" is not the word you would expect to find, and treated technically there can be no "holding" of a chattel. It is not necessary to express any opinion upon the question whether in cases coming within the rule the leave of the court is a condition precedent to a valid disclaimer. I am of opinion that the decision of the learned Baron is erroneous, and must be reversed.

Brett, L.J.—I think that the disclaimer in rule 28 was meant to apply to one only of the descriptions of property which can be disclaimed under sect. 23. Rule 28 certainly does not apply to them all. The disclaimer provided for in sect. 23 is the creature of the statute. The section gives a right

of disclaimer in certain nominated cases, the first being the case of property in "land of any tenure." It is true that it deals also with another subject, that of unprofitable contracts. But when we find that the disclaimer applies specifically to "land of any tenure," and when we find that the rule is drawn by persons who would use legal phraseology to express their meaning, I cannot help thinking with Mr. Cave, that it was intended by the words "leasehold interest" to refer to land of any tenure" in sect. 23, and that the phrase would not apply to any of the other contracts mentioned in sect. 23, although in a popular sense a contract like the one in question might be called the "lease" of a chattel.

COTTON, L.J.—I am of the same opinion. The rule has been framed to enable the Act, as respects certain of its provisions, to be carried into execution, and it must be construed with respect to the subject-matter in reference to which it is made. The words are: [His Lordship read the rule.] Now, the *prima facie* meaning of "leasehold interest" is an interest in land of a leasehold tenure. Looking at sect. 23 as regulated by rule 28, we find that it refers to various things, and among them to "land of any tenure." The "leasehold interest" referred to in rule 28 cannot be meant to apply to all the subjects nominated in sect. 23. In my opinion it must be meant to apply to an interest in "land of any tenure," and therefore to an interest in land of a leasehold tenure, and it therefore does not apply to the sort of contract in question in this case.

*Judgment reversed.*

Solicitors for plaintiffs, Bell, Brodrick, and Bell, for Rodgers, Thomas, and Co., Sheffield.

Solicitors for defendants, Anderson and Sons.

Nov. 30 and 31, and Dec. 2, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.J.J.)

COVERDALE v. CHARLTON. (a)

*Local board—Streets—Vesting—Grazing of roads in board's district—Public Health Act 1875 (38 & 39 Vict. c. 55) s. 149.*

*The effect of the word "vest" in sect. 149 of the Public Health Act 1875 is to give to an urban authority, with respect to the streets mentioned in the section, the property in so much of the soil and surface as is necessary for all the purposes applicable to a street.*

*An urban authority, in 1876, let to plaintiff the grazing of a highway and of a private road within their district. Plaintiff accordingly turned in his cattle, and defendant, having subsequently pastured his cattle on the highway and private road, plaintiff claimed damages against him for trespass.*

*Held (affirming the decision of the Q.B. Division, Cockburn, C.J. and Mellor, J.), (1) That sect. 149 gave the urban authority sufficient property in the highway to enable them to let the grazing, and therefore that plaintiff could maintain his action. (2) That the urban authority, having no power to let the grazing of the private road, plaintiff had not sufficient possession to enable him to maintain his action in respect of that road.*

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.

THESE were cross appeals from a judgment of the Q.B. Div., on a special case.

The following are the facts, so far as they are material for the purposes of this report, set out in the special case:—

In the year 1766 an Act was passed for dividing, inclosing, and draining certain lands, grounds, and common pastures in the parish of Cottingham, in the East Riding of the county of York.

The commissioners appointed by or under the said Act made their award on the 24th Aug. 1771, and thereby set out and appointed certain public and private roads within the said parish (including Endyke and Cold Harbour-lanes hereinafter mentioned). Endyke-lane was set out by the said award as a private road in the following terms:

We do order, direct, determine, and award that there shall at all times for ever hereafter be a private way or road, as and where the same is staked, ditched, or bounded out, of the breadth of thirty feet, for the use of the said proprietors whose allotments adjoin upon the same, their tenants, lessees, heirs, and assigns, their servants, horses, cattle, carts, and carriages only, leading from the turnpike road of the town of Kingston-upon-Hull and Beverley westward into and over the south side of lands in the said New Ings herein severally awarded the said Francis Riley and Samuel Knipe to and for them awarded the said Francis Whiting, &c.

Since the year 1818 Endyke-lane had been a public road, and as such it has since that date been repaired by the parish. Cold Harbour-lane, which in the said award was described as the North Carr-road, was set out thereby as a private road in the following terms:

And we do order, direct, determine, and award that there shall at all times for ever hereafter be a private way or road, as and where the same is now staked, ditched, or bounded out, of the breadth of forty feet, for the use of the several owners of lands and grounds in Cottingham aforesaid, their tenants, lessees, heirs, and assigns, and their servants, horses, carts, and carriages only, and to be called the North Carr-road, leading to and from the said Dunswell-road eastward into and over lands in the said Inn-common and North Carr, to and from the turnpike road leading from the said town of Kingston-upon-Hull to Beverley aforesaid.

Cold Harbour-lane has continued since the date of the said award, and still is, a private road.

Cottingham, whether strictly the area of a parish or a township, is and always has been for the purpose of maintaining its highways a distinct and separate area, which is commonly and in this case hereinafter called the parish of Cottingham.

On the 19th April 1876 the local board entered into an agreement in writing with the plaintiff, under which the local board agree to let to the plaintiff the right of herbage or pasturage for cattle, except sheep, in and about the sides of the roads hereinafter mentioned, from the day of the date of the said agreement, until the 23rd Nov. then next at the rent of 8*l.* 10*s.* Such roads were described as follows in the schedule to the said agreement: "From Gibson's to Railway Gate, north Moor-lane, 5*l.*; Cold Harbour and Middle Dyke to railway gates, 2*l.* 5*s.*; Little North Carr-lane, and Endyke-lane, 1*l.* 5*s.*"

The day after the execution of the said agreement the plaintiff commenced depasturing the herbage with his cattle in the roads that had been assigned to him under the said agreement, and thenceforth until the commencement of this action he regularly continued to do so.

On the 25th April 1876 three horses and eight

head of other cattle, belonging to the defendant, were turned into Endyke-lane aforesaid, under the care of the defendant's servant, and grazed there upon the sides of the said road, and on the following day horses and other cattle of the defendant, to about the same number, were turned into Cold Harbour-lane aforesaid, under the care of the same servant, and grazed there upon the sides of the said roads.

The defendant knew that the said alleged right of the herbage in and about the sides of the said roads had been let by the said local board to the plaintiff, but refused to remove his cattle or to discontinue turning them out to graze upon the sides of the said roads.

No actual obstruction of the plaintiff's cattle was caused on either day on which the alleged trespasses took place by the acts referred to in the seventeenth paragraph.

It has been agreed between the plaintiff and defendant that, if the judgment of the court be for the plaintiff, the amount of the damage is to be 1s.

The question for the opinion of the court is whether the plaintiff is entitled to recover.

Costs of the trial to abide the event of the action.

The Q.B. Division gave judgment for the plaintiff as to the highway, Endyke-lane; for the defendant as to the private road, Cold Harbour-lane.

Each party appealed from this judgment.

The case in the court below is reported, and the special case fully set out, 38 L. T. Rep. N. S. 687.

By sect. 3 of the Public Health Act 1875:

"Street" includes any highway (not being a turnpike-road) and any public bridge (not being a county bridge), and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not.

Sect. 144:

Every urban authority shall within their district, exclusively of any other person, execute the office of and be surveyor of highways, and have, exercise, and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in force, save so far as such powers, authorities, or duties are or may be inconsistent with the provisions of this Act; every urban authority shall also have, exercise, and be subject to all the powers, authorities, duties, and liabilities which by the Highway Act 1835, or any Act amending the same, are vested in and given to the inhabitants in vestry assembled of any parish within their district.

All ministerial acts required by any Act of Parliament to be done by or to the surveyor of highways may be done by or to the surveyor to the urban authority, or by or to such other person as they may appoint.

The 149th section is as follows:

All streets being or which at any time become highways repairable by the inhabitants at large within any urban district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority. The urban authority shall from time to time cause all such streets to be levelled, paved, metalled, flagged, channelled, altered, and repaired as occasion may require; they may from time to time cause the soil of any such street to be raised, lowered, or altered as they may think fit, and may place and keep in repair fences and posts for the safety of foot passengers.

Any person who, without the consent of the urban authority, wilfully displaces or takes up, or who injures the pavement, stones, materials, fences, or posts of, or the trees in, any such street, shall be liable to a penalty

not exceeding five pounds, and to a further penalty not exceeding five shillings for every square foot of pavement, stones, or other materials so displaced, taken up, or injured; he shall also be liable in the case of any injury to trees to pay to the local authority such amount of compensation as the court may award.

*Cave, Q.C. and Cyril Dodd* for the defendant.—Endyke-lane is a "street" within sect. 149 of the Public Health Act 1875, and vests in the board. The question is, what is the meaning of the expression "vest in?" It cannot be that the section vests the freehold in the soil and surface in the board so as to give them the cellars below the street. This construction is far too large. It is merely meant to give to the board the same right over the streets as existed for the benefit of the public before the Public Health Acts were passed; that is to say, they may deal with the streets, by lowering or altering them or otherwise, without making compensation to the owners of the soil. "Vest" may mean give the right of passage over, and, if so, the difficulty of assigning a meaning to it different from "be under the control of" is got over. It was never intended that the local board should have such a right of property in the street as would enable them to make a profit. The soil in the highway formed part of the common land awarded by the Inclosure Commissioners. The property in it therefore remains in the lord of the manor:

*Beckett v. Corporation of Leeds*, 26 L. T. Rep. N. S. 375; L. Rep. 7 Ch. 421; see also

*St. Mary, Newington, v. Jacobs*, 26 L. T. Rep. N. S. 800; L. Rep. 7 Q.B. 47;

*Lade v. Shepherd*, 2 Str. 1004; and

*Marquis of Salisbury v. Great Northern Railway Company*, 5 C.B. N.S. 174; 28 L. J. 40, C.P.

The surface may be vested in the board so as to make them liable for negligence if they do not repair it (*White v. Hindley Local Board*, 32 L. T. Rep. N. S. 46; L. Rep. 10 Q.B. 219; 44 L. J. 114, Q.B.); but it does not follow that the board acquires any beneficial interest in the soil. The plaintiff cannot maintain this action. He has no better right than the board had, and they had none to let the grass in Endyke-lane.

*Wills, Q.C. and Wilberforce* for plaintiff.—

Under sect. 149 a street becomes vested in the urban authority so as to give them full powers of dealing with the soil, and enabling them to keep the roadway in good condition. "Vest" implies that the property in the soil passes to the board. It must mean something more than the words "be under the control of," which are also contained in the section. In *White v. The Hindley Local Board* (*sup.*) the point was not taken that the *locus in quo* became vested in the board under the Public Health Acts, so as to give the board a different character with respect to it than as surveyor of highways. The board have clearly a proprietary right in the trees under sect. 149. See also

*Taylor v. The Corporation of Wigan*, 35 L. T. Rep. N. S. 696; L. Rep. 4 Ch. Div. 396; 46 L. J. 105, Ch.

By sect. 27 of the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), the Legislature have thought it necessary to limit the extent to which the soil of streets shall vest by providing that minerals are not to vest in the sanitary authority. As to the private road, Cold Harbour-lane, it is admitted that the board had no power to let the pasturage. But the plaintiff had sufficient possession of the grass to enable



him to maintain his action. He had sufficient *de facto* possession by his cattle. Very slight possession is enough as against a mere wrong-doer. In Co. Litt. 4 b, Lord Coke says, "If a man hath 20 acres of land, and by deed granteth to another and his heirs *vesturam terræ*, and maketh livery of seisin . . . the land itself shall not pass, because he hath a particular right in the land; for thereby he shall not have the houses, timber trees, mines, and other real things, parcels of the inheritance, but he shall have the vesture of the land—that is, the corn, grass, underwood, sweepage, and the like, and he shall have an action of trespass *quare clausum fregit*. The same law if a man grant *herbagium terræ*." See also

*Earl of Rutland v. Earl of Shrewsbury*, 2 Brownl., judgment of court at p. 240;  
*Bristow v. Cormican*, L. Rep. 3 App. Cas. at p. 667;  
*Catteris v. Couper*, 4 Taunt. 547;  
*Heath v. Milward*, 2 Bing. N.C. 98.

*Cave*, Q.C. in reply.—As to Cold Harbour-lane, the plaintiff has had no actual or constructive possession. He has never had an actual exclusive possession, because the public have had a right of passing over all the *locus in quo*. The plaintiff is therefore a mere trespasser:

*Jones v. Chapman*, 2 Ex. 821;  
*Smith v. Lloyd*, 9 Ex. 562.

As to Endyke-lane, the judgment of Willes, J., in *Hinde v. Charlton* (15 L. T. Rep. N. S. 472; L. Rep. 2 C. P. 104; 36 L. J. 79, C. P.) shows that a section like this must be construed with reference to the whole object of the statute, and that "vest" need not necessarily pass the freehold. It is also a clear authority that where a body is intrusted with public duties, such expression as "vest" must be construed so as to give them no more property in the things passed than is necessary for the performance of their duties. He also referred to

*Drumfit v. Roberts*, 22 L. T. Rep. N. S. 301; L. Rep. 5 C. P. 224; 39 L. J. 95, C. P.;  
*Parsons v. St. Matthew, Bethnal Green*, 17 L. T. Rep. N. S. 211; L. Rep. 2 C. P. 66; 37 L. J. 62, C. P.;  
*Gibson v. The Mayor of Preston*, 22 L. T. Rep. N. S. 298; L. Rep. 5 Q. B. 218; 39 L. J. 131, Q. B.

BRAMWELL, L.J.—I am of opinion that this judgment should be affirmed. With all respect to the framers of these Acts, I find it very difficult to put a meaning on the word "vest" in sect. 149. I have great misgivings as to what is the true meaning, but my inclination would be to attach to "vest" the meaning put upon it by Willes, J. in *Hinde v. Charlton* (*ubi sup.*), and to hold that a street, under sect. 149, vests in the local board, without their having any property in the soil or surface. The word "vest" may have two meanings; it may mean that the property in the street, *usque ad cælum et usque ad medium filum*, passes to the board. I cannot think this is the true meaning of the word as used in sect. 144. It is impossible to suppose that, by using the word "vest," it is intended to give the local board an absolute right to the surface, with all above and all below it. It would be an outrageous and needless thing to do so. Mr. Wills's argument was, that the general object and intent of the provisions of this Act were to be looked to, and, if pressed by particular words, the effect of which is to cause loss to individuals, you must suppose that the Legislature, in view of the importance of

effecting the general objects of the Act, contemplated that that loss might be sustained. You must not be deterred from construing the Act beneficially for the public by considering the possible loss to individuals. That is a very forcible argument; but, looking steadily to the objects in view here, I could not make up my mind to say that the meaning of "vest" is to grant the freehold of the land to the local board with all the consequences that follow a grant of the freehold, and consequently the rights in the soil *usque ad medium filum*. I do not think the Act of last session (41 & 42 Vict. c. 77) bears upon the matter. All that the Legislature mean by sect. 27 was to declare that, whatever might be the proper construction of sects. 68 and 149 of the Act of 1875, they should not be construed as applying to mines and minerals. The monstrous inconvenience and injustice of holding that the word "vest" has the effect of passing the absolute freehold prevent me from putting that construction upon it—a construction, too, which I think a needless one. Then, what is the meaning of "vest?" I do not know that it is a term of art as applied here. It must have a statutory meaning. There is no expression in the Act such as "transferred" or "conveyed;" but it says the street shall "vest." I should like to hold that that means "shall vest *quæ* street," and that no right of soil vests; but I am afraid that is not a sensible construction. I do not see that it would add anything to the words "and shall be under the control," &c. I think by the word "vest" it is meant that the surface, and the street itself, so far as it is used as streets are used, shall vest in the board. The Act says that all streets vest, the pavements, stones, and other materials vest, and "all buildings, implements, and materials provided for the purposes thereof." Then it goes on to say in what manner the urban authority are to deal with the streets, and the soil and fences of them, and provides that any person who, without the consent of the urban authority, wilfully displaces or takes up or injures the pavement, stones, &c., "or the trees in any such street," shall be liable to a penalty not exceeding 5*l.*, and "he shall also be liable, in the case of any injury to trees, to pay to the local authority such amount of compensation as the court shall award." Now, what is the meaning of that? Does it mean that, if an oak was standing in a street at the time when that street became under the control of the local board, they would become entitled to that tree? If it does mean that, it goes a long way to show that the local board have the property in the street they now claim. If it does not apply to trees already in existence, but only to the ones the board themselves may plant, even then it goes to show that they must have some property in the soil, or in the produce of it, of the street. I cannot help thinking that sect. 57 of the Act is adverse to the opposite contention, because there it is evidently contemplated that when the local authority had not the control of a street, it was necessary to give them special power to break open the street in order to lay down pipes, &c., showing by implication that in the case of streets which are highways repairable by the inhabitants at large, they needed no such special power. It seems to show that the surface of such a street as I have last referred to vests in the local board for the purpose of doing that which is necessary for

it as a street, and also for doing such things as are necessary and usually done underneath a street. I am much fortified in this view by the strong expression of opinion of Willes, J. in *Hinde v. Charlton* (*sup.*). I think, therefore, the local board had a right to the herbage which was let to the plaintiff, and that the defendant, having incautiously taken part of it, is liable. As to the other part of the claim, I concur in the judgment of the court below that the plaintiff is unable to make out his case. It was attempted to be made out that he had a *de facto* possession as to the private road; but it is difficult to see how there could be any *de facto* possession unless the parts used were so actually in possession that the right claimed by the plaintiff would be an interference with the actual enjoyment of the lane that was going on. If there was an inclosed field, and a man turned his cattle into it and locked the gate, he might well claim a *de facto* possession of the field; but if he turned them on to an open common, to my mind, no *de facto* possession could be set up. In the present case I think there could be no *de facto* possession of anything beyond the spots on which his flock were actually grazing. It is said that by discontinuance of possession the lord of the manor has lost his title, and consequently possession was in the first occupant of the lane; that the actual occupants for the time being were the board of health, and that they having licensed the plaintiff he was in by right. The answer is, that no jury ought to hold, under the circumstances, that there had been such a discontinuance of possession by the person in whom the true title to the soil was, as to entitle the first occupant to claim it. I think, therefore, on that ground also the plaintiff's claim ought to be disallowed, and the judgment of the court below should be affirmed.

BARRT, L.J.—The plaintiff's action is not necessarily one of trespass; it is one in which he states certain facts, and seeks for a remedy. There was a dispute between the plaintiff and the defendant, and the plaintiff says that he is entitled to a remedy in respect of acts done by the defendant in two separate lanes. But the plaintiff, although he is not bound to say, "I claim against you as a trespasser," yet does in argument really state that he would be entitled to maintain an action of trespass with regard to both lanes. He says so with regard to the first lane, because he says the property in the soil was in the local board, and they let the land to him. As to the second, he says that he had possession of that lane, and that the defendant was a wrongdoer. The questions which arise in the case are: (1) Had the plaintiff a right to the herbage of the first lane? (2) Was he in possession of the second lane, so that he could maintain his action against the defendant, who was a mere wrongdoer? As to the first lane, the plaintiff's right depends entirely upon the right of the local board, and upon whether they had a right to make any arrangement with him as to the grass. It does not depend upon the nature of the right, whether a necessary or some other right. Now whether the board could or could not give him the right he claims, depends entirely upon sect. 149 of the Act of 1875. It is admitted that as to the first lane it is a "street" within the meaning of that section; therefore the question comes to be, what right does sect. 149 give to the local board in a street as defined by that section?

That must depend upon the words of the section. Now it is a rule of construction that you must, if you can, give a meaning to every part of the section you are construing. You must give all the words their ordinary legal signification, unless there is something in the context to vary that signification. The words here are, "all streets shall vest in;" but inasmuch as the words follow, "and be under the control of," you must give a meaning to the words "vest in" different to the words "under the control of." The ordinary legal signification of "vest in" is to give the property in. It is argued that sect. 57 of the Act of 1875 shows that "vest" means the same thing as "be under the control of," and that where the local board had not the control of streets it was necessary to give them special power to break up the surface for the purpose of laying pipes. If that contention be true, it is in effect to strike out the word "vest" from sect. 149 altogether. It is attempted to give a meaning to the words "vest in" by saying that they are words of mere inference, and may be treated as surplusage; but it would be entirely contrary to the rule of construction I have mentioned to say that. Therefore I think that sect. 57 has no effect whatever, and we are left then to the construction of sect. 149 standing alone. In my opinion, a meaning cannot be given to the words "vest in" in addition to that given to the words "shall be under the control of," except by construing "vest in" as passing the property in. Then it is said you give more than it can possibly be supposed the Legislature intended to give to local authorities; that is to say, that construction would give them the cellars under the streets and the mines under the land. But it seems to me that, after "vest" has been decided to give the property in, the real question is, in what does it give the property? That depends upon the words describing the subject-matter to which the section refers. Here the subject-matter is a "street," not land. The case of *Hinde v. Charlton* (*sup.*), with regard to the pew, is a good guide on this point. There the gift of the pew was held not to vest the property in the land on which it was. You must look not only to the words which vest, but to those describing the property given. Here it seems to me "vest" means "vest" the property in a street, so far as it is used as a street. It does not include the houses on each side. It must mean that which consists of the roadway, and the footpath on each side—that part between the houses which is used as the roadway of the street; that is to say, the whole of the surface between the houses. But it is then said, that would not give enough, because it would leave you with respect to matters which must be dealt with in a street without the power of dealing with them. But taking the word "street," as used in an Act of Parliament like this, it means, I think, the depth below the surface, but not the whole depth. It means the whole surface, and so much in depth as may not unfairly be used for the purposes of the local board with respect to the street. That would, therefore, enable them to lay down sewers, gas pipes, and water pipes to such a depth as in a street is used for the purpose of laying them down. It would, therefore, not enable them to go down to the depth of mines, as a street is never used for such a purpose. Neither would it enable them to

deal with the houses on each side. "Vest," therefore, in my opinion, gives the local authority the property in the street—the surface and such a depth as may be fairly used for the purposes of the street, and for these purposes the absolute property is given. I agree with Mr. Wills's argument that the Legislature has so far taken away the rights of the adjacent owners, and given them to the local board. They have the ordinary rights of property with respect to what is given to them. If that is so, they were entitled, by reason of the right which they had, to give some right to the plaintiff here. They assumed by agreement to let to him the right of herbage and pasturage. It is not necessary, as to the first lane, to say that they gave him possession of it; but he had a right under his agreement to feed his cattle on that lane, and on that right the defendant has encroached. I am therefore of opinion that the plaintiff is entitled, as to that lane, to bring the action he has now brought. As to the private lane it is admitted that the local board has no right at all. The plaintiff says he had possession, and the defendant was a wrongdoer; but we must inquire what sort of possession the plaintiff was using. The only actual *de facto* possession he had was that his cattle were feeding there. He admittedly had no other possession than by the mouths of his cattle. It might be different if the local board had assumed to let him the lane as the owners, although they had no right to do it, and if he attempted to set up a right by agreement to the exclusive possession of it; but, notwithstanding their agreement with him, they still meant the public to pass over it and tread down the grass. All they intended to give him was this: they took a sum of money for allowing his cattle to feed upon the lane. That agreement is no more than for a power of agistering which they could have granted if they had been the owners. I do not think there was any agreement under which it could be said that the plaintiff had any possession of the land either by himself or by his cattle, and therefore I do think that he had not any possession at all, and cannot maintain his action. In my opinion the judgment of the Queen's Bench Division was right, and must be affirmed.

COTTON, L.J.—I am of opinion that both appeals fail. As to the first lane, it is admitted to be a street within sect. 149 of the Public Health Act 1875, and the question is whether or not the local board had any right to the grass; that is to say, any property in the surface of the street. It was said for the defendant that, where public bodies, like local boards, are given by statute a public duty to fulfil, you must construe such words as "vest" not according to their natural meaning, which would have the effect of passing the entire property in the soil and surface, but you must construe them to give so much only as is necessary for the fulfilment of the duty. *Hinde v. Charlton* (*sup.*) and the judgment of Willes, J. were relied on to show this. In my mind that judgment does not support the defendant's contention. In construing every Act of Parliament you have to look at the particular words used, and, except so far as it may supply a principle of construction, I do not think *Hinde v. Charlton* applies to the present case. The question there was as to what right to a pew the claimant obtained under an Act which pro-

vided that the pews in a church should be "vested in" the purchaser, and the court held that the freehold of the pew did not vest, but only the right to use it during divine service. But they only decided what was the true construction of the word "vest" in the particular Act. Willes, J., in his judgment, says that there are a "whole series of authorities in which language large enough to convey a right to land, to canal and railway companies, and to trustees for the benefit of the public who require only the control of it, has been held to be satisfied without giving an interest in the soil and freehold to the grantee, but by giving a control only to the extent necessary for exercising the functions which it was intended to assist them in the discharge of." He then proceeds to refer to *Stracey v. Nelson* (12 M. & W. 535) as one of the strongest of those authorities; but when that case is looked at it does not bear out the general proposition which Willes, J. lays down. To my mind it does not assist us in construing this Act, because the learned judges who decided it do not affect to construe the word "vest," but only say that it applied to a particular kind of property mentioned in the Act. That case, therefore, lays down no such rule of construction as the defendant contends for. There is the further remark, that in *Hinde v. Charlton* Willes, J. had not to meet the same difficulty we have here, because here the Act says not only that the street shall "vest in," but also be "under the control" of the urban authority. It is a true principle of construction that when separate and distinct words are used in an Act, you cannot construe one part of a section or sentence so as to render the other part inoperative. Now, had the word "vest" any admitted meaning before this Act was passed? In an Act which is *pari materia*—the Lands Clauses Consolidation Act 1845—you find in sect. 81 that conveyances "shall be effectual to vest the lands thereby conveyed in the promoters of the undertaking." And again in sect. 100 there is a similar proviso. Then in the Trustee Act 1850 (13 & 14 Vict. c. 60), enabling the Court of Chancery to make orders for the transfer of property to new trustees, sect. 3 provides that the Lord Chancellor may make an order that lands belonging to lunatics be "vested in" certain persons. Another class of Act is the Bankruptcy Act 1869 (32 & 33 Vict. c. 31), s. 17, where it is enacted that upon the appointment of a trustee the property of the bankruptcy shall "vest in" such trustee. There is therefore an established sort of statutory meaning attached to the word "vest." Looking at the Act in question in this case, we find in sect. 12 that all property, real or personal, belonging to the council of a borough at the passing of the Act "shall continue vested, or vest in, such council," &c. Then it is remarkable that sect. 13 contains almost the same words as regards sewers as sect. 149 does with respect to streets. It says that sewers "shall be vested in and be under the control of" the local board. It is impossible, I think, that the Legislature used words in sect. 13 in a different meaning to the same words in sect. 12. In my opinion the meaning is, that whatever vests in the board must become the property of the board. The board therefore must have some property in the surface and soil of the street, and, agreeing generally as I do with Brett, L.J., I think that the street did vest in the board,

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and some property in the soil and surface of it became vested in them for the purposes of a street. In regard to Cold Harbour-lane, it is admitted that the local board had no property in the soil; but it is said that the plaintiff had such possession as enabled him to maintain his action of trespass against the defendant under the old procedure, and therefore that he can maintain it now. Now, what did he do with respect to Cold Harbour-lane? He maintained that he had asserted his right under a lease from the board, which was in the nature of a grant to him of *herbagium terre*; that he had taken possession of one part of the lane, and by what he had done had taken possession of the whole. That argument seems to depend upon a fallacious perception of what Lord Coke really said. He referred to a case where there was a grant of an absolute and exclusive right for all purposes of whatever was previously on the land, and then Lord Coke says the grantee shall have an action *quare clausum fregit* against a trespasser. But here the case is entirely different. The public have a perfect right of walking over the grass, and the plaintiff could not complain of an encroachment. What he had got was merely this—only a very limited right of his cattle eating certain parts of the grass. It was a mere enjoyment, subject to the rights of the public. This was distinctly not a possession of the soil so as to entitle him to maintain his action, and he cannot rely upon any right independent of mere enjoyment, and therefore, in my opinion, cannot maintain his action against the defendant for injury to the grass.

*Judgment affirmed.*

Solicitor for plaintiff, *H. Stirke*, for *J. Seymour Moss*, Hull.

Solicitor for defendant, *J. L. Morris*, for *Spurr and Son*, Hull.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Feb. 1 and 8.

(Before MALINS, V.C.)

Re ALISON; JOHNSON v. MOUNSEY. (a)

*Statute of Limitations (3 & 4 Will. 4, c. 27), ss. 25, 28—Mortgage in form of trust sale—Express trust of surplus purchase moneys—Second mortgage by assignment of surplus purchase moneys.*

In 1827 S. conveyed certain premises to A. by way of security for 3000*l.* and interest in trust to sell, and out of the purchase moneys pay costs, principal, and interest, and pay the surplus to S. In 1833 S. conveyed the same hereditaments to M., and assigned to her the surplus purchase moneys arising from any sale by A. by way of mortgage to secure 300*l.* and interest. A. took possession in 1849, and held it till he died, in 1874. In 1876 the trustees of his will sold under their trusts of the mortgage deed. The purchase money being more than sufficient to pay A.'s principal, interest, and costs, the representatives of M. claimed to have their debt paid out of the surplus.

Held, that, when the trust for sale was executed, an express trust attached to the proceeds, and that

(a) Reported by J. R. BROOKS, Esq., Barrister-at-Law.

therefore the claim of M.'s representatives was not barred by the statute.

THIS was a summons by the plaintiffs in the action of *Johnson v. Mounsey*, being an action for the administration of the estate of Richard Alison, deceased, to vary the chief clerk's certificate by striking out a claim of 1950*l.* thereby certified to be due to Annie Louisa Falcon and Michael Joseph Falcon.

By indentures of lease and release, dated the 9th and 10th Oct. 1827, Sophia, Anne, and Phoebe Stringer, in consideration of 3000*l.* lent to them by the said Richard Alison, conveyed certain hereditaments in Liverpool to him, his heirs and assigns, upon trust to sell or mortgage, and apply the proceeds in payment of all expenses and the discharge of the debt of 3000*l.* with interest at 5 per cent., and to "pay the residue or surplus of the money to arise by such sale or mortgage, unto the said S. Stringer, A. Stringer, and P. Stringer, their heirs and assigns, as tenants in common." The same indenture contained a declaration that until sale a sufficient part of the rents and profits should and might be applied in payment of all such interest of the said sum of 3000*l.* as should at any time be in arrear for one calendar month, a covenant by the Misses Stringer to pay the mortgage money and interest, in which however no day was fixed for payment, and a power for the mortgagee to enter and receive the rents at any time after default should be made in payment of the principal money and interest thereby accrued.

By an indenture, dated the 25th Aug. 1828, the hereditaments comprised in the last-mentioned deed were charged with the payment of a further sum of 500*l.* then advanced by R. Alison.

By indentures of lease and release, dated the 8th and 9th July 1833, the Misses Stringer conveyed the same hereditaments to Esther Mills upon trust for sale, and assigned to her all surplus moneys which might arise from a sale by R. Alison, to secure an advance of 300*l.*

By indenture, dated the 6th Oct. 1856, the said hereditaments and surplus moneys were charged with a further sum of 200*l.* advanced by Esther Mills.

In 1849, the interest being in arrear, Richard Alison entered into possession and continued in possession without any acknowledgment of the mortgagor's title till his death in Aug. 1874. The rents received were about equal to the interest due.

In Sept. 1876 the trustees of R. Alison's will sold the hereditaments comprised in the mortgage deed of 1827 to the corporation of Liverpool for 5450*l.*, and conveyed them to the corporation by an indenture which recited and purported to exercise the trust for sale contained in the mortgage deed of 1827. It was admitted that, after payment out of the purchase-money of principal, interest, and costs, they had in their hands a surplus of 1950*l.*

This action was brought for the administration of Richard Alison's estate in Aug. 1877 by the infant beneficiaries under his will. The estate amounted to 460,000*l.* A. L. Falcon and M. J. Falcon, who were the persons entitled to the mortgage debt secured by the second mortgage and further charge to Esther Mills, brought in a claim

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in the action to be paid their debt, amounting to 1222l. 18s. 10d., out of the surplus purchase-moneys.

It appeared that, during the negotiations for the purchase by the corporation, Messrs. Lewis and Mounsey, a firm of accountants of which Mr. E. Mounsey, one of the trustees of R. Alison's will, was a member, and who acted for him and his co-trustee, had consulted with Mr. William Douglas, the agent of Mr. and Miss Falcon, as having an interest in the property, and that Mr. Mounsey had given to Mr. Douglas a pencil memorandum of the amount received by R. Alison or his trustees for rents, and the amount due for interest, but this memorandum was not signed. (This evidence was objected to as not appearing in the chief clerk's certificate, but was finally admitted by consent.)

The chief clerk had allowed the claim.

*Glasge, Q.C., Snow, and Oswald* for the plaintiffs.—It is clear that a mortgage in this form is a mortgage within the 28th section of the Statute of Limitations:

*Locking v. Parker*, 27 L. T. Rep. N. S. 635; L. Rep. 8 Ch. 30.

The claimants are barred, therefore, unless there has been an acknowledgment within the statute. The conveyance under the trust for sale is not such an acknowledgment:

*Lucas v. Dennison*, 2 L. T. Rep. N.S. 186; 13 Sim. 584;

*Batchelor v. Middleton*, 6 Hare, 75.

The requirements of the statute must be exactly complied with

Sug. Real Prop. Stat. 117, 2nd edit.

Even an acknowledgment by one of two joint tenants is insufficient:

*Richardson v. Younge*, 25 L. T. Rep. N. S. 230; L. Rep. 10 Eq. 275; 6 Ch. 478.

*Bristowe, Q.C. and Warmington* for the trustees of R. Alison's will.

*Higgins, Q.C. and P. H. Lawrence* for the claimants.—Here there was an express trust of the surplus sale moneys, and an assignment to my clients of those moneys. The case, therefore, is governed by the 25th section of the Act, and does not come within sect. 28 at all. The cases cited only go to the point that in the case of a mortgage in this form the mortgagor cannot redeem after twenty years. We are not asking for redemption, but to recover moneys impressed with an express trust. *Locking v. Parker* (*ubi sup.*) is in our favour. It decided that, for the purpose of a suit to redeem, a mortgage in the form of the trust is within sect. 28; but James, L.J. expressly says that there would have been an express trust with reference to the sale moneys had there been a surplus: (L. Rep. 8 Ch. p. 40.) The trust does not arise till the security is realised:

*Kirkwood v. Thompson*, 12 L. T. Rep. N. S. 446; 2 H. & M. 392, 400.

That this is not the same as an ordinary mortgage is shown by the fact that the mortgagee cannot foreclose:

*Anon.* 6 Madd. 10;

*Schweitzer v. Mayhew*, 31 Beav. 37;

*Jenkin v. Rowe*, 18 L. T. Rep. N. S. 204; 5 De G. & Sm. 107;

*Sampson v. Pattison*, 1 Hare, 533.

And that, if the trust of surplus moneys be for

the borrower, his executors and administrators, it effects a conversion:

*Re Underwood*, 30 L. T. Rep. 90; 3 K. & J. 745.

The correspondence with our agents, consulting them about the sale, was an acknowledgment of our title.

*Glasge, Q.C.* in reply.—This claim is and must be in the nature of a redemption suit:

*Kirkwood v. Thompson*, 2 H. & M. 400.

In *Locking v. Parker* (*ubi sup.*) the sale was within twenty years of the mortgage, and that was the reason for the dictum on which the claimants rely. The decision is plainly in my favour, for it settles that a trust for sale is a mortgage within sect. 28. The pretended acknowledgment amounts to nothing. The pencil memorandum of account is not signed at all. The letters, even if they contained an acknowledgment, which they do not, are only signed by one of two joint tenants in trust, and are within the decision in *Richardson v. Younge* (*ubi sup.*).

*MALINS, V.C.*, after stating the facts with regard to the mortgage deeds and Mr. Alison's undisputed possession, proceeded:—Now this is undoubtedly a mortgage in one sense, and there are numerous cases that have been cited showing that. I should not have required a case to show me that it is a mortgage. It is not a security which has all the incidents of a mortgage, because it is agreed on both sides that a mortgagee's ordinary right of foreclosure under such a deed as this cannot be exercised. The mortgagor can redeem, but the mortgagee cannot foreclose. It is, therefore, not in the strict sense of the word a mortgage, though it is in another sense of the word, inasmuch as it is a security for a loan which the mortgagor has a right to redeem, and which the mortgagee has a right to sell, and sell whenever he thinks proper. Now Mr. Alison having entered into possession under this deed in 1849, did not die till 1874. [His Lordship here referred to the large fortune left by Mr. Alison, and the provisions of his will, and continued:] In the year 1876 the corporation of Liverpool being desirous of purchasing this property, the trustees of Mr. Alison's will took what I consider to be a very reasonable and proper course, and one which I cannot too strongly express my surprise they have ever thought it worth their while to depart from. [His Lordship here commented on the large fortune of the infant beneficiaries under Mr. Alison's will, and the comparative insignificance of the sum sought to be recovered, and proceeded:] Now when I state that the trustees took a reasonable course, I think that course is accurately described in the 17th paragraph of the affidavit of Mr. Douglas in these words: "In the negotiations which preceded the said sale and conveyance, the said Edward Mounsey"—who was a trustee of the will, and also the agent for selling the property—"consulted me respecting the price to be asked for the said premises, and led me to believe that there would be no difficulty in paying to me as the attorney of the said Phoebe Stringer the balance that would remain after payment out of the said purchase money of the said mortgage moneys, interests and costs." Now when this matter was before me last week, I had no evidence of that fact beyond this statement. But since that, an affidavit has been filed, which, although its admissibility

was at first contested, was afterwards agreed to be read. It has now been read, and it shows most distinctly that in every step taken for the sale of this property the right of the second mortgagees was recognised, they were consulted in fixing the price, in deciding how the property should be sold, and in every step that was taken, and that the interest thereon was limited to the interest of Mr. Alison the mortgagee. Mr. Glasse says all that goes for nothing, because the case is within the 28th section of the Statute of Limitations. Now I shall certainly not be the judge to narrow the effect of the 28th section of the Statute of Limitations, because I hold on this, as I have done on all other occasions, that the interests of society are best promoted by adhering to the Statute of Limitations, and making time an end of all disputes. But I have to consider, with regard to the authorities, and with reference to the whole transaction, whether the section of the Act does in point of fact apply to this individual case now before me. Now the evident intent of this statute is to bar the right of the mortgagee to redemption. If a mortgagor, therefore, files a bill for redemption—if this very mortgagor, or the second mortgagee claiming through him, who has a right to redemption, if either of those two, the mortgagor or the second mortgagee, files a bill for redemption—this 28th section would be conclusive. I am fully aware of those cases, and I entirely adhere to them, which decide that where the mortgagee has been in possession for more than twenty years, if after the expiration of the twenty years he resorts to his power of sale—which is very convenient, because, for instance, if he has been in possession twenty-one or twenty-two years without an acknowledgment by the mortgagor, and makes his title by virtue of his ownership, he has to prove what is a very difficult thing to prove, namely, a negative, that there never has been any acknowledgment given to the mortgagor, and this title is a very difficult one to make out; if, on the other hand, time having expired, he resorts to his power of sale, then, whatever may be the rights between mortgagor and mortgagee, the purchaser gets a good title, and one which cannot be questioned that that is not an acknowledgment of the mortgagee's title. But in this case the mortgagee having been in possession for twenty-seven years, might have said "I am owner." This was a mortgage in 1827, the mortgagee entered into possession in 1849, he has been there ever since, he has never in any way recognised the title of the mortgagor. The course adopted was that they had recourse to this trust for sale; as I have said, it is not an ordinary mortgage deed. Now, what is the trust? The deed of 1827 conveys the property to Mr. Alison to secure his debt and interest, and upon trust for sale. That is a trust which the authorities show the mortgagor could not have enforced; it is a mere mortgage. The mortgagee may fix his own time for exercising the power. He may defer it as long as he likes, but, if he or those claiming through him were to defer it to the end of a century, nobody would doubt then that he could not make out his title under a power of sale, but would make his title under the absolute ownership, acquired by lapse of time. But he resorts to this trust for sale; and the question is whether he is not a trustee of the surplus money of the mortgagor, or those claiming through the

mortgagee. Now, under all the circumstances of this case—considering the great hardship on the second mortgagee, and that the first mortgagee for thirty-three years has had his principal and interest, and the great propriety that the admitted surplus of 1950*l.* should go to the second mortgagee rather than to the first mortgagee, who, before the surplus arose, had had every farthing of principal, interest, and costs—I should have every inclination on those grounds, and considering the position of these infants, who are virtually the plaintiffs in this case, to have recourse to any doctrine of the court which would enable me to do an act of justice in the manner I have suggested. I think I am armed with the power of doing so, and being armed with the power of doing so, it is my intention that this second mortgagee shall have the 1950*l.* in question. Now, Mr. Glasse has referred to the case of *Locking v. Parker*. This case is very much in point in the present instance. It was a case in which the mortgages in question had been created, I think, for more than forty years. The power of sale was exercised within twenty years; and in that state of things the suit was instituted, and a bill was filed in 1871 or 1872, and that suit I can only look upon as a redemption suit. The Master of the Rolls (Lord Romilly) thought it a case where the plaintiffs ought to be allowed to have the benefit of the redemption. The Lords Justices, from whom I am bound to take the law, took a different view of it, and said that, although the twenty years had not elapsed, there would be no right of redemption. I follow that, and I have already said that in the present case, if it had been a suit for redemption, it must necessarily be dismissed with costs. However, it is not a suit for redemption. The mortgage there was precisely in the form it is in this case, except that, instead of the mortgagee himself being made the trustee, somebody else is made so for him. I think that will make no difference; it is a case in which the mortgage is in the form of a trust for sale, and the Lords Justices have decided that there was no right of redemption. James, L.J. thus expresses himself: "It is said, however, that there is an express trusts in the deed with reference to sale moneys. The Solicitor-General, in his argument, admitted that there might be an express trust with reference to sale moneys, exactly in the same way as where a mortgagee sells under the powers of a common mortgage. In that case, when the estate has been sold, there is an express trust of the surplus money for the mortgagor. If, then, there had been any allegation in this bill, or any evidence that there were any surplus moneys, the bill might have been sustained for those surplus moneys; but that is not the frame and intention of the bill. The bill prays the execution of the trusts of the indenture, and is in substance a bill for the redemption of the estate, which, under the circumstances, cannot, according to the view we have taken, be sustained; and I am of opinion that we cannot go out of our way to give any relief in respect of this trifling matter." Now, therefore, I understand their intention to be this—if the property is sold under the trusts for sale, then there is a trust of the sale moneys, which the twenty years does not bar. That makes it to my mind rational. If in the present case, as I have already said, resting upon ownership derived from the long possession, they had thought fit to sell

the property by virtue of the ownership, they would then have been simply mortgagees in possession; the mortgagees in possession without any recognition of the title of the mortgagor for more than twenty years would have had a perfectly safe title in selling it as owners—the mortgagor, or anybody claiming under the mortgage, would not have had any claim against them. But, as they elected to execute the trust created in 1827, and to treat that as a still subsisting trust, that trust obliges them to do this: if they sell the property, first to pay all the expenses, and then to pay the principal, interest, and costs, and to hold the surplus property expressly in trust for the mortgagee, his heirs and assigns. Therefore I have the authority of the Lords Justices, and if I were to do otherwise than decide that the second mortgagee was entitled to the property, I should be deciding in direct opposition to the language here used, which is language that in my opinion meets the justice of the case. I cheerfully follow that, and therefore I am very happy upon that authority to say that in this case the property having been sold under the power of sale, the mortgagee's representatives are trustees of the surplus moneys, as in every transaction relating to the business they admitted themselves to be in 1876. And as they induced the second mortgagee at that time to expect that the surplus should be handed over to him, anything more ungracious on the part of these trustees, or the next friend, or whoever put the machinery of the court into operation, I cannot conceive. It is most unsatisfactory to me, and they having admitted that, I think on every principle they are bound to adhere to that, and therefore I dismiss the summons with costs.

Solicitors for the applicants, *Crook and Smith*, agents for *W. K. Greenway*, Liverpool.

Solicitors for the trustees of *R. Alison's* will, *T. H. Lydall*, agents for *Martin*, Liverpool.

Solicitors for the second mortgagee's representatives, *Johnson and Sons*.

Friday, Feb. 15.

(Before MALINS, V.C.)

**SILBER LIGHT COMPANY (LIMITED) v. SILBER.** (a)

*Company—Shareholders suing in name of—Majority opposed to proceedings—Leave to add company's name as defendant.*

*Two shareholders in a limited company brought an action against S., managing director, and his co-directors in the name of the company, claiming to recover moneys improperly expended by them. At a meeting of the shareholders subsequent to the commencement of the action, resolutions were passed by a large majority that the name of the company should not be used as plaintiff in the action, and that the company should be voluntarily wound-up.*

*Held, on summons by the liquidator to strike out the company's name, that the company could not be made a plaintiff against the wishes of the majority, but leave should be given to add its name as a defendant.*

THE Silber Light Company (Limited) was registered in Jan. 1873, to purchase from Mr. Silber and work certain patents for the manufacture of

lamp-burners. The capital of the company was 120,000*l.* in 10*l.* shares, of which 5000 were given to Silber, but the dividends on these shares were deferred. Silber was made managing director. The company carried on business successfully up to 1876. The profits then began to fall off, and no dividends were subsequently declared. In July 1878 the plaintiffs, two shareholders, brought an action in the name of the company against Silber and the other directors, alleging that Silber had improperly made profits upon certain contracts of the company with third parties, and charged commission upon goods purchased by himself, under the name of the firm Silber and Fleming, on behalf of the company; that he had let business premises to the company at an exorbitant rent, and that the accounts had been falsified and dividends paid out of capital. In the same month of July a general meeting of the shareholders was held, and passed by a large majority a resolution that the company should be wound-up voluntarily, and that the name of the company should not be used in any proceedings taken by the dissentient minority of the shareholders as plaintiffs against the directors, and appointing Mr. Allott liquidator. At a subsequent meeting on Aug. 12 a resolution was passed authorising Mr. Allott to sell the property, business, debts, and choses in action of the company to Silber for the price of 32,000*l.* These resolutions were confirmed on a poll by a large majority of the shareholders. Silber did not vote on these resolutions in respect of his shares. The dissentient minority still continuing the action, the liquidator had taken out a summons to strike out the company's name, which was now adjourned into court.

*J. Pearson, Q.C.* and *Phear* for the liquidator.—It is clearly decided that, where the shareholders of a company have in the exercise of their discretion come to a *bond fide* resolution not to prosecute a suit, the court will not interfere:

*Foss v. Harbottle*, 2 Hare, 461.

Again, the contract for sale to Silber includes all claims of the company against him, and therefore necessarily puts an end to this litigation. That contract was entered into by the liquidator in pursuance of the express directions of an overwhelming majority at the meeting. He was appointed for the express purpose of carrying it out, and was therefore bound to do so. The litigation in the name of the company cannot go on if the contract is to stand, but the plaintiffs do not attempt to set it aside. They could do so if it is an abuse of the power of the majority, but they need not use the company's name for that purpose:

*Menier v. Hoopers Telegraph Works*, 30 L. T. Rep. N. S. 209; L. Rep. 9 Ch. 350; and the judgments in *Maddougall v. Gardiner*, 33 L. T. Rep. N. S. 521; L. Rep. 1 Ch. Div. 22.

They also referred to

*East Pant Du Mining Company v. Merryweather*, 2 H. & M. 254;

*Pender v. Lushington*, L. Rep. 6 Ch. Div. 70.

The Attorney-General, *Glassey, Q.C.*, and *Thompson* for Silber.

*Higgins, Q.C.* and *Whitehouse* for the plaintiffs.—The liquidator ought to have been impartial between the two parties of shareholders, and to have come to the court under sect. 138 of the Companies Act 1862, to ask whether the contract with Silber was a proper one to be executed in pursu-

(a) Reported by, *J. R. BROOKE, Esq., Barrister-at-Law.*



ance of the resolutions. If this contract amounts, as my friends contend, to a waiver of breaches of trust it is not justified by the resolutions; but it does not amount to that—it is a mere assignment of debts, the largest word is *choses in action*. An assignment of *choses in action* does not amount to condoning breaches of trust. We do not dispute that in the case of a going company a minority of the shareholders cannot use the name of the company against the will of the majority in any case which falls within the domestic forum, i.e., in any case where the company has power to condone the wrong. Where it has not power, as in the case of an *act ultra vires*, or of fraud, the individual shareholders may sue without using the company's name:

*Atwood v. Merryweather*, L. Rep. 5 Eq. 467 n.

And if the court will give us leave to amend by adding the company's name as defendant, it will prevent our being met with a demurrer as in the case of *Macdougall v. Gardiner* (*ubi sup.*). But in cases where there is a winding-up, as in this case, the court has given leave to a small minority to use the name of the company against the will of the majority:

*Re Bank of Gibraltar and Malta*, 30 L. T. Rep. N. S. 209; L. Rep. 1 Ch. 69;

*Re Imperial Bank of China*, 14 L. T. Rep. N. S. 611; L. Rep. 1 Ch. 339.

At any rate we have shown that we have done all we can to obtain the use of the company's name, and ought, if necessary, to be allowed to go on without it.

MALINS V.C. (after stating the facts of the case) said, that the question raised was one of some difficulty, viz., under what circumstances a body of shareholders are or are not entitled to carry on a litigation in the name of the company. But here it was perfectly clear that an immense majority of the shareholders had decided that the litigation ought not to be carried on, and that it would be better to wind-up the company, and for this purpose had adopted a contract to sell the property and business of the company to Silber. It was unnecessary to go into the merits of the case. He was inclined to agree with Mr. Higgins's argument that a liquidator ought to be impartial, and it would have been well if Mr. Allott had brought the contract before the court. A small body of shareholders represented by the plaintiffs desired to make Silber liable to refund large sums of money to the company. But it was clear that the continuance of litigation for that purpose would interfere with the carrying out of the contract which the large majority of the shareholders desired. On principle, therefore, he deliberately decided that where a large majority of the shareholders deprecate a particular litigation, and pass a resolution to that effect, it ought not to be carried on, and on that ground he acceded to the application. But though his Lordship was not aware that the point had ever been decided, he thought, by analogy to the cases where an heir or other co-plaintiff who repudiates a suit on coming of age is made a defendant, the plaintiffs in this case ought, if they wished to continue their action, to have liberty to amend by making the company a defendant, and he ordered accordingly.

Solicitors: for the company, *Johnsons, Upton, Budd, and Atkey*; for Mr. Silber, *Simpson and Oulvingford*; for the plaintiffs, *Vallance and Vallance*.

Friday, Feb. 28.

(Before FRY, J.)

Re ROPE'S TRUST. (a)

*Maintenance—Discretion of trustees—Control of the court.*

*A testator gave a legacy of 1000l. in trust for two sons of his niece when they should attain twenty-two years of age, and, in case either of them should die under that age, in trust, as to 750l., part thereof, for the survivor, and as to the remaining 250l. for the separate use of the niece, with a like gift over to her of the 750l. if both the sons died under the age of twenty-two years. The will empowered the trustees to apply the income for or towards the maintenance, education, and general benefit of the legatees, with liberty to pay the same to the father, mother, or guardians of any such legatee pending the absolute vesting of any legacy for the purposes aforesaid, without being liable to see to the application thereof, and, in particular, to pay to his niece the income of the legacy bequeathed in trust for her sons, to be by her applied for their benefit at her discretion: Held, that the court might order such discretion to be exercised under the control of the court when it was shown that a sound discretion had not been exercised.*

WILLIAM JAMES ROPE, by his will dated the 7th June 1873, directed his trustees to stand possessed of the sum of 1000l., upon trust for the two sons of his niece, in equal shares, to be payable to them respectively as and when they respectively attained the age of twenty-two years, but, in the event of the death of either of them before he or they should attain the age of twenty-two years, then the testator directed his trustees to stand possessed of the sum of 250l. (part of the legacy of 1000l.) upon trust for and to pay the same to his said niece for her sole and separate use, free from the debts, control, or engagements of any husband, and to stand possessed of the sum of 750l. (the remainder of the legacy of 1000l.) upon trust for and to pay the same to the survivor of his niece's said two sons when he should attain his said age of twenty-two years; and, in case of the death of both such sons under the age of twenty-two years, the testator directed his said trustees to stand possessed of the whole of the legacy of 1000l. after the decease of the survivor under the age of twenty-two years, upon trust to pay the same to the testator's said niece for her sole and separate use and benefit as aforesaid. And after other gifts to the niece's two sons to take effect only in certain events, the testator declared that his trustees should be at liberty to apply the income of any for the time being expectant, though not actually vested legacy, or share of any expectant legacy, of the several legatees under his will, where not otherwise directed, for and towards his or her maintenance, education, and general benefit, with liberty to pay the same to the father, mother, or guardians, or any guardian of any such legatee, pending the absolute vesting of any legacy, for the purposes aforesaid, without being liable to see to the application thereof; and in particular the testator desired his trustees to pay to his said niece the income derivable from the first-mentioned legacy bequeathed to or upon trust for her children, to

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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be by her applied for their benefit at her discretion. The testator died, and his will was duly proved.

The trustees raised the sum of 1000*l.*, and appropriated the same to answer the legacy bequeathed in trust for the two sons of the testator's niece, and invested the same sum in consols.

From the time of such investment down to Oct. 1877 the dividends had been received by the trustees, and paid over to the testator's niece for the benefit of her children.

One of the trustees having died, the surviving trustees, about the month of July 1878, transferred the consols, and paid the dividend in their hands into court under the Trustee Relief Act (10 & 11 Vict. c. 96), and, by their affidavit, stated that from some time before the testator's death the niece had been living apart from her husband, that her sons had resided with her down to a recent date; that she had, in March 1878, been convicted of obtaining goods by false pretences, and for such offence was then undergoing imprisonment with hard labour; and that the trustees had been informed and believed that the two sons, who were both infants, were attending school at their father's expense.

A petition was presented to the court by the two infant sons by their father and next friend, praying that the income of the legacy might be paid to the father until the further order of the court, he undertaking to apply the same from time to time in or towards the maintenance and education of the infant petitioners.

Certain counter-charges were made against the father, and on the suggestion of the court it was agreed that all questions except that of the power of the court to control the niece's discretion should be referred to chambers.

*Glasse, Q.C.* and *Northmore Lawrence*, for the petitioners, urged that the niece was in the position of a trustee, and subject to the control of the court, notwithstanding that she had a discretion given to her by the will, and cited

*Costabadie v. Costabadie*, 6 Hare, 410;  
*Re Hodges*, L. Rep. 754.

*Locock Webb, Q.C.* and *G. W. Brabant*, for the niece, contended that, so long as she exercised a sound discretion, her application of the income ought not to be interfered with by the court.

*W. P. Jolliffe* for the trustees of the will.

*FRY, J.* said that the only question he had now to determine was whether the court could control the discretion of the niece. The court could not interfere with a trustee's discretion, but might order such discretion to be exercised under the control of the court when it was shown that a sound discretion had not been exercised.

Solicitors for the petitioners, *Gregory and Co.*  
Solicitor for the respondent, the niece, *F. A. Brabant*.

Solicitor for the trustees of the will, *Lovell, Son, and Pitfield*.

Feb. 28 and March 7.

(Before *FRY, J.*)

Re GRAYSON'S WILL. (a)

Gift to heir—*Persona designata*.

A testator devised land to trustees in trust to permit A. to enjoy the rents and profits during his life,

and, after his decease, to permit the eldest son of A. to enjoy the rents and profits during his life; and, "upon the death of such eldest son, then in further trust to convey the said tenement and its appurtenances to the right heirs male of A. and his heirs for ever." A. having died after the testator's death, leaving B. his eldest son and right heir surviving, and the surviving trustees having refused to convey to B.:

Held, on petition, that B. as right heir of A. was entitled to a vesting order of the estate in fee simple.

*WILLIAM FLEMING GRAYSON*, by his will, dated the 26th Jan. 1837, devised certain freehold hereditaments in the following words:

I give and bequeath unto *Daniel Fleming* and *Mark H. Quayle*, and the survivors of them, and the heirs and executors of such survivor, all and singular that tenement, with its appurtenances, situate at Cartgate, near Hensingham, in the county of Cumberland, in trust, nevertheless, to suffer and permit the *Rev. Sir Richard Fleming* to receive and enjoy for his own use and benefit the annual rents, issues, and profits of the said tenement and its appurtenances, for and during the term of his natural life, and, upon the decease of the said *Sir Richard Fleming*, to suffer and permit the eldest son of the said *Sir Richard Fleming* to receive and enjoy, for his own use and benefit, the annual rents, issues, and profits of the said tenement and its appurtenances for and during the term of his natural life, and, upon the decease of such eldest son, then in further trust to convey the said tenement and its appurtenances to the right heir male of the said *Sir Richard Fleming*, and his heirs for ever.

The testator died in 1838, and his will was duly proved in the same year.

*Sir Richard Fleming* died in April 1857, leaving *Sir Michael-le-Fleming*, his eldest son and right heir male, surviving.

By a deed dated the 3rd Oct. 1878 *Sir Michael-le-Fleming* conveyed the devised hereditaments to *Henry Collins* and *William Henry Atkinson*, their heirs and assigns, upon trust to sell the same, and hold the proceeds of sale in trust for *Sir Michael-le-Fleming*, his executors, administrators, and assigns.

*Mark H. Quayle*, the surviving trustee of the will, had been asked to concur in a sale of the devised hereditaments, so as to pass the legal estate, but had refused to do so, and a petition was accordingly presented under the Trustee Act 1850 (13 & 14 Vict. c. 60) by *Sir Michael-le-Fleming*, *Henry Collins*, and *William Henry Atkinson*, for an order vesting the devised hereditaments in *Henry Collins* and *William Henry Atkinson*, their heirs and assigns.

*Dryden*, for the petitioner, contended that by the words "the right heir male" there was *persona designata*. [*Fry, J.* referred to *Archer's case*, 1 Co. 66.] This, being an executory gift to the heir of another person, vested as soon as there was a person who answered the description, viz., on the death of *Sir Richard Fleming*. He cited

*Danvers v. Earl of Clarendon*, 1 Vern. 35;  
*Bawlinson v. Waes*, 9 Hare, 673;  
*Wrightson v. Macaulay*, 14 M. & W. 214;  
*Boydell v. Golightly*, 14 Sim. 327;  
*Fuller v. Chamier*, L. Rep. 2 Eq. 682;  
*Jarman on Wills*, 3rd ed. vol. 2, 78 et seq.

*Quale-Jones* for the trustee.—The only son is to take a life estate, and must have been known as the right heir male of his father. The life estates of the father and eldest son are legal, and the trustees took only an estate in remainder, ex-

(a) Reported by *FRANK EVANS, Esq., Barrister-at-Law*.

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pectant on the death of Sir Richard Fleming and his eldest son, in trust to convey on the death of the latter, and therefore the right heir male could not be the person who would be such on the death of Sir Richard Fleming. The words "right heir male" meant the person who would be such on the death of the eldest son. He cited

*Doe d. Noble, v. Bolton*, 11 Ad. & Ell 188;

*Doe d. King v. Frost*, 3 B. & Ald. 546.

March 7.—**FAY, J.**, after reading the words of the devise, said that, as a general rule, vesting ought to be held to take place at the earliest possible period. When the gift was to the heir he should be ascertained at the testator's death, if the testator's heir, and if the heir of a stranger, at the death of such stranger. The conclusion he had come to was, that the heir was to be ascertained on the death of Sir Richard Fleming, and such heir would be the eldest son, the petitioner, Sir Michael-le-Fleming. There was this distinction, however, between the cases referred to by Mr. Dryden and the present case, that, in the latter, there was no gift of an intermediate estate between the life interest of the eldest son and the gift to the heir. In *Radford v. Willis* (L. Rep. 7 Ch. 10; 25 L. T. Rep. N. S. 721) James, L.J. said: "The case is, in my opinion, one where the rule in favour of early vesting ought to be applied more than in almost any other case. . . . It is urged that the direction to convey makes it probable that the testator intended to point out a person to whom a conveyance could be made—a husband living at the time when the conveyance was to be executed. I am of opinion that there is nothing in this argument, the direction to convey being only in substance a direction to clothe the equitable interest with the legal estate." Although there were some circumstances in the present case which were different from those in the cases cited, he thought a vesting order ought to be made on the ground that the estate ought to vest at the earliest moment.

Solicitors for the petitioners, *Gregory and Co.*  
Solicitors for the trustees, *Griffin and Quayle*.

### QUEEN'S BENCH DIVISION.

Saturday, Dec. 21, 1878.

(Before LUSH, J.)

MOORE v. ROBINSON. (a)

*Trespass—Married woman living apart from husband—Right to bring action—Remedy for protection of property—Married Women's Property Act 1870 (33 & 34 Vict. c. 93), s. 11.*

*A married woman living apart from her husband can maintain ejectment for the recovery of property purchased with her own earnings.*

*Plaintiff, a married woman living apart from her husband, purchased with her own earnings the goodwill and stock-in-trade of a beerhouse. From this beerhouse she was, as decided by the present action, wrongfully expelled by the lessor. She brought the action to recover damages for the expulsion.*

*Held, that, by virtue of the Married Women's Property Act 1870, plaintiff could maintain this action, as she could have brought an action for ejectment, that being a remedy for the protection of her property within the provisions of the Act.*

(a) Reported by A. H. POTTER, Esq., Barrister-at-Law.

### FURTHER CONSIDERATION.

This was an action, tried before Lush, J., at the Durham Assizes, which was brought to recover damages for wrongful ejectment from a beerhouse, the goodwill of which had been purchased by the plaintiff, a married woman living apart from her husband, out of her own earnings.

*Cave, Q.C. and Edge* for plaintiff.

*Herschell, Q.C. and Aspinall* for defendant.

The facts and arguments will appear from the following written judgment of LUSH, J.:—This action is brought by a married woman living apart from her husband for damages for being expelled from a beerhouse, which she claimed to be hers, and for loss of profits and of stock and fixtures therein. It appeared that she was married in 1865; that some time in 1874 she left her husband, and has not since lived with him; that with the savings from her own work while they lived together she, after the separation, took a beerhouse; and that from the profits of the business she carried on there and elsewhere she accumulated enough to purchase the goodwill and stock of the beerhouse in question. A person of the name of Smith took the house for her of the defendant, and entered into an agreement in his own name for a yearly tenancy, the plaintiff paying to the outgoing tenant 70*l.* for the goodwill, stock, and fixtures. The licence was transferred to Smith in the usual way. The agreement, which was dated the 8th March 1877, contained the following stipulations: "Provided that the said John Smith shall not at any time convert the said beerhouse and premises into a private dwelling-house, but, on the contrary, shall conduct and manage the same in a proper and orderly manner, and use his best endeavours to extend the custom and business thereof, and shall annually and at all times apply for and use every effort to obtain all such licences at his own expense as shall be necessary for keeping open the said premises, and shall not do or suffer to be done any offence, matter, or thing, against such licence, or in, or upon, or about, the said demised premises, whereby such licence might be imperilled, or the certificate of the magistrates required for obtaining a renewal of such licence be refused, suspended, or forfeited, or by reason of any such offence, matter, or thing, the said John Smith might be, or be liable to be, fined by such magistrates, and in case the said John Smith shall do, or permit, or suffer any of the said acts, matters, or things, agreed by him not to be done, permitted, or suffered, then and in such case, and thereupon or at any time thereafter it shall and may be lawful for the defendant to put an end to and determine the letting, and to enter upon and resume possession," &c. It was further agreed that the fixtures should be absolutely forfeited by Smith to the defendant in the event of a breach of any or either of the stipulations. The plaintiff carried on the business with the assistance of her daughter. On the 4th May Smith executed a declaration of trust and handed the same to the plaintiff, together with the licence indorsed in blank. The defendant alleged, and I think there is every reason to believe, that he thought the plaintiff was Smith's wife. Smith was a seafaring man, and after signing the declaration of trust, and handing over the licence, he went to sea, and was absent between

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six and seven weeks. He next went away a second time for the same purpose, and after a short stay in the beerhouse went away again. The last departure was about the 3rd Dec. The defendant, who carried on business in the adjoining house, thereupon on the 6th Dec. served a notice addressed to Smith, requiring him to remove his goods by twelve o'clock the next day, and on the following day he entered and took possession, removing the furniture, &c., to a neighbouring warehouse. Upon this state of facts, two questions arose: first, whether the right of re-entry had accrued; and secondly, whether the plaintiff can maintain the action in her own name. It is agreed that if the entry was wrongful, and the plaintiff is entitled to recover for the expulsion, the verdict shall be entered for 100*l.* with costs. If the entry was rightful, and the plaintiff is entitled to sue for the goods taken possession of by the defendant, the verdict shall be for 15*l.* without costs. [After deciding that the entry and expulsion were unjustifiable, his Lordship continued:] The only other question which was argued was, whether the plaintiff was entitled, by virtue of the Married Women's Property Act 1870, to maintain such an action as this. I am of opinion that she is. The words of the 11th section are: "A married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property; and she shall have, in her own name, the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property." The lease, goodwill, stock, and fixtures were purchased with her earnings for her own use, and it cannot, I think, be doubted that the word "property" is large enough to cover all these, and was intended to cover any description of property in which she had invested her earnings. The entry of the defendant being wrongful, could she not have maintained ejectment? I think she certainly could. That is a "remedy" for the "protection" of her property; and a person who can maintain ejectment can bring an action of trespass, which is a substituted remedy for ejectment, whereby the value of the property is sought to be recovered instead of the property itself. It is true, as was argued by Mr. Herschell, that the 11th section is less comprehensive than the 21st and 26th sections of the 20 & 21 Vict. c. 85, which entitles a woman who has obtained a protection order to sue on contracts and for wrongs and injuries as well as for "property;" and it might be that a married woman in the position of the plaintiff might not be able to bring an action unconnected with property—as an action of libel—in her own name. (See *Ramsden v. Brearley*, L. Rep. 10 Q. B. 147; 32 L. T. Rep. 24.) But as regards the present cause of action, the rights given to the one are as comprehensive as those given to the other. It would be an unreasonable construction of the words of the Act to hold that a married woman may sue in detinue

for her goods, and not in trover or trespass for their conversion. However the action may be framed, the object of it is to protect her property. On this ground it was held in *Summers v. The City Bank* (L. Rep. 9 C. P. 580; 31 L. T. Rep. 268) that a married woman, who carried on business separately from her husband and who kept a banking account might maintain an action against her banker for damages for not presenting a bill of exchange deposited with them for that purpose, for not giving her notice of its dishonour, and for dishonouring her cheque, she having funds in their hands to meet it. My judgment is therefore for the plaintiff for 100*l.*, which, as the defendant has since died, is by agreement to be entered as of the 10th July last, the day when the action was tried, with costs.

Solicitors for plaintiff, *J. Scaife*, for *Duncan* and *Duncan*, South Shields.

Solicitors for defendant, *H. C. Cook*, for *Adamson*, North Shields.

## COMMON PLEAS DIVISION.

Saturday, Jan. 11.

(Before DENMAN, J.)

NOAD v. MURROW AND ANOTHER. (a)

*Practice*—Pleading—Agreement imperfectly alleged—Substantive cause of action—Amendment, when to be allowed—Order XXVII., r. 1.

The plaintiff, by his statement of claim, claimed damages for false and fraudulent representation, whereby he was induced to sell the lease of a public-house to one N., and receive bills in part payment, on the faith that N. was in good and solvent circumstances, which bills were dishonoured. The paragraph which alleged the false and fraudulent representations went on to allege "that the defendant undertook and promised the plaintiff that he (the defendant) would discount or procure to be discounted the said bills, if given in such part payment, and would procure the indorsement of some person of good credit on the said bills as a guarantee for their payment when due." No consideration for this promise, nor any specific damages resulting from its breach was alleged.

The jury found that the defendant had not been guilty of any fraudulent representation, but that he had agreed to get the bills backed or to discount them as alleged.

Held, that this agreement was not pleaded as a substantive ground of action, but as evidence in support of the case of fraud, and that the defendant was entitled to judgment.

Leave to amend after verdict, by pleading a consideration for the agreement and alleging it as a substantive cause of action, refused; the judge who tried the case being of opinion that such an amendment would not do justice between the parties.

Case heard on further consideration before Denman, J.

The statement of claim alleged that the plaintiff, being desirous of selling the lease, fixtures, and goodwill of a public-house, was introduced by the defendant Pether to the defendant Murrow, a public-house broker; and through the introduction of Murrow and Pether agreed to sell, and

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

did in fact sell, the lease, &c., to one Nolan for 2050*l*. That the defendants, before the completion of the purchase, "falsely and fraudulently represented to the plaintiff that Nolan was a person in good circumstances, and might be safely trusted on credit by the plaintiff to make part payment of the purchase money in bills of exchange for 25*l*. each, payable at intervals of three months, and the defendant Murrow undertook and promised the plaintiff that he (Murrow) would discount or procure to be discounted the acceptances of the said Nolan, if given in part payment of the said purchase, and that he, the said Murrow, would procure the indorsement of some person of good credit on the said bills as a guarantee for their payment when due." That the plaintiff, relying on the said false and fraudulent representations was induced to take part payment from Nolan in bills amounting to 400*l*.; that the representations were untrue to the knowledge of the defendants; that the bills received from Nolan were worthless; and that Murrow had neither discounted nor procured to be discounted the bills, nor obtained the indorsement of a person of good credit. The statement of claim concluded by alleging that "by reason of the false and fraudulent representations made by the defendants as alleged the plaintiff had lost the sum of money represented by the bills, to wit, the sum of 400*l*."

There was a distinct claim against the defendant Pether for previous false and fraudulent representations on other matters, with a separate claim for damages.

The defendant Murrow, by his statement of defence, denied that the plaintiff sold the lease, &c., to Nolan by his introduction. He denied the alleged representations, and the alleged undertaking or promise either to discount the bills or to procure the indorsement of some person of good credit, and all other material allegations; and further pleaded that, if he did make any such representations as alleged, the same were not in writing signed by him as required by the statute.

The statement of defence put in by Pether, and the issue of the action as against him, are immaterial for the present purpose.

The jury found that there was no fraudulent representation, but an agreement by Murrow to discount the bills himself or procure them to be discounted by some other person, and assessed the damages at 400*l*.

Dec. 19.—The case now came on before Denman, J. on further consideration.

Kemp, Q.C., for the plaintiff, asked for judgment.—The statement of claim sufficiently shows that the plaintiff sues not only for fraudulent misrepresentation, but on an express contract. It may be that some amendment will be required to show the consideration for the promise, but the plaintiff is entitled to that. In *Budding v. Murdoch* (L. Rep. 1 Ch. Div.) the plaintiffs were allowed to amend their pleadings so as to raise an entirely new case, having failed on that first set up by them.

O. Hall for the defendant Murrow.—An amendment in this case would go to the very root of the action. The case at the trial was essentially one of fraud, and that has been negatived by the jury. The statement of claim raises no case of contract

at all. It does allege a promise, apparently as part of the representations complained of, but no breach is alleged; and if a breach can be gathered from the pleadings, there is at any rate no allegation of damage resulting from breach of contract, or from anything but the alleged false representations. Nor is there any consideration for the defendant's alleged promise, and in fact none was proved. If the defendant had understood that the action against him was one of contract, he would have pleaded the Statute of Frauds to that as well as to the claim for false representation.

Kemp, Q.C. in reply.—The consideration proved was that the plaintiff consented to the sale to Nolan, whereby the defendant got his commission, on condition of the defendant's promises with respect to the bills. We admit that it is not so pleaded, and therefore ask for an amendment.

Jan. 11.—DENMAN, J. delivered judgment as follows:—This action was brought by the plaintiff against the defendants, Pether and Murrow, for certain joint and also for certain several causes of action. The first five paragraphs of the statement of claim related wholly to the acts of the defendant Pether, who, it was alleged, had by false representations induced the plaintiff to purchase the lease of a public-house, called the "George the Fourth," for 2050*l*. Nothing now turns upon this part of the case, as Pether at the end of the plaintiff's case submitted to judgment for an agreed sum in respect of the claim against him. The statement of claim then proceeded to allege that the plaintiff, being desirous of selling the lease, &c., was introduced by the defendant Pether to the defendant Murrow, a public-house broker, and that through the introduction of the defendants the plaintiff agreed to sell to one Nolan at 2050*l*. The statement of claim then alleged (in paragraph 8) "that the defendants before the completion of the purchase falsely and fraudulently represented to the plaintiff that Nolan was a person in good circumstances, and might safely be trusted upon credit by the plaintiff to make part payment of the purchase money in bills of exchange at certain dates; and Murrow undertook and promised that he would discount or procure to be discounted Nolan's acceptances if given in part payment, and that he (Murrow) would procure the indorsement of some person of good credit on the said bills as a guarantee for their payment when due;" (par. 9) "that the plaintiff, relying upon the said false and fraudulent representations, was induced to take part payment in Nolan's bills to the amount of 400*l*;" (par. 10) "that Nolan was not, as defendants well knew, a person in good circumstances, who might safely be trusted on credit;" (par. 11) "that the bills were worthless to the knowledge of the defendants, and that Murrow had refused to discount, or procure to be discounted, the said bills, or to procure the indorsement of some person of good credit on the said bills as a guarantee for their payment when due;" (par. 13) "that by reason of the false and fraudulent representations in paragraphs 6-11 the plaintiff had lost" the 400*l*. represented by the bills, which he claimed as damages. The defendant Murrow in his statement of defence denied the false representations alleged, and then proceeded as follows: "And the defendant further denies that he ever undertook or promised the plaintiff that he could discount or procure to be

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discounted the acceptances of the said Nolan, as alleged in the eighth paragraph, and further denies that he ever undertook or promised the plaintiff to procure the indorsement of some person of good credit on the said bills as a guarantee as in the said eighth paragraph alleged." There was also a paragraph setting up the Statute of Frauds, and a denial of the allegations in the subsequent paragraphs relating to Murrow. At the trial it was proved that the plaintiff, wishing to get rid of the lease, &c., of the public-house, which he had bought of Pether in Feb. 1877, was introduced by Pether to the defendant Murrow in April 1877. Murrow, being a public-house broker, put the house up to auction on the 15th May, but it was not sold. About the 24th May a conversation took place, at which the plaintiff and his uncle (one Mellor), and Pether and Murrow were present, relating to the purchase by Nolan referred to in the pleadings. The evidence as to this conversation was very conflicting. The plaintiff Noad said that he having heard from Pether that the defendant Murrow had agreed to sell to Nolan, the above parties met, and that Mellor asked Murrow who Nolan was, whereupon Murrow said, "He is a very respectable man, and I have sold the house to him for 2050*l.*, and have a deposit for 100*l.*, half by a cheque and half by an I O U. Nolan is to find 160*l.* in cash and the remainder in bills;" that he, the plaintiff, then said: "I won't take bills, I had sooner take less for the house, as I want cash;" that Murrow replied, "I have a friend in the city who has some ward money to lend, and he will discount these bills for one at a small percentage; he has cashed bills for me before, and I will get them done, Mr. Nolan is a very respectable man, and the bills will be sure to be met. I have arranged with Mr. Nolan to get the bills backed by a good man;" and that upon those statements he agreed to sell to Nolan. He also said that in the evening of the day of the change (Aug. 3rd), Murrow produced sixteen bills, which Mellor observed were not backed according to arrangement, whereupon Murrow observed "that it was an oversight, but that he could get them discounted all the same," and thereupon the plaintiff signed and indorsed the bills. On the 7th Aug. the plaintiff and Mellor, according to the plaintiff's evidence, called again on Murrow, and further asked him for the cash for the bills which he had promised, to which Murrow replied "that he had not been able to see the friend who had promised to discount them, but would do so if they would call again in a few days. The plaintiff, however, had at some time signed a paper as follows: "Received of Messrs. Murrow 346*l.* 6*s.* 10*d.* being the balance due to me over the sale of the George the Fourth, and I discharge Mr. Pether from all claims I may have against him. 7th Aug. 1877. H. Noad." His account of this was that he signed it a few days afterwards, the defendant Murrow covering it over with his hands, and that on that occasion (Mellor not being present) Murrow said he had seen his friend, who having seen the public-house would not discount the bills; that Murrow then said, "We had trouble enough over the matter; you had better take the bills away;" and produced the slip of paper which he signed without reading, and which had been already drawn up. On cross-examination, the plaintiff admitted that after taking the bills back he had seen the defendant Murrow about the 18th Aug., and had

then told him he should send the bills to his uncle Mellor, which he had done, and that his uncle had kept them three months, and tried to discount them, but without success. The plaintiff's uncle Mellor was also called as a witness, and after stating the facts as deposed to by the plaintiff down to the auction on the 15th May, proceeded to give his account of what took place, at the meeting at Murrow's office. [The learned judge then stated the evidence given by Mellor on this point.] The witness then gave his version of what took place on the day of the "change," not differing materially from what the plaintiff had stated. He also spoke of several calls upon Murrow, in one of which he accused both him and Pether of a gross swindle, and asked where the cash for the bills was, to which he said that Murrow replied: "My friend won't discount them. I shall have to get another gentleman to do so. They will be all right." He said this took place seven or eight days after the "change," and that the plaintiff was present. This witness said for the first time on cross-examination that Murrow had said, "Nolan was a person in good circumstances, and might safely be trusted on credit," and that Noad said, "If you will get the bills backed and discounted as you state I will agree to the sale;" to which Murrow replied, "It will be all right." [The learned judge then stated at length the evidence given by the defendant Murrow, denying the alleged false representations, and also the statements in conversation imputed to him.] This being the character of the evidence on both sides, I summed up the case. I left to the jury, first, whether they found that the defendant Murrow had been guilty of any fraudulent representation, and this question they answered in the negative. But I also left to them whether the defendant Murrow had agreed to get the bills backed or to discount them as alleged by the plaintiff. This question they found in the affirmative, and assessed the damages at 400*l.* Mr. Hall, for the defendant Murrow, then claimed judgment for him on the ground that no such claim was alleged on the statement of claim independently of the alleged fraud, and that, even if such an agreement was alleged as a substantive cause of action, it was so alleged as not to amount to a good cause of action for want of any allegation of a consideration for such agreement; and, even if so alleged, that there was no evidence of any such consideration upon the facts proved. I adjourned the case for further consideration, and afterwards heard counsel upon these objections. Having now fully considered them, and the pleadings and evidence in the case, I am of opinion that the defendant Murrow is entitled to judgment on the ground suggested by Mr. Hall. The only difficulty I have had in coming to this conclusion arises from the fact that the defendant does in his statement of defence specifically contradict the allegation in paragraph 8 of the statement of claim, "that he undertook and promised the plaintiff that he would discount or procure to be discounted" the bill, if given in part payment of the purchase; and that he would "procure the indorsement of some person of good credit on the bills as a guarantee for their payment when due;" so that it cannot be said that he was surprised by the case made by the plaintiff so far as that allegation was concerned. But on the other hand, I think it quite clear, as urged by

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Mr. Hall, that that was not the *real* case which the defendant Murrow had to meet, but a mere statement of certain evidence, going to support the case of fraud relied on by the plaintiff in that very paragraph of the statement of claim which states the undertaking in question. This appears from the subsequent paragraphs of the statement of claim, in none of which is the supposed promise or undertaking relied on as a substantive part of the cause of action, nor are any damages claimed for the breach of it as such. No consideration for any such promise is alleged on the face of the statement of claim, so that, but for the allegations of fraud, and in the absence of amendment, it is admitted that the statement of claim would be bad upon demurrer, which alone would entitle the defendant to judgment. Mr. Kemp, however, contended that I ought to amend the statement of claim in order to give effect to the finding of the jury. I certainly would do so if I thought that I should thereby be doing justice between the parties, or if I thought that I should thereby be enabling them to settle the real question in dispute between them. The amendment proposed was that I should state the consideration of the alleged promise to have been that the defendant Murrow should receive the 2½ per cent. which he in fact charged upon the completion of the agreement to sell to Nolan. I should feel no difficulty, if I thought it right to do so, in so amending the statement of claim as to make it cover the undertaking suggested and the breach of it. But, in considering whether to amend or not, I think that I ought not only to have regard to the finding of the jury upon a question left to them, *ex abundanti cautela*, but to the real truth and merits of the case, so far as I can gather them from the conduct of the parties upon the trial; and I certainly was not at all satisfied with the evidence upon this part of the case for the plaintiff. Looking at the way in which Mellor gave his evidence with reference to the conversation, and at the way in which he mended it as he went on; looking also at the discrepancies between the two statements as to the signing of the document of the 7th Aug.; and looking at the other evidence which was given, it appears to me that the guarantee or quasi-guarantee relied on at the trial, highly improbable in itself, was a mere afterthought not intended to be relied upon, when the pleadings were drawn, as a substantive cause of action, and not founded on fact. Under these circumstances, I think that it would not be fair to the defendant Murrow, who at the trial appeared to me to give perfectly credible evidence, far more in accordance with probability than that of the plaintiff, in denial of the alleged undertaking, to enable the plaintiff to succeed by making an amendment which in reality would have entirely altered the nature and substance of the claim. I must therefore decline to amend, and give judgment for the defendant Murrow with costs.

*Judgment for the defendant.*

Solicitor for the plaintiff, *E. Sweeting*.

Solicitors for the defendant, *Keene and Marsland*.

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### PROBATE BUSINESS.

*Tuesday, Feb. 25.*

(Before the Right Honourable the **PRESIDENT**.)

In the Goods of **JOHN WALSHAW** (deceased). (a.)

**FIELDING v. WALSHAW.**

*Administration "with the will annexed"—Deed of gift—Document partly ambiguous and partly clearly testamentary—Executor "according to the tenor."*

*Where the deceased had on the day before his death executed a document which purported to be a deed of gift, but which bore neither seal nor stamp, and contained (inter alia) a direction to the widow to receive "all moneys forthcoming, including sick and funeral moneys, my said wife to pay all dues and demands," and a number of specific gifts of bank shares, moneys, &c., to various relatives.*

*Held (in spite of declarations made by the deceased of his intention to dispose of his property inter vivos, and not to make a will), that the document, although ambiguous, was testamentary, and the Court accordingly granted administration "with the will annexed" to the widow as "executrix according to the tenor."*

**JOHN WALSHAW**, late of Mossley, in the parish of Ashton-under-Lyne, in the county of Lancaster, leather dealer, died on the 22nd May 1878, having on the previous day executed a document (purporting to be a deed of gift) which ran as follows, but bore neither stamp nor seal:

To all people to whom these presents shall come, I, John Walshaw, do send greeting; know ye that I, the said John Walshaw, of Mossley, in the parish of Ashton-under-Lyne, in the county of Lancaster, leather dealer, for and in consideration of the love I bear towards my loving wife, Mary Walshaw, of the same parish and county, have given and granted, and by these presents do hereby give and grant, unto the said Mary Walshaw, her heirs, executors, or administrators, all and singular my stock-in-trade, household furniture in my shop and house (Stamford-road, Mossley), money in hand, and to receive all moneys forthcoming, including sick and funeral moneys, my said wife to pay all dues and demands; I also give unto her during my life the sum of 10s. (ten shillings) per week, and all the assistance I can give or render as lies in my power, and whatever money arises out of bank shares as bonus or bonuses, more than I require for my own use, shall be taken possession of by my wife.

The bank shares which I possess shall be sold and then to be divided into nineteen shares, which I give to the following persons: my sister Mary Ann Fielding, of Stamford-road, Mossley, in the parish of Ashton-under-Lyne, in the county of Lancaster, two shares; her daughter, Mary Ann Newby, of the same place, parish, and county, two shares; her daughter, Fanny Rhodes, of Ashton-under-Lyne, in the same parish and county, two shares; my half-brother, Edward Walshaw, labourer, Southport, one share; Abraham Ogden, now in America, one share; Mary Ellen Ogden, his daughter, also in America, one share; Giles Ogden, his son, also in America, one share; Joseph Ogden, Archers-street, Carr Hill-cottages, Mossley, in the parish of Saddleworth, in the county of York, one share; Elizabeth Ann Ogden and Fanny Ogden, daughters of the said Joseph Ogden, of the same place, parish, and county, one share each; Elizabeth Ogden (widow of William Ogden), of Stamford-road, Mossley, in the parish of Ashton-under-Lyne, in the county of Lancaster, one share; Alfred Edward Ogden, of Sandbed, Mossley, in the parish of Saddleworth, in the county of York, one share; Fanny Marland, of Stamford-road, Mossley, in the parish of Ashton-under-Lyne, in the

(a) Reported by **L. D. POWLES, Esq., Barrister-at-Law.**



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county of Lancaster, one share, John Ogden, of the same place, parish, and county, one share; Jane Ogden and Sarah Ogden, both of the same place, parish, and county, one share each.

In witness whereof I have hereunto put my hand and seal, this 21st day of May 1878. JOHN WALSHAW.

Witnesses, Seth Radcliffe, Daniel Dempsey.

From the various affidavits before the court it appeared that the above document was prepared by an auctioneer named Daniel Dempsey, who resided at Mossley, and who was called in by the deceased early on the morning of the day on which it bears date, and was executed by the deceased in duplicate in the presence of Daniel Dempsey and Seth Radcliffe. When giving instructions to Dempsey the deceased told him that he would not make a will, but wanted a deed of gift prepared, and, on executing both parts of the said deed, the deceased told both the witnesses that he did not intend the documents signed by him to operate as a will, but as a deed. He had on the day previous told his wife, the present defendant, that he would never make a will, but would give what he had in his lifetime. After the execution of the deed in duplicate, as above stated, one copy was retained by Dempsey and the other handed to the defendant.

On the 7th Aug. last the copy of the deed in the possession of the defendant was brought into the principal registry of the Probate Division, pursuant to a subpoena issued against her on the 30th July 1878, at the instance of the present plaintiff, the sister of the deceased.

On the 16th Dec. a citation was issued at the instance of the plaintiff, which was served on the defendant, and to which an appearance was duly entered.

On the 17th Feb. 1879 a notice of motion was served on the defendant to the effect that the court would be moved on the 25th on behalf of the said plaintiff, for an order for probate of the last will and testament of the said deceased, or, in the alternative, for administration with the will annexed.

On the 20th the defendant served a counter-notice of motion on the plaintiff to the effect that on the same day the court would be moved on behalf of the said defendant to declare that the document of the 21st May 1878 was not a will.

Dr. Deane, Q.C., for the plaintiff, Mary Fielding, contended that, although ambiguous, the document in question was clearly a will, and ought to be treated accordingly.

Bayford, for the defendant, Mary Walshaw, contended that the said document was not a will, or at any rate so very ambiguous as to render it unsafe to admit it to probate.

The following authorities were quoted in the course of the arguments:

- 1 Williams on Executors, pt. I., book II., p. 105.
- Bartholomew v. Henley, 3 Phill. 318;
- Masterman v. Maberley, 2 Hag. 247;
- King's Proctor v. Davies, 3 Hag. 221.

The PRESIDENT (Sir James Hannen). — The utmost that can be said of this paper is that it is ambiguous. But I doubt if this is really the case. It contains directions to the widow to receive "sick and funeral moneys," and whatever this expression means it could only take effect after the death of the deceased, and his widow is invested with all the duties of an executor. Putting it no higher than that it is open to comment as ambi-

guous. I am satisfied that it is a will. The deceased evidently objected to the use of the word "will," and perhaps to the expenses of probate. I must, however, respect his intentions. If he intended this document to take effect on his death I must give effect to it. Now, regarding this document, part of it is clearly testamentary; for instance the provisions in reference to the deceased's pecuniary affairs. I am of opinion that this document is testamentary, and must be admitted to proof, and I shall therefore grant administration to the widow with this document annexed as executrix according to the tenor, and I order that the costs of these proceedings be paid out of the estate.

Solicitors for the plaintiff, *Clarke, Woodcock, and Ryland.*

Solicitors for the defendant, *Milne, Riddle, and Mellor.*

## COURT OF BANKRUPTCY.

Jan. 13 and 14.

(Before the CHIEF JUDGE.)

*Ex parte* NEWSHAM; *Re* WOOD. (a)

*Debtor in custody—Unregistered bill of sale by—Goods in hands of the police—Apparent possession—Bills of Sale Act 1854, s. 7.*

*A., being in custody upon a criminal charge, executed a bill of sale of certain jewels, of which the police inspector had taken possession. The bill of sale was never registered. A. having been subsequently adjudicated a bankrupt, the trustee under an order of the court obtained possession of the jewels from the police inspector.*

*Held, upon appeal (affirming the order of the judge of the court below), that the bill of sale was void for want of registration as against the claim of the trustee, who was entitled to the jewels as being in the apparent possession of the grantor of the bill of sale at the date of the adjudication.*

THIS was an appeal from the decision of the County Court at Brighton on the 8th Nov. 1878.

On the 22nd March 1878 Thomas Gard Wood, the bankrupt, was arrested upon the charge of obtaining money under false pretences, and on the 11th May was fully committed for trial. On the same day, in consideration of 80*l.*, T. G. Wood executed a bill of sale whereby he assigned to Michael James Newsham, the appellant, certain jewels belonging to him, which, having been upon his person at the time of his arrest, had been taken possession of by the police, and were then in the hands of one of the inspectors. The bill of sale was not registered, but notice of it was given to the police inspector. Upon the 5th June 1878 T. G. Wood filed a declaration of inability to pay his debts, and on the following day he was duly adjudicated a bankrupt.

He was tried on the 8th upon the charge of obtaining money by false pretences, and was convicted; but no order was made in respect of the jewels, which therefore remained in the hands of the police inspector.

The jewels having been claimed by the trustee in the bankruptcy, and by Mr. Newsham, an interpleader summons was taken out by the police inspector on the 13th July, and heard on the 18th, when an order was made directing the delivery of

(a) Reported by A. A. DORIA, Esq., Barrister-at-Law.

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the jewels to the trustee, the question as to who was entitled to them being reserved for the decision of the Court of Bankruptcy. A motion by M. J. Newham to the County Court for an order declaring that he was entitled to the jewels, and directing the trustee to deliver them to him, having been refused, the present appeal was brought.

*Winslow, Q.C.* and *J. J. Sims* appeared for the appellant.—Property seized by the Crown, and in the hands of its officer, was not in the apparent possession of a prisoner. The Crown takes possession of property found upon a prisoner for two purposes, viz., to use it as evidence against him, and to apply it under certain circumstances in payment of the expenses of the prosecution. The possession, therefore, of the Crown is adverse to the rights of the prisoner. The interpretation clause of the Bills of Sale Act 1854 showed what things are included in it, and by sect 7 the Act is made to apply only to goods in the "possession or apparent possession" of the grantors. There was no "possession" or "apparent possession" in the present case, for the bankrupt never had the use or enjoyment of the property after the police had seized it. The County Court judge relied upon the case of *Ancona v. Rogers* (35 L. T. Rep. N. S. 115; L. Rep. 1 Exch. Div. 285). Possession of the Crown differs from that of a bailee, since the Crown takes possession by force, and not for the benefit of the prisoner. Such possession was not within the mischief guarded against by the Bills of Sale Act.

*Swanston, Q.C.* and *W. Nicholson*, for the respondent, were not called on.

The CHIEF JUDGE.—This case is reasonably clear, the only difficulty in it being the point of law mentioned in Mr. Winslow's argument. Upon the question of law, the view submitted to me on behalf of the appellant is, that the transaction between him and the bankrupt was not within the Bills of Sale Act. I think it was clearly within that statute. Here there is a bill of sale executed by a man who is, beyond all question, the owner of the property included in it. It has been argued that the property was not goods in the apparent possession of the owner, and what was erroneously called the interpretation clause of the Bills of Sale Act has been referred to. That Act applies to all personal chattels, and lest it should be thought that certain articles were not within it, a definition clause was added to it, saying that they should be included in it. The case which has been cited not only covers the point now before me, but contains a complete exposition of the law upon the subject. If a man bails his goods, he is deemed to be in possession of them; and can there be any difference between that state of things and the case where, by operation of law, goods have been taken out of his immediate possession? If the prisoner had been discharged without being brought to trial, or after being tried had been acquitted, can there be any doubt that he would have had a right to demand back the possession of these goods? This was a secret bill of sale, and is within the mischief guarded against by the Bills of Sale Act. The appeal must be dismissed with costs.

Solicitors for the appellant, *Hops and Co.*

Solicitor for the respondent, *Jas. Gray.*

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## Supreme Court of Judicature.

### COURT OF APPEAL

SITTINGS AT LINCOLN'S INN.

Thursday, Feb. 20.

(Before JAMES, BRETT, and COTTON, L.JJ.)

Ex parte COOPER; Re McLAREN. (a)

*Stoppage in transitu—End of transitu—Constructive delivery—Delivery of part of cargo—Master's lien for unpaid freight.*

Where goods are placed in the possession of a carrier to be carried for the vendor to be delivered to the purchaser, the transitu is not at an end so long as the carrier continues to hold the goods as a carrier, and it is not at an end until the carrier, by agreement between himself and the consignee, agrees to hold for the consignee not as carrier but as his agent.

The same principle applies to goods placed in the possession of a warehouseman or wharfinger.

A cargo of miscellaneous iron castings was shipped at Glasgow on the 30th July, by a Scotch firm of manufacturers on board a vessel chartered by them, and consigned to M., a merchant in London, the bill of lading being made out in favour of M. or his assignees, he or they paying freight. M. was managing partner of the Scotch firm, and carried on business in London on his own account.

On the 7th Aug. the ship arrived in the port of London, and on the same day a portion of the cargo was delivered on board a barge belonging to M. On the 8th Aug. the Scotch firm gave notice to the master to stop the unloading of the ship. At that time part only of the freight had been paid. M. had not paid for the goods. On the 19th Aug. M. filed a liquidation petition, and on the 21st Sept. a sequestration was issued against the Scotch firm in the Scotch court:

Held, that the delivery of a part did not amount to a constructive delivery of the whole of the cargo, as, the whole of the freight not having been paid when the part was delivered, it could not be supposed that the master of the ship intended to give up his lien on the cargo for unpaid freight; that the stoppage in transitu was therefore in time, and the trustee in the Scotch sequestration was entitled to the part of the cargo not actually delivered before the stoppage.

*Slabey v. Heyward* (2 H. Bl. 504) and *Hammond v. Anderson* (1 B. & P. N. R. 69) distinguished.

This was an appeal from a decision of Mr. Registrar Hazlitt, sitting as Chief Judge in Bankruptcy.

The facts of the case were briefly as follows:

Andrew McLaren carried on business as an iron merchant in London on his own account. He also traded at Alloa, in Scotland, in partnership with Richard Andrews, under the firm of the Albion Iron Company. Andrews was only a sleeping partner, McLaren having the management of the business.

On the 30th July 1878 a cargo of 114 tons of miscellaneous iron castings, such as ovens, wheels, troughs, grates, &c., were shipped by the Albion Iron Company on board a vessel called the

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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*Shamrock*, at Glasgow, and consigned to McLaren in London, the bill of lading being made out in favour of McLaren or his assignees, "he or they paying freight."

On the 7th Aug. 1878 the ship arrived in the port of London, and on the same day about thirty tons of the goods were placed on board a barge belonging to McLaren.

On the 8th Aug. McLaren, who was then in Scotland, and who was aware that both he himself and his Scotch firm were on the verge of insolvency, sent a telegram to his manager in London: "If commenced to unload ship, stop proceedings; if not, do not begin until I return." Upon receipt of this telegram the unloading was suspended.

On the 12th Aug. McLaren returned to London and saw the captain of the ship, and arranged with him to stop the delivery.

Part of the freight was paid on the 7th Aug., and another part was paid on the 15th Aug.

The goods had not been paid for by McLaren.

On the 19th Aug. McLaren filed a liquidation petition in London, and on the 21st Sept. his Scotch firm presented a sequestration petition in the Scotch court, and a sequestration was issued on the same day.

The balance of the freight was paid on the 23rd Aug. by the receiver in the liquidation, and the remainder of the cargo was then landed and placed *in medio*.

The cargo was claimed by the trustee in the English liquidation, and also by the trustee in the Scotch sequestration, the question being whether McLaren's separate creditors or the creditors of his Scotch firm were to get the benefit of it.

The registrar having decided in favour of the trustee in the Scotch sequestration, the trustee in the English liquidation appealed.

Before the appeal came on for hearing the Scotch trustee abandoned his claim to the thirty tons which had been unloaded before the 8th Aug.

*Joseph Brown*, Q.C. and *Stern* for the appellant.—The delivery of a part of the cargo on the 7th Aug. amounted to a constructive delivery of the whole; and thus the *transitus* was at an end before the notice to stop was given:

*Slubey v. Heyward*, 2 H. Bl. 504;

*Hammond v. Anderson*, 1 B. & P. N. R. 69;

*Lickbarrow v. Mason*, 1 Sm. Lead. Cas. 7th edit. 756;

*Hanson v. Meyer*, 6 East, 614;

*Tanner v. Scovell*, 14 M. & W. 28.

If it is a question of intention, as stated in Benjamin on Sales, 2nd edit., p. 663. The intention at the time of the partial delivery must be regarded, and there can be no doubt that at that time the intention was to deliver the whole cargo. [CORROD, L.J.—The only case altogether in your favour is *Jones v. Jones*, 8 M. & W. 431.] This is not like *Dixon v. Yates* (5 B. & Ad. 313-341), where Parke, J., said, "If part be delivered with intent to separate that part from the rest, it is not an inchoate delivery of the whole." Here there was no such intention, and the partial delivery was an inchoate delivery of the whole, which would have been completed but for the telegram. The onus of proving an intention to separate a part from the whole lies on the person seeking to stop *in transitu*. In *Betts v. Gibbons* (2 Ad. & E. 73), Taunton, J., in answer to counsel who maintained that a delivery of part amounts to a delivery of the whole only when circum-

stances show that it is meant as such, said, "No; on the contrary, a partial delivery is a delivery of the whole, unless circumstances show that it is not so meant." McLaren in stopping the delivery was giving a fraudulent preference to the creditors of his Scotch firm. They also cited

*Simmons v. Swift*, 5 B. & C. 857;

*Miles v. Gorton*, 2 Cr. & M. 504;

*Allan v. Gripper*, 2 Cr. & J. 218;

*Bolton v. Lancashire and Yorkshire Railway Company*, 13 L. T. Rep. N. S. 764; L. Rep. 1 C. P. 431.

*Benjamin*, Q.C. and *B. T. Reid*, for the respondent, were not called upon.

JAMES, L.J.—I think that the decision of the learned registrar in this case ought to be affirmed. I do not know that it is necessary to lay down absolutely a general principle as regards those cases of *Slubey v. Heyward* (2 H. Bl. 504) and *Hammond v. Anderson* (1 B. & P. N. R. 69), namely, as to the circumstances under which a delivery of part is to be considered a delivery of the whole, so as to put an end to the vendor's right of stoppage *in transitu*. The simple question here is whether, if the vendor receives notice of the vendee's insolvency, and at once takes steps, going to the port as fast as he can, and finds that the captain has delivered part of the goods, he has a right to stop the delivery of the rest. No such case, as far as I have heard, has ever occurred. The cases which have occurred have been cases in which there has been a change of the relationship between the carriers or the warehousemen and the vendee, and such a change of relationship as to make the carrier or the warehouseman the actual holder of the goods for the vendee. In the case of *Bolton v. Lancashire and Yorkshire Railway Company* (13 L. T. Rep. N. S. 764, 767; L. Rep. 1 C. P. 431, 440), Willes, J. says this: "Then, as to the alleged delivery of part of the goods, and the effect of that upon the vendor's right to stop the rest: there have been different expressions of opinion at various times as to whether the delivery of a portion of the goods, the subject of an entire contract, operates as a constructive delivery of the whole, so as to put an end to the right of stopping *in transitu*. It was supposed to have been thrown out by Taunton, J., that a delivery of part operated as a constructive delivery of the whole; but that doctrine has since been called in question and dis-sented from; and it is now held that the delivery of part operates as a constructive delivery of the whole only where the delivery of part takes place in the course of the delivery of the whole, and the taking possession by the buyer of that part is the acceptance of constructive possession of the whole." Now, in this case, the fact seems to be really quite clear. There could be nothing like a constructive delivery by the captain of the whole or a constructive acceptance of the whole by the vendee. What the effect might have been if the whole freight had been paid so that the captain had no lien whatever that he could have exercised on behalf of the owners, and the delivery had begun—what difference that would make it is not necessary now to say. It appears to me quite clear that, as there was not actual payment of the whole of the freight, there could not be a constructive delivery of the whole of the goods, because the captain must be assumed not to have delivered the whole until he had received the whole of the freight, and therefore, if the captain had not con-

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constructively delivered the whole, it would be impossible to say that the vendee had constructively accepted a delivery which was never constructively made. I am of opinion, therefore, that in this case there was not such a constructive delivery by the captain, and such a constructive acceptance of that delivery by the vendee as would amount to an acceptance of the whole; that is to say, such an acceptance as to prevent the vendee from refusing to take, or to prevent the vendor from exercising his right of stoppage *in transitu*, the vendee having become insolvent. I do not think it makes any difference that McLaren was partner in the Scotch firm.

BARR, L.J.—I am of opinion that there was in this case a valid stoppage *in transitu* of the goods by the vendor as against the insolvent vendee at the time when McLaren directed the captain to stop the delivery. In my opinion the goods were then in the hands of the shipowner as carrier, and the *transitus* was not at an end. The only ground upon which it is urged that the *transitus* was at an end is, that there had at that time been a part delivery of the cargo. It seems to me that a part delivery of the cargo or of the bulk of the goods is not *prima facie* a delivery of the whole, and that those who rely upon the part delivery as a constructive delivery of the whole are bound to show that the part delivery was made under such circumstances as to make it a constructive delivery of the whole. Now here it is first objected that McLaren, as a member both of the London house and of the Scotch firm, was doing wrong in stopping the delivery, so as to give the Scotch firm an opportunity of stopping *in transitu*, that he was thereby making a fraudulent preference; but it was admitted by Mr. Brown that that depended upon whether the *transitus* was at an end, whether the delivery in law was complete. Therefore, unless the delivery was complete, there was nothing wrong in McLaren (knowing that his London house was insolvent) stopping the delivery so as to give the Scotch firm the opportunity of exercising their rights as unpaid vendors. The Scotch firm had the right to stop *in transitu* under the circumstances of this case, unless the *transitus* was over. We therefore come down, or are driven down, to the only point in this case, that is, whether the *transitus* was over. Now, the goods were shipped by the Scotch firm. They were placed on board ship to be carried to London, and there delivered. At the time therefore of the delivery on board the goods were held by the captain as the carrier on behalf of the Scotch firm. They were brought to London. There is a part delivery. There had been freight paid, and, to my mind, the captain was bound to deliver, unless ordered to the contrary, up to the extent of the prepaid freight; but the moment he had delivered sufficient to satisfy the prepaid freight, he had his lien upon the rest of the cargo for the unpaid freight. Then the captain, holding the goods as carrier, delivers a part; but is it to be said, or can it be properly said that, when he delivered a part, he intended to deliver the whole? If he did intend to deliver the whole, he intended to give up his lien for his freight. The inference is directly the contrary. As a matter of fact he could not have intended to deliver the whole, and therefore when he delivered part he did not intend to deliver the whole, but, on the contrary, he in-

tended to keep back the remainder, or part of the remainder, in order to secure his lien for the freight. In the same way it does not seem to me that from the mere fact of the consignee, McLaren's servant, having received a part, he knowing that he could not receive the rest without paying the freight, and there being no evidence that he offered freight for the rest, it can be said that the proper inference is that he intended to take the delivery of part as the delivery of the whole. It is a mere ordinary case of taking the delivery of a cargo in consecutive deliveries. If that be so, the captain will hold the undelivered part of the cargo as the carrier, and in that case the *transitus* is not over. If so, the Scotch firm was entitled to stop *in transitu*. With regard to the cases of *Slubey v. Heyward* and *Hammond v. Anderson* (*ubi sup.*), it seems to me that the ground of decision was that in one case the captain of the ship had altered his position from that of a mere carrier, and had undertaken, with the consent of the assignees of the bill of lading, to hold the whole of the cargo for them, and, in the other case, in the same way, the wharfinger, who for a time had held for the persons who put the goods into his hands, altered his position, and he, with the consent of the person to whom the goods were transferred, had agreed to hold them, no longer for the person who had put them into his hands, but for the other side. In both cases there was an attornment, and unless something equivalent to an attornment is shown on the part of the carrier, so that he has altered his position from that of a carrier, and holds the goods in another capacity, it seems to me that the *transitus* could not be at an end, and, as long as the carrier holds the goods as carrier, the mere fact of delivery of part does not prevent the unpaid vendor from stopping the remainder *in transitu*. It seems to me that any other doctrine would be of the greatest possible danger in mercantile transactions. I may say that this case goes even further than a mere stoppage *in transitu*, because, in my mind, the agreement of the vendor and the vendee, both of whom were *sui juris*, intended a cessation of the delivery of the goods.

COTTON, L.J.—Whether this case is one of stoppage *in transitu* or delivery of the whole of the goods, the only question is whether or no there had been a delivery to McLaren in London; that is to say, whether he had actual or constructive possession of that portion of the cargo which remained in the ship, because, as to the rest, I understand it is not disputed. Now, in my opinion, there is no ground for the contention that from the very first the captain was the agent of McLaren of London; that is to say, that when those goods were put on board the ship they came into the possession of McLaren of London. That being so, these goods, which were actually on board the ship, remained in the possession of the person who occupied the position of having to carry the goods and to deliver them to McLaren in London. Was there such a delivery? Actually there was none; but it is said that there was a constructive delivery, and therefore constructive possession, by McLaren. Why? Because it is said, and truly, that there was actual delivery to him in London of portions of the cargo. Now the case might be different possibly if the whole of the cargo had been one entire machine, because, if a person is allowed to take possession of one piece

of a machine, it is possession of the whole. It may possibly be—but I do not decide it, for it stands in a very different position from the present case—that he has got possession of the entirety of which he has taken away an essential part. But here we have a cargo of a number of different things capable of being estimated separately as to their value, and in fact estimated in the bills of lading as to the particular value of each. Does a delivery of a portion of these articles, which are in their nature entirely separate one from the other, constitute constructive delivery of the whole? In my opinion, on principle it does not. It is only a delivery of that which is put over the ship's side and into the hands of the consignee. The captain has a lien for his freight on the remainder, without in any way having given them up. But it is said that the decisions and authorities are against that conclusion. Now certainly no decision has been quoted which decides this case in favour of the appellant. *Tanner v. Scovell* (14 M. & W. 28) was said to be a case most in his favour; but it really was no such thing. It was only a decision that, where a consignee took part intending to deal with it separate from the rest of the cargo, under those circumstances taking part was not taking the whole. But Mr. Brown, I think, put his argument, not in words, but in substance, thus: that where there was no evidence it must be presumed that taking the part was taking the whole. In my opinion that proposition is wrong in principle; but has it been so decided? In *Tanner v. Scovell* the learned judge who delivered the judgment of the court (Pollock, C.B.) (14 M. & W. at page 37) says this: "It will be found that the only two cases, so far as I have looked, which bear the semblance of an authority that a mere part delivery is sufficient to put an end to the right to stoppage *in transitu* are *Slubey v. Heywood* and *Hammond v. Anderson*. In the case of *Binney v. Poyntz* (4 B. & Ad. 571), part delivery of a portion of a haystack, with intent to separate that from the remainder, was held not to be sufficient. In *Jones v. Jones* (8 M. & W. 431), on the other hand, this court held, that the vendee (who was assignee under a trust deed) took possession of part of the cargo with the intention of obtaining possession of the whole for the purposes of the trust, and therefore that such taking possession of part did put an end to the transit; but it was fully admitted in that case, that the mere delivery of part to the vendee, when he meant to separate that part from the remainder, did not put an end to the right to stop *in transitu* . . . If the vendee takes possession of part, not meaning thereby to take possession of the whole, but to separate that part, and to take possession of that part only, it puts an end to the *transitus* only with respect to that part, and no more; the right of lien and the right of stoppage *in transitu* on the remainder still continue." Now the judgment in *Slubey v. Heywood* does not say on what special ground the case was decided, but only the circumstances of the case so decided. In *Hammond v. Anderson* there had in point of fact been an actual weighing by the purchaser of the entirety of the cargo. How can a man weigh a thing that is not in his possession? That entirely puts an end to any general proposition in favour of the appellant being deduced from those two cases. Then the case of *Jones v. Jones*, which has been referred

to, looks a little more like a case which would have maintained the general proposition. But, it was decided upon the documents in that case, and the court came to the conclusion as a matter of fact that there was an intention to take the whole when part only was actually taken out; and, that being so, that case is an authority that where a man taking part shows an intention, acquiesced in by the carrier, to receive and take possession of the whole, that is a constructive possession of the whole by the acquiescence of both parties. It does not in any way support the proposition that a mere delivery of a part of the cargo, such as in the present case, can be looked upon as a constructive delivery of the whole, or as putting the consignee in constructive possession so as to defeat the lien, and also defeat the right to stop *in transitu*, or the right of the consignor if he desires under the circumstances to put an end to the contract.

JAMES, L.J.—I think that, having had the advantage of hearing the judgments of my learned brothers, I may say that our decision, upon which we are unanimous, will be expressed thus: That where goods are placed in the possession of a carrier to be carried for the vendor to be delivered to the purchaser, the *transitus* is not at an end so long as the carrier continues to hold the goods as carrier, and is not at an end until the carrier, by agreement between himself and the consignee, agrees to hold the goods for the consignee, not as carrier, but as his agent. And of course the same principle will apply to a warehouseman or wharfinger.

*Appeal accordingly dismissed with costs.*

Solicitors for the appellant, *Linklater, Hackwood, Addison, and Brown.*

Solicitors for the respondent, *West, King and Co.*

*Friday, Dec. 20, 1878.*

(Before JAMES, BAGGALLAY, and THESIGER, L.JJ.)

CURTIS v. WORMALD. (a)

*Conversion—Personally directed to be invested in land—Intestacy—Real or personal estate.*

*Where a testator directs his residuary personal estate to be laid out in land, to be held on trusts which ultimately fail, land purchased before the failure of the trusts is taken by the next of kin as real estate.*

*Decision of Jessel, M.R. affirmed.*

*Head v. Godlee, Reynolds v. Godlee (Johns. 536), overruled.*

THIS was an appeal from a decision of the Master of the Rolls.

George Gent died in 1818, having by his will devised his real estate in strict settlement, limiting life estates to certain persons, with remainders to their sons successively in tail male, with an ultimate remainder in fee to a person who died in the testator's lifetime, and on whose death the testator had made a codicil substituting another devise; this substituted devise he revoked by a subsequent codicil, and directed that the remainder of the fee simple of all his landed estates should go in such way as the law might direct. And he directed the trustees of his will, whom he also appointed his executors, to lay out his residuary personal estate in the pur-

(a) Reported by H. FRAY, Esq., Barrister-at-Law.

chase of freehold and copyhold estates to be settled to the same uses.

All the tenants for life survived the testator, and died without issue, the last survivor dying in 1870.

The next of kin of the testator at his death were Edward Walker, who died in 1820, and Benjamin Walker, who died in 1827.

Edward Walker devised his real estate to his son George Walker absolutely, and Benjamin Walker died intestate as to his residuary real estate, leaving George Walker his heir-at-law. George Walker subsequently died, having devised his real estates to trustees who were parties to the present suit.

Considerable sums, forming part of the testator's residuary personal estate, after payment of debts, &c., were invested in the purchase of freehold and copyhold estates at various times between 1821 and 1870. Such freehold and copyhold estates were for the most part respectively conveyed and surrendered to trustees to the uses declared by the will and codicils concerning the devised estates.

The last of these purchases was completed after the death of the last surviving tenant for life, but the contract had been entered into before his death.

This action was brought for the administration of the testator's estate, and by an order made on the 13th Nov. 1876 it was declared that, according to the true construction of the testator's will and codicils, and in the events which had happened, he had died intestate as to the corpus of his residuary personal estate, and that his next of kin, according to the Statute of Distributions, living at his death were entitled to such corpus.

A summons was taken out by the heir-at-law of such next of kin, asking for a declaration that the corpus of the residuary personal estate devolved as real estate, and the summons was heard in March 1878 before

JESSEL, M.R., who delivered judgment as follows:—The point which I have to consider and decide is this: A testator directed his trustees—for although the same persons may have been appointed executors they are for this purpose trustees and trustees only—to lay out his residuary personal estate in the purchase of real estate, freeholds and copyholds, to be settled to certain uses, comprising a long series of limitations. The residue was ascertained—that is, the testator's debts and legacies, and funeral and testamentary expenses, were all paid—and then the residue was at different times laid out by the trustees, pursuant to the will, in the purchase of freehold and copyhold estates, which were conveyed so as to vest the legal estate in the trustees. That being so, the limitations took effect to a certain extent, and then by reason of failure of issue of the tenants for life, the ultimate limitations failed, and there arose a trust for somebody. Now for whom? According to the doctrine of the Court of Equity, settled, if I may say so, by the well-known case of *Ackroyd v. Smithson* (1 Bro. C. C. 503)—for it has always been the law of this court since—this kind of conversion is a conversion for the purposes of the will, and does not affect the rights of the persons who take by law independent of the will. If, therefore, there is a trust to sell real estate for the purposes of the

will, and the trust takes effect, and there is an ultimate beneficial interest undisposed of, that undisposed-of interest goes to the heir. If, on the other hand, it is a conversion of personal estate into real estate, and there is an ultimate limitation which fails of taking effect, the interest which fails results for the benefit of the persons entitled to the personal estate, that is, the persons who take under the Statute of Distributions as next of kin. Their right to the residue of the personal estate is a statutory right independent of the will. The result is, that in the case I put there is a trust for the next of kin. How anyone could imagine it was a trust for anybody else it is difficult to understand; and, had I not been referred to the judgment of a very eminent judge on this subject, I should have said it was impossible to understand it. There certainly is authority for saying—a single authority, and an authority standing alone—that the ultimate trust is not for the next of kin, but for the executors. Why? The executors have ceased to have anything whatever to do with the matter. They have paid over the legacy to the legatee, who happens to be a legatee-trustee, and who holds it by law, under the Statute of Distribution, as trustee for the next of kin, and no one else. By what process of reasoning any other result can be arrived at I have been unable to discover. The decision to which I have referred is one which, to my mind, is utterly opposed to the whole law upon the subject. Then the next question which arises is, how does the heir-at-law in the first case, or the next of kin in the second, take the undisposed-of interest? The answer is, he takes it as he finds it. If the heir-at-law becomes entitled to it in the shape of personal estate, and dies, there is no equitable reconversion as between his real and personal representatives, and consequently his executor takes it as part of his personal estate. On the other hand, if the next of kin, having become entitled to a freehold estate, dies, there is no equity to change the freehold estate into anything else on his death: it will go to his devisee of real estate, or to his heir-at-law if he has not devised it, and will pass as real estate. As to that, there is no question, no doubt, no difficulty. No one has suggested any other principle, and even in the case cited, *Reynolds v. Godlee* (Johns. 536, 582), it was admitted that that was the principle, and the only point of difference or distinction suggested was that which appears to me to be opposed to the whole law on this subject, namely, that there was an ultimate trust for the executors, and not for the next of kin. As that does not seem to me to have any foundation, and as it appears to me to be opposed to both principle and authority, I do not consider myself bound to follow that decision, and I may say that I am very glad to find I can invoke the very same judgment of the very same judge for the purpose of showing that I am not bound to follow it; for being referred to a decision of another judge—the Master of the Rolls—given several years before, he said that that decision was not obligatory upon him; but that, as he thought it consonant with sense and reason, and sound law, he chose to follow it. Unfortunately I do not entertain the same view as regards this authority, and therefore I am unable to follow it.

A declaration was accordingly made:

That all the real estate bought or contracted to be



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bought before the death of the last tenant for life passed to Edward Walker and Benjamin Walker, the next of kin of the said testator, as real estate in equal moieties, and that George Walker became entitled to one of such moieties as the devisee of the said Edward Walker, and to the other moiety as the heir-at-law of the said Benjamin Walker at his (Benjamin Walker's) death, and that both of such moieties passed to the devisees of the real estates under the will of the said George Walker.

From this decision the legal personal representatives of Benjamin Walker appealed.

*Chitty, Q.C., Ince, Q.C., and G. Murray* for the appellant.—The case of *Oogan v. Stephens*, before Lord Cottenham while at the Rolls (5 L. J., 17 Ch.), settled that land purchased under a direction to invest money in land to be settled to uses which fail to take effect goes on such failure to the testator's next of kin. The question here is, whether the next of kin take it as realty or as personality. *Head v. Godlee, Reynolds v. Godlee* (Johns. 536) is a distinct authority that they take it as personality, and that decision, which was pronounced by such an eminent judge as Wood, V.C., so long ago as 1859, ought not now to be overruled. *Oogan v. Stephens* is not unfavourable to our view.

*Davey, Q.C., Bagshawe, Q.C., Romer, and Snape*, for the respondents, were not called upon.

*JAMES, L.J.*—I have no doubt, in my own mind, as to the proper decision to be arrived at in this case. With all reference to the judgment of Lord Hatherley in *Reynolds v. Godlee*, it is impossible, I think, to arrive at any other conclusion than that at which the Master of the Rolls has arrived in this case. The principle is this, as settled in the case of *Oogan v. Stephens*, if it required settlement: that what was the right rule as between the real and personal estate where land was directed to be sold, was also the right rule as between the two estates in the converse case; that is to say, where money is directed to be laid out in the purchase of land, and the purpose for which that land was required failed, the land went, on the failure of the purpose, to the persons who were beneficially entitled to the personal estate; but, where there is no trust remaining to be performed, and the executors have entirely discharged themselves from every executorial duty whatever, it is absurd to say that the land is to go back to them upon trust for the persons entitled to the personal estate. It goes directly to the persons beneficially entitled, that is to say, to the next of kin, just as the heir-at-law would take the proceeds of sale of real estate on failure of the purposes for which it was directed to be sold. The same principle applies in both cases. The principle is this, that where you trace property to a man there is no equity between his different classes of representatives as to altering the position in which that property is. If it is money arising from the sale of land it remains money; that is to say, the heir-at-law of the person who has become beneficially entitled to it has no right to have it reconverted into land. If it is land purchased under a direction to invest in land, the persons interested in the personal estate of the persons who have become entitled to it as next of kin have no right to have it reconverted into money. This property must remain exactly as if it vested in the heir. It comes to the next of kin in the shape of real estate, and their personal representatives have no

equity to have it reconverted into personalty, but it must go to the heirs or devisees of the next of kin, according as they died intestate or testate. The decision of the Master of the Rolls must be affirmed.

*BAGGALLAY, L.J.*—I entirely assent, and for the same reasons.

*THESIGER, L.J.*—I am of the same opinion.

*Appeal accordingly dismissed; costs of all parties out of the estate.*

Solicitors for the appellant, *Esobank and Par-tington*.

Solicitors for the respondents, *G. L. P. Eyre and Co.*

Nov. 16 and 23, 1878.

(Before *JAMES, BAGGALLAY, and THESIGER, L.JJ.*)

Re CURRIE. (a)

*Practice—Lunacy—Vesting order—Trustees Act 1850 (13 & 14 Vict. c. 60), s. 5.*

*The surviving trustee of a settlement having become of unsound mind, the persons beneficially entitled to a sum of consols comprised in the settlement presented a petition in lunacy for an order vesting in them the right to transfer the stock and receive the dividends.*

*Held, that the order could not be made, as it was the settled rule not to administer trusts in lunacy; but that, on the petition being amended and intitled in the Chancery Division as well as in Lunacy, and affidavits of fitness being produced, an order would be made appointing the petitioners trustees of the settlement, and vesting in them, as such, the right to transfer the stock and receive the dividends.*

THIS was a petition presented in Lunacy under the following circumstances:

By a marriage settlement, dated the 13th July 1827, a sum of 10,000*l.* Consols was vested in three trustees upon trust for Mr. Currie for life, and after the determination of that trust, upon trust for Mrs. Currie for life, and subject to those trusts, for the children of the marriage, and, in default of issue, for Mr. Currie absolutely.

By the same settlement a sum of 2860*l.* New Three per Cent. Annuities was vested in the same trustees upon the same trusts, except that Mrs. Currie took the first life interest, and the ultimate trust was for her absolutely.

There was no issue of the marriage.

Mr. Currie died in 1873, having by his will appointed Mrs. Currie and two other persons his executors, and bequeathed his residuary personal estate to Mrs. Currie absolutely.

The surviving trustee of the marriage settlement having become of unsound mind, though not so found by inquisition, the three executors of Mr. Currie's will presented the present petition in Lunacy praying that the right to transfer the 2860*l.* New Three per Cent. Annuities, and to receive the dividends due or to accrue due thereon, might vest in Mrs. Currie for her own benefit, and that the right to transfer the 10,000*l.* Consols, and to receive the dividends due or to accrue due thereon, might vest in the three petitioners as the legal personal representatives of Mr. Currie.

*Ingle Joyce* for the petitioners.—The court has power, under the 5th section of the Trustees Act 1850, to make the order prayed for. A similar

(a) Reported by H. FRAY, Esq., Barrister-at-law.



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order was made in *Re White* (L. Rep. 5 Ch. 698). He also cited

*Es parte Bradshaw*, 2 De G. M. & G. 900.

JAMES, L.J.—You are really asking us to administer a trust in lunacy, which it is our settled rule never to do. We therefore cannot make the order asked. But, as the affidavits which have been filed show that the petitioners are proper persons to be appointed new trustees of the settlement, we can make an order appointing them new trustees, and vesting the right to transfer the sums of stock in them as such trustees, upon the petition being amended for that purpose and intitled in the Chancery Division as well as in Lunacy.

BAGGALLAY and THESIGER, L.JJ. concurred.

Nov. 23.—The petition having been amended as suggested, the Court now made an order appointing the petitioners new trustees of the settlement, and vesting in them the right to transfer the sums of stock, and to receive the dividends.

Solicitor: *F. L. Soames*.

Saturday, Jan. 11.

(Before JAMES and BAGGALLAY, L.JJ.)

Re MEARES. (a)

*Lunacy—Death of lunatic—Costs of inquisition—Lunacy Regulation Act 1862 (25 & 26 Vict. c. 86), s. 11.*

*The court has jurisdiction, under the 11th section of the Lunacy Regulation Act 1862, to order costs, which have been properly incurred for the protection of a lunatic and of his property, to be paid out of the lunatic's estate, although the lunatic has died before the appointment of a committee, and there are no funds in court.*

THIS was a petition in Lunacy asking for the payment out of a deceased lunatic's estate of the costs, charges, and expenses of the proceedings in the lunacy, taken under the following circumstances:

On the 17th Jan. 1878, on a petition presented by M. A. Meares, an inquisition in lunacy was directed concerning Eleanor Meares, an alleged lunatic.

On the 7th Feb. 1878, the inquisition was taken, and Eleanor Meares was found to be of unsound mind, but she died before any committee of her person or estate had been appointed.

While sane, Eleanor Meares had made a will, by which she appointed an executor, and gave all her property to a relative who predeceased her, so that her property went to her next of kin.

The executor having refused to pay the costs of the proceedings in lunacy, M. A. Meares, who was one of the next of kin, presented the present petition for payment of the costs out of the lunatic's estate.

There was no fund in court.

*Decimus Sturges* for the petitioner.—The court has jurisdiction to make the order under the 11th section of the Lunacy Regulation Act 1862, which provides that costs of this kind may be ordered to be paid, either by the party or parties who shall have presented the petition, or by the party or parties opposing the petition, or out of the estate of the alleged lunatic.

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

*Freeing for the executor.*—The 11th section applies only in the lifetime of the lunatic. The lunatic being dead, and no part of her property being under the control of the court, the court has no jurisdiction to make any order affecting it, or interfering with the administration of the estate.

*Decimus Sturges* in reply.—The costs were incurred for the protection of the lunatic and her estate. [JAMES, L.J.—What jurisdiction have we to make the order? BAGGALLAY, L.J.—Have you any authority where the court has ordered the payment of such costs after the death of the lunatic, there being no fund in court?] An order such as we ask for was made in *Re O*—(L. Rep. 10 Ch. 75). [JAMES, L.J.—There the alleged lunatic was alive. Here she is dead.] That makes no difference in principle; her executor is before the court.

JAMES, L.J.—I find a case of *Williams v. Wentworth* (5 Beav. 325), which is in favour of the petition. The head-note is this: "The law will raise an implied contract, and give a valid demand or debt against the lunatic or his estate, for moneys expended for the necessary protection of his person and estate. Under a commission of lunacy, A. B. was, upon inquisition, found lunatic, and the verdict was confirmed upon the trial of a traverse. Before the costs had been ordered to be raised, A. B. died: Held, that under the 3 & 4 Will. 4, c. 104, the real estate of the lunatic was liable for the costs of the proceedings." It seems to me, therefore, that we have power to make this order, and as these costs were properly incurred for the protection of this lunatic and her estate, they must be paid out of her estate.

BAGGALLAY, L.J. concurred.

*Freeing* suggested that there should be an order for taxation of the costs, and a declaration that the costs were properly incurred for the protection of the lunatic and her estate, and should be paid out of her estate in due course of administration.

Order accordingly.

Solicitors for the petitioner, *Guscott, Wadham, and Daw*, agents for *O'Donoghue and Anson*, Bristol.

Solicitor for the respondent, *Charles Appleyard*.

Wednesday, Jan. 29.

(Before JESSE, M.R., JAMES and BRAMWELL, L.JJ.)

RUSTON v. TOBIN. (a)

*Trial by jury—Action in Chancery Division—Alleged fraud—Discretion of judge of first instance—Judicature Act 1873, ss. 34, 42—Rules of Court 1875, Order XXXVI., rr. 3, 26.*

*In an action to have an agreement set aside on the ground of fraud, the plaintiff gave notice, under Rules of Court 1875, Order XXXVI., r. 3, of trial by a judge and jury. The defendant gave notice of motion to have the action tried without a jury, and the Vice-Chancellor to whose court the action was attached ordered accordingly.*

*Held on appeal, that the Vice-Chancellor had exercised a sound discretion, and that the case was more fit for a judge than a jury.*

*Order XXXVI., r. 26, gives the court a discretion in all cases of fraud, or such as raise questions*

(a) Reported by E. S. ROCHE, Esq., Barrister-at-Law.

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*which before the Judicature Acts came into force were properly within the jurisdiction of the Court of Chancery, to order them to be tried without a jury, and the court is not bound in such a case to allow a jury at the instance of the plaintiffs.*

*The Court of Appeal will only interfere with the discretion of a primary judge as to how a case before him ought to be tried, when it differs from his opinion upon a point of law affecting the exercise of that discretion.*

THIS was an appeal by the plaintiff from an order of Malins, V.C., refusing to allow the action to be tried by a judge and jury. The action was brought to set aside an agreement for the sale of a patent by the defendant to the plaintiff on the ground of fraud, and was therefore one of those actions assigned to the Chancery Division by the Judicature Act 1873, s. 34, and as to which the court had a discretion whether the trial should take place before a jury, by rule 26 of Order XXXVI. On the 12th Dec. 1878 the plaintiff gave notice of trial by a judge and jury in Middlesex, and also notice of his intention to have the case tried before a special jury. The defendant gave notice of motion to have the action tried without a jury by Malins, V.C., to whose court it was attached. The facts and arguments are fully set forth in the judgment of the court below.

MALINS, V.C.—This is an action, commenced in Jan. 1877. The plaintiffs are stated to be a syndicate established for the purposes of making an agreement with the defendant, M. Tobin, to purchase from him, in consideration of 3000*l.* to be paid, and which I understand has been paid, and 3000*l.* more to be paid, which I understand has not been paid, certain patents; and that agreement was dated April 15, 1876. The plaintiffs allege that they have been defrauded by the defendant, and, in fact, cheated out of their money; and they have, therefore, a right to recover it back. The prayer is to have it declared that the said agreement was obtained by the fraudulent representations of the defendant, and to have the said agreement delivered up to be cancelled; for the repayment of the sum of 3000*l.* paid by the plaintiffs, with interest from the day of payment; damages for the loss sustained by the plaintiffs through the said misrepresentations, and such further relief as to this honourable court may seem good. Now there are four heads of relief, and I think that three of them, at all events, might have been the subject of an action at law; viz., the repayment of the 3000*l.* paid, damages for the loss sustained, and such other relief as the court might think fit to give. The only justification for coming to this court was that the agreement was obtained by fraud, and they wanted the agreement delivered up to be cancelled. Now I take it to be clear that, when a man obtains money from another by fraud and misrepresentation, if he can prove that fact, he can recover the money back in an action at law, and when he has made an agreement in writing, under which the money was paid, or under which the money has to be paid, there is no occasion whatever for his coming into this Court to have the instrument delivered up to be cancelled. It is a case which occurs every day in the courts of law and equity, and it is a case in which the plaintiffs might have maintained an action against Tobin at law, and there was no occasion whatever for their

coming into this court, unless it was that they preferred this as the tribunal to decide between them. The great argument that Mr. Glasse has urged is, that the plaintiffs were obliged to come into this court under the rules of the Judicature Act, because the jurisdiction is assigned to this court in all cases for the rectification or cancellation of written instruments; and if the cancellation or rectification of a written instrument had been absolutely essential to the relief they sought, then I should think there was a justification for coming here; but, as I am clearly of opinion that no rectification or cancellation was necessary in this case, they were not obliged to come here, but might have gone to any of the common law divisions. Now these observations are only important on this point, that there being two branches of the law to which the plaintiffs might resort, either the Common Law Division or the Chancery Division, they have selected the Chancery Division. Having thus selected their own tribunal, which I am clearly of opinion they were not obliged to do, very strong reason must be shown why the jurisdiction should again be shifted before I can accede to such an application. But, independently of these considerations, this is a case for recovering money; in other words, setting aside a transaction on the ground that it was brought about by fraud. Now, as I pointed out in the case of *Back v. Hay*, that is peculiarly, and always has been considered peculiarly, the jurisdiction of the Court of Chancery when that court existed, and the jurisdiction and business of this court now that it is simply called the Chancery Division. There are no cases of fraud, however complicated, difficult, and lengthy, which this court has not been in the habit of dealing with, and which it does not deal with almost constantly. It is therefore, and always has been considered, the peculiar tribunal for trying these questions; and I could not send a case like this to be tried by a jury unless I was absolutely satisfied that justice could not be obtained here, or that there was an absolute right on the part of the plaintiff to take the defendant to a jury if he so desired. Now that entirely depends on the rules which have been referred to, viz., the 36th Order, rule 3: "Subject to the provisions of the following rules the plaintiff may with his reply or at any time after the close of the pleadings give notice of trial of the action, and thereby specify one of the modes mentioned in rule 2, and the defendant may, upon giving notice, within four days from the time of the service of the notice of trial, or within such extended time as a court or judge may allow, to the effect that he desires to have the issues of fact tried before a judge and jury, be entitled to have the same so tried." But it being foreseen that such a requisition might be made in many cases which could more properly be tried in this branch of the court, the 26th rule of the 36th Order gives the court a discretion: "The court or judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Act could without any consent of parties be tried without a jury." This therefore clearly falls within that rule, because before the passing of this Act it was, as I have already mentioned, the ordinary jurisdiction of the court to try such cases. They could be tried without the consent of either

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party, and I have a discretion given by that 26th rule of the 36th Order. Now then, having a discretion, the question arises, how ought I to exercise it? Cases have been pressed upon me in which the court has allowed the parties to go to a jury. Many cases may occur and have occurred before me in which, if either of the parties had desired a jury, I should have acceded to their suggestion; such as cases of nuisance by smells, or noises, or anything of that kind; and accordingly in the cases which were referred to—viz., *West v. White*, which was first before Bacon, V.C., and was a question whether the plaintiffs sustained a nuisance by the erection of certain cement works in their neighbourhood, although it commenced here by a bill in the old times for an injunction to restrain the nuisance, the parties desiring a jury, and as the simple fact to be decided was nuisance or no nuisance, the Vice-Chancellor, in my opinion, most properly exercised his discretion by letting the parties go to a jury to try that single question. They did try it, they did find a nuisance, and the plaintiffs succeeded. The other case, before the Master of the Rolls, which was much pressed upon me, was *Bordier v. Burrell*, in which I do not find a single syllable falls from the Master of the Rolls which indicates that he would have decided differently from my decisions in *Pelly v. Baylis* and *Back v. Hay*, if they had been cited to him, but as they had only just been decided they were not probably in print. And I should myself have done the same, because it was a case of nuisance by the darkening of ancient windows, and there was a dispute whether it was a nuisance or not, and that being the one matter of fact to be decided in the case, he said it was a proper case for him to exercise the discretion given by the 26th rule, in allowing the case to be tried by a jury. The same observation will apply to all the other cases, such as *Clark v. Cookson*. They all proceed on the same principle, that where there is a single question of fact to be decided, it may be conveniently and better decided by a jury, than by a court without a jury. This is a mere allegation of fraud on one side denied on the other, just such a case as this court is in the habit of trying constantly. Therefore, without advertent more particularly to it, I entirely adhere to what I said in *Back v. Hay* and *Pillay v. Baylis*, and I do not find that there has been a syllable of dissent in any court from these decisions. I therefore accede to the motion of the defendant to have the action tried without a jury.

The plaintiffs appealed.

*Glasse, Q.C.* and *Pundas Gardiner*, for the appellants, contended there was nothing to justify the court in depriving the plaintiffs of the right given by rule 3 of Order XXXVI, and that this was not a case for the exercise of discretion under rule 26. The case depended very much on conflicting evidence, and therefore considerable inconvenience would result from the action being tried without a jury. The following cases were referred to, principally in the court below:

*Clark v. Cookson*, 34 L. T. Rep. N. S. 646; L. Rep. 2 Ch. Div. 746;  
*Swindall v. Birmingham Syndicate*, 35 L. T. Rep. N. S. 111; L. Rep. 3 Ch. Div. 127;  
*West v. White*, 36 L. T. Rep. N. S. 95; L. Rep. 4 Ch. Div. 631;  
*Sykes v. Firth*, 46 L. J. 627, Ch.;  
*Bordier v. Burrell*, L. Rep. 5 Ch. Div. 512;

*Back v. Hay*, 36 L. T. Rep. N. S. 295; L. Rep. 5 Ch. Div. 235;  
*Pillay v. Baylis*, 36 L. T. Rep. N. S. 296; L. Rep. 5 Ch. Div. 241;  
*Brooke v. Wigg*, 38 L. T. Rep. N. S. 549, 732; L. Rep. 8 Ch. Div. 510.

*Higgins, Q.C.* and *J. Sangster Green*, for the defendant, were not called upon.

*JESSEL, M.R.*—I am clearly of opinion that, as a general rule, the Court of Appeal ought not to interfere with the discretion of a judge of first instance as to the mode of trial of an action. The present action is exactly the sort of case which has been tried in the old Courts of Chancery and nowhere else, and is far more fit for a judge than a jury. The Vice-Chancellor has therefore exercised a sound judicial discretion which ought not to be interfered with.

*JAMES, L.J.*—I am entirely of the same opinion. Appeals ought not to be brought from a decision of the judge of first instance as to the mode of trial of an action. Interlocutory appeals upon matters of this kind merely add to the expense of actions, which indeed, I fear, has been in some ways much increased by the Judicature Acts. The only case of the kind in which the Court of Appeal would interfere with the discretion of the primary judge with regard to the mode of trial of an action would be where he had said, "I exercise my discretion in this matter because I entertain such an opinion upon a point of law," and the Court of Appeal differed from him on that point, and held that he had exercised his discretion with a wrong view of the law. I hope we shall not have any more appeals of this character. I have done, and will do, my best to prevent them.

*BRAMWELL, L.J.* concurred.

*Appeal dismissed with costs.*

Solicitors: *Swann and Co.*; *Walter Webb*.

Wednesday, Feb. 12.

(Before *JAMES, BRAMWELL, and BRETT, L.JJ.*)

Re EDWARDS; M'NEILE v. CHAMBERS. (a)

*Ward of court—Lunacy—Infant—Jurisdiction.*

*An application having been made to the Vice-Chancellor of the county palatine of Lancaster for directions as to the custody and treatment of an infant ward of court, who was alleged to be of unsound mind, though not found so by inquisition, the Vice-Chancellor held that he had no jurisdiction to entertain the application. On appeal,*

*Held (reversing the decision of the Vice-Chancellor), that the jurisdiction of the Palatine Court over its ward, which was founded on the infancy, was not ousted by the fact that the ward had become of unsound mind. The case was, therefore, remitted to the Vice-Chancellor to be dealt with on the merits.*

THIS was an appeal by *Eyre Evans-Edwards*, an infant, by one of his guardians as next friend, from a decision of *Little, V.C.* of the Lancaster Palatine Court, holding that he had no jurisdiction to entertain an application on behalf of the infant, a ward of court (who, it was alleged, had become of unsound mind), for directions as to his custody and education. It appeared that *E. E. Edwards*, although not found of unsound mind

(a) Reported by *E. S. ROCKE, Esq., Barrister-at-Law.*

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by inquisition, was alleged to be so, and had been placed in an asylum for imbeciles. Differences having arisen between his two guardians as to the proper mode of treating him, an application was made to the Vice-Chancellor with respect to the custody and treatment of the infant. The material facts are set forth in the judgement delivered in the court below.

LITTLE, V.C. said:—I am of opinion that this court possesses no jurisdiction to try the question in dispute between the two co-guardians, as to whether the infant is or is not of unsound mind, nor to give directions for his retention in, or dismissal from, a lunatic asylum. In connection with the subject, however, I wish to add that the argument at the bar satisfied me upon a point upon which I had previously entertained some doubt—viz., what was the precise effect upon my jurisdiction of the 23rd section of the County Palatine Act of 1850, which abolished the jurisdiction previously existing in this court in cases of lunacy. Prior to the passing of that Act the court had jurisdiction of issuing and executing commissions of lunacy within its limits, and of dealing with the persons and estates of persons found lunatic by inquisition. The section in question merely abolishes that jurisdiction, and leaves the subject-matters of it to be dealt with by the general lunacy jurisdiction of the country. I think, therefore, that the court, as a court of equity, still possesses the same powers which the High Court of Chancery formerly possessed, and which are now exercised by the Chancery Division of the High Court of Justice, over the estates of lunatics not so found by inquisition, in cases in which moneys have been paid into court, or where trusts are being executed by the court. It was pressed upon me that, assuming the court to possess that jurisdiction, the case of *Vane v. Vane* (L. Rep. 2 Ch. Div. 124) shows that the court has power to deal with the case of the male infant in the manner proposed by the application before me. By the 12th and 13th sections of the Lunacy Regulation Act 1862, certain powers are vested in the Lord Chancellor in his character of a delegate of the Crown in matters of lunacy, to deal with the estates of insane persons not found lunatic by inquisition, for the benefit of those persons in cases in which the property is very small, the limits of the property being where the incomes do not exceed 50*l.*, or the capital value 1000*l.* In *Vane v. Vane* the question was with reference to a lady of unsound mind, not so found by inquisition. No question existed there as to that being her true condition, and the friends of the lady desired to avoid proceedings in lunacy. The lady was entitled to an annuity of 175*l.*, which arose out of trust funds, which were proposed to be brought into court, and under the circumstances of that case the Master of the Rolls, after dealing with the subject of jurisdiction, and stating that the court possessed original jurisdiction in a case such as that before him, where there had been no inquisition in lunacy, and after referring to the provisions of the Lunacy Regulation Act, proceeded to say that although the property in the case before him exceeded the limits mentioned in that Act, he would still be willing to exercise the original jurisdiction of the court in the case if there was no opposition by the friends of the lady, and no question as to the custody of her person. He was assured by counsel that there was no such

question, and thereupon he did proceed to appoint a guardian to that lady, and gave directions upon the subject of her maintenance. But that case is, I think, as different as possible, and most importantly different from this case. I have already remarked that I have no application before me intitled in the matter of the infant treated as a person of unsound mind, and as suing by a guardian or next friend charging himself with the representation of the infant's interests while labouring under that state of mental incapacity. But if the difficulty is merely that the Rev. Canon Hume, one of the guardians, has not so described the infant in the application to the court, that difficulty might be got over by an amendment of the title of his notice of motion. But the next thing is that I have before me a dispute between the co-guardians as to whether the child is mentally incompetent or not, and I have no jurisdiction to decide that dispute. Then, again, consider the position of the infant as to the question of his future. To say nothing of his interests in personal estate, which are, or may be, of considerable value, he is legally entitled (not entitled under a trust merely) to his share in the Irish estates producing a rental, say, at present of 370*l.* per annum, with a probability of the income from that source being increased by the dropping of terminable annuities which now burden the estate. The statute law applicable both to England and Ireland contemplates and provides for the case of lunatics, or alleged lunatics, possessed of properties of this character and amount, being dealt with by the lunacy jurisdictions and not by courts of equitable jurisdiction merely. It rests with the English jurisdiction in lunacy to say whether, under the circumstances of this case, a commission of lunacy shall or shall not be issued. If a commission shall be directed to issue, the status of the infant will depend upon the return to that commission, and in case the infant is found a lunatic the government of his person and his property will be attached to the lunacy jurisdiction of this country, either conclusively or conjunctively with the corresponding jurisdiction in Ireland. The conclusions at which I find myself compelled to arrive, therefore, make it proper that I should now declare that this court does not possess jurisdiction to deal with the matter of the amended petition so far as it relates to the arrangement proposed to be come to with the Commissioners of Inland Revenue, or with the matter of the application to the court mentioned in the order of the 3rd Sept. last, so far as it relates to the continuance or otherwise of the infant Eyre Evans Edwards, at the Royal Albert Asylum for idiots or imbeciles, and that the court does not think fit to give any directions upon those subjects, except that any of the parties are to be at liberty to make any such application as they may be advised to make with reference to those subjects to the competent jurisdiction or jurisdictions. I give that latter direction because, without it, the Rev. Canon Hume, as guardian of the infant, appointed by this court, might feel embarrassed as respects his future course of action. I fully anticipate, and indeed I desire that the order which I am now making should be re-considered elsewhere. No doubt the advisers of the parties will consider in what form any ulterior proceedings for such purpose should be shaped, that is to say, whether as a mere appeal from my order to the Court of

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Appeal, or as an appeal combined with an application to the jurisdiction in lunacy.

On the appeal by the Rev. Canon Hume,

*North, Q.C. and Olave*, for the appellant, contended that there was no authority in favour of the Vice-Chancellor's view, but plenty of authority the other way. In *Re Atterbury's Trusts* (31 L. T. Rep. 243; 27 L. J. Ch. 704) it was held that the jurisdiction applying to an infant was not taken away because the infant had got an additional disability; and here the Vice-Chancellor was not asked to do anything which he would not have done if the infant had been sane. The case of *Vane v. Vane* (34 L. T. Rep. N. S. 613; L. Rep. 2 Ch. Div. 124) also showed that the learned judge had power to deal with the case in the manner proposed. They further relied upon

*Re Howarth*, 28 L. T. Rep. N. S. 54; L. Rep. 8 Ch. App. 415;

*Beale v. Smith*, 29 L. T. Rep. N. S. 625; L. Rep. 9 Ch. App. 85;

*F. Thompson* for the other guardians.

*JAMES, L.J.*—I think, with all deference to the Vice-Chancellor, that upon this question he ought to exercise his jurisdiction, and that it is no answer to say that the infant has got some physical or mental infirmity, any more than it would be to say that the infant was only a day old, and he might possibly turn out to be infirm. In considering which is best for the infant, the judge is obliged to consider something collateral, and what is the state of the infant's mind does not, in any way, affect his jurisdiction or his duty to provide as best he can for the infant.

*BRAMWELL and BRETT, L.JJ.* concurred.

*North, Q.C.*—Probably the best thing would be to remit the petition back to be dealt with by the Vice-Chancellor, with an intimation that he has full jurisdiction notwithstanding the alleged state of mind of the infant.

*JAMES, L.J.*—During the infancy. Of course the moment an infant comes of age that would not be so. That part of the order of the Vice-Chancellor which deals with the want of jurisdiction by reason of the unsoundness of mind will be discharged, and there will be a declaration that this court, being of opinion that the Court of Chancery of the County Palatine has full jurisdiction to make proper orders with respect to the infant, notwithstanding the allegation of the infant's having become of unsound mind or imbecile, the case is remitted back to the Vice-Chancellor to deal with it on the merits.

Solicitors: *Field, Boscoe, and Co.; Worthington, Evans, and Cook.*

#### SITTINGS AT WESTMINSTER.

Thursday, Nov. 14, 1878.

(Before *BRAMWELL, BRETT, and COTTON, L.JJ.*)

*HUNT v. THE WIMBLEDON LOCAL BOARD.* (a)

Local board—Contracts—Public Health Act 1848 (11 & 12 Vict. c. 63), s. 85, and 1875 (38 & 39 Vict. c. 55), s. 174.

*Defendants*, an urban authority, through their surveyor, verbally ordered plans for offices from plaintiff, an architect. Plaintiff made the plans, which were at first approved by defendants, but afterwards abandoned as involving too much

expense. New offices were necessary for defendants, and the plaintiff's plans were necessary for the offices for which he had designed them, and the plans were worth 94l.

*Sect. 174 of the Public Health Act 1875 enacts that "every contract made by an urban authority whereof the value or amount exceeds 50l. shall be in writing, and sealed with the common seal of such authority."*

*Held* (affirming the decision of *Lindley, J.*), that plaintiff was not entitled to recover for his work and labour in making the plans, as, even if plaintiff had executed the consideration on his part, sect. 174 was not directory merely, but obligatory, so as to render all contracts exceeding in value 50l. unenforceable, unless the requirements of the section were complied with.

APPEAL from a decision of *Lindley, J.*, on further consideration, after a trial with a jury at Westminster, on March 13 and 14, 1878.

The action was brought by the plaintiff, an architect, to recover for work and labour done in preparing plans and drawings for the erection of offices for the defendants, the Wimbledon Local Board, in accordance with instructions given to the plaintiff by the defendants' surveyor acting under their authority. The plans, having been made by the plaintiff, were submitted to the defendants, and approved by them, and advertisements for tenders for carrying out the building of offices according to the plans were published, but the amount of the tenders being too high none were accepted. Ultimately offices upon an extensive scale were built from plans made by another architect.

The jury found that the board authorised their surveyor to employ the plaintiff to prepare the plans, and ratified his act in procuring them; that new offices were necessary for the board; that the plaintiff's plans were necessary for the erection of the offices for which they were designed, and they assessed the plaintiff's damages at 94l.

*Lindley, J.*, on April 6, gave judgment for defendants. The plaintiff appealed. The case in the court below is fully reported 39 L. T. Rep. N. S. 35.

The Act in force when the plans were ordered was the Public Health Act 1848. Before they were finished the Public Health Act 1875, repealing the Act of 1848, came into force. The 85th section, however, of the Act of 1848 was substantially re-enacted by sects. 173, 174 of the Act of 1875, except that 50l. was substituted for 10l. as the limit within which the contracts of urban authorities need not be under seal.

By sect. 173 of the Public Health Act 1875,

Any local authority may enter into any contract necessary for carrying this Act into execution.

*Sect. 174:*

With respect to contracts made by an urban authority under this Act, the following regulations shall be observed:

(1.) Every contract made by an urban authority whereof the value or amount exceeds 50l. shall be in writing, and sealed with the common seal of such authority.

(2.) Every such contract shall specify the work, materials, matters or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not fully performed.

(a) Reported by *W. APPLETON, Esq., Barrister-at-Law.*

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(3.) Before contracting for the execution of any works under the provisions of the Act, an urban authority shall obtain from their surveyor an estimate in writing, as well of the probable expense of executing the work in a substantial manner, as of the annual expense of repairing the same; also a report as to the most advantageous mode of constructing, that is to say, whether by contracting only for the execution of the work, or for executing and also maintaining the same in repair during a term of years, or otherwise.

(4.) Before any contract of the value or amount of 100*l.* or upwards is entered into by an urban authority, ten days' public notice at the least shall be given, expressing the nature and purpose thereof, and inviting tenders for the execution of the same; and such authority shall require and take sufficient security for the due performance of the same.

(5.) Every contract entered into by an urban authority in conformity with the provisions of this section, and duly executed by the parties thereto, shall be binding on the authority by whom the same is executed, and their successors and all other parties thereto, and their executors, administrators, successors, and assigns, to all intents and purposes.

By sect. 197,

Every urban authority shall from time to time provide and maintain such offices as may be necessary for transacting their business, or that of their officers and servants under this Act.

The arguments sufficiently appear in the judgment (*post*).

*Marriott, Q.C.* and *W. Paterson* for defendants.

*Patchett, Q.C.* and *E. Clarke* for plaintiff.

The following cases were cited :

*Nowell v. Mayor of Worcester*, 9 Ex. 457; 23 L. J. 139, Ex.;

*Frend v. Dennett*, 4 C. B. N. S. 576; 27 L. J. 314, C. P.; s. c. in Equity, 5 L. T. Rep. N. S. 73;

*Nicholson v. Bradfield Union*, L. Rep. 1 Q. B. 620; 35 L. J. 176, Q. B.;

*Clarke v. Cuckfield Union*, 21 L. J. 340, Q. B.;

*Haigh v. North Brierley Union*, E. B. & E. 873; 28 L. J. 62, Q. B.;

*Ungley v. Ungley*, 37 L. T. Rep. N. S. 52; L. Rep. 5 Ch. Div. 887; 46 L. J. 854, Ch.

*Wilson v. West Hartlepool Railway Company*, 2 De J. & S. 475.

BRAMWELL, L.J.—I am of opinion that Mr. Justice Lindley was right in his decision, and that this judgment should be affirmed. First, I think that sect. 173 of the Act of 1875 is applicable to this case, and is not limited, as Mr. Patchett contended, to the cases particularly enumerated in the previous part of the Act. I see no reason for limiting the section, which is general in its terms and plain. In the next place, I think that section 174 is not directory, but obligatory. It is not prohibitory merely, so that the making of a contract otherwise is an offence, but mandatory that the contract shall be made in that particular way. It is an injunction relating to the conduct of both parties in making the contract. I do not mean to say that it makes any partial act on the part of the contractors necessary, but the evidence of their obligation upon contracts above 50*l.* must be in writing, sealed with the seal of the corporation. Before the statute the common law said that the contracts of corporations must be under seal, with an exception as to small contracts necessary for the daily carrying out of the work. The section is important in this view, that under the common law rule it might be difficult to fix the limit, say 5*l.*, 10*l.* or 20*l.*, at which the contract ceased to be a small one within the rule. The Legislature, therefore, has now fixed the sum at 50*l.* It is clear to me that this contract was purely executory (having regard to the order given for the plans),

and that no action could be brought upon it, unless the requirements of the statute were complied with. It is said, on the other hand, that it was an executed contract of which the corporation have received the benefit. I will deal with that presently. First, the equitable doctrine of part performance of contracts relating to land was relied upon. I think that doctrine is not applicable to the present case. I believe the doctrine to be that which is mentioned by the Master of the Rolls in his judgment in *Ungley v. Ungley* (*sup.*). He says: "The law is well established, that if an intended purchaser is let into possession in pursuance of a parol contract, that is sufficient to prevent the Statute of Frauds being set up as a bar to the proof of the parol contract. The reason is, that possession by a stranger is evidence that there was some contract, and is such cogent evidence as to compel the court to admit evidence of the terms of the contract in order that justice may be done between the parties." Now, I think the reason of that rule is inapplicable to a case like the present. I venture to say that, if the fusion of law and equity had not taken place, a court of equity would not apply the doctrine to a case like this. It is then said that at common law the plaintiff is entitled to recover because the defendants have had the benefit of the contract. That doctrine possibly exists to some extent—I am not sure to what extent. I am not sure it would be found to exist at all if the sum in dispute was a very large one; but the doctrine is said to be, that where a man enters into a contract, not under seal, with a corporation, of which they have got the benefit, he is entitled to recover. It is said to be limited to cases where the benefit has been entirely in hand, and where the work performed has been so necessary, under the circumstances, that the corporation would not have done its duty if the order had not been given. That doctrine does not apply here, for two reasons. The defendants have not had the benefit of the work in that sense. There is no doubt the order for the plans was given, and, so far as the work went, ratified and acted upon, by the defendants; but there the thing stopped. If the tenders had been accepted there would have been a further benefit from the plans to the corporation, they would have derived a benefit from them in respect of having the buildings erected according to them; but that is different from the case cited where they had the coals and burned them. Here they tried to apply the plans to the purpose for which they were ordered, but found they were unable to do so. There is also the further distinction that here the plans were not necessary things, as in the cases of the things ordered in *Clarke v. The Cuckfield Union* (*sup.*) and *Nicholson v. The Bradfield Union* (*sup.*), where it was the duty of the corporation to give orders for them. The corporation in this case could have done without the plans; they could have waited and gone on without new offices. In *Clarke v. The Cuckfield Union* (*sup.*), Wightman, J.'s judgment is a very long one, and shows that he entertained very great doubt; but after all in that case the bill only came to 14*l.* 16*s.*, and it may be doubted whether the contract did not come within the common law rule as to small contracts. The next case was *Nicholson v. The Bradfield Union* (L. Rep. 1 Q. B. 620; 35 L. J. 176, Q. B.), and there the amount was only 26*l.*, and I am not sure

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that even there the same rule did not apply. That was the case in which coals were ordered and used. Blackburn, J., in his judgment, assumes there was an obligation on the part of the corporation, and he follows the case of *Clarke v. The Ouckfield Union* (sup.), which he says is not distinguishable. Then he adds, "We are aware that many high authorities have questioned the soundness of that decision, and, as pointed out in the judgment of that case, there are prior decisions in the Court of Exchequer which it is difficult to reconcile with it. We think, however, that as far as it extends to such a case as the present, at least the case was rightly decided. There may be cases in which the circumstances may be different from those in *Clarke v. The Ouckfield Union* (sup.) and the present case, and which would still be governed by the principles laid down in the decisions in the Exchequer—those we leave to be decided when they arise; but so far as those prior decisions are inconsistent with *Clarke v. The Ouckfield Union*, we prefer to follow the authority of *Clarke v. The Ouckfield Union*, which we think is founded on justice and convenience." One word as to the accountant's case (*Haigh v. The Briery Union*, sup.): It seems to me that Erie, J. does not put the matter upon the mere ground that the work was actually done; he seems to consider that the retainer to do it would have been an engagement binding upon the corporation. Blackburn, J., in *Nicholson v. The Bradfield Union*, said that "justice and convenience" required that the defendants should be ordered to pay where the contract is executed; but it is by no means clear that he would have said so in a case like the present. It is by no means clear to my mind that people who ought to know the requirements of the law, and that they are dealing with a body exercising authority only on behalf of the ratepayers, should not take the consequences of dispensing with what is required by a provision for the protection of the ratepayers. In the present case, if there had been a little more solemnity in making the contract, the plaintiff's attention might have been called more particularly to the kind of plans required, and he might have prepared less expensive plans, such as the board could use. In my opinion the importance of preserving the general principle has been too much lost sight of in construing statutes such as the one in question and the Statute of Frauds. The latter Act has been frittered away and made unintelligible from a desire to do justice in particular cases.

BARR, L.J.—I am of opinion that, even if sect. 174 had not been passed, the plaintiff could not have recovered, on the ground that the defendants are a corporation, and that the contract was not made under seal. I take the rule of the common law to be this—that where the defendants are a corporation, and the contract sued upon is not under seal, the defendants are not liable. This case comes within that general rule, and is not within any recognised exception; nor is it within the exception of the doctrine of equitable part performance, applied by the Court of Chancery to the Statute of Frauds. That doctrine is equally applicable, whether the defendants be a corporation or an individual; it seems to me founded upon the view that the Statute of Frauds only deals with the matter of evidence, and not with the validity of the contract. The Statute of

Frauds applies where the contract is a good one, only it says that no evidence shall be given of the contract in certain events. The Court of Chancery have held that under certain circumstances they will allow a contract to be put in evidence, although the terms of the statute have not been complied with; but that doctrine does not apply where by a rule of law the contract is not binding at all. That, in my opinion, is the case here. I also think this case is not within the common law exception suggested. There is, I think, by authority, a recognised common law exception in such cases; where the contract is made by the corporation and not under seal, yet, if it be in the nature of a daily small transaction which must of necessity take place, and with regard to which it would be obviously impossible or inconvenient that it should be under seal, then the courts of common law have declared that the general rule shall not prevail. I think the making of these plans was not part of the daily business of the corporation, nor a necessary part of their business, nor a small contract, and was therefore in no respect within the exception. Another exception is suggested. It is said that a rule of law exists that where orders are given by a corporation, and the person to whom they are given accepts and fulfils them to the best of his ability, and the corporation, or the persons on whose behalf they are acting, accept and enjoy the full benefit, the corporation is liable although the contract is not under seal. I doubt very much whether there is any such exception or rule known to the courts of equity or common law. I doubt whether any such rule has ever been recognised by any authority in a court of justice. But it is unnecessary to consider that matter, because I think that, taking this order to have been given on behalf of persons who may be called *cestuis que trust*, this case does not come within the rule, if it exists at all. This is not like the case of a company where the directors may give the order, and those on whose behalf it has been given may accept or reject the contract, and they do accept it. If that was the case here the doctrine contended for might apply. But here it is only the corporation acting for the inhabitants of a borough—those inhabitants cannot have power either to accept or reject the engagements which their board enter into. They are not like the shareholders of a railway company. If a contract is made it is without their option, for they have no option. To such a corporation the doctrine is not applicable at all. If it was applicable I think the corporation did not take the whole benefit of the work done by the plaintiff. That work was the making of plans ordered by the corporation; he makes the plans, and he has then done all the work which upon the contract (I will assume) he was bound to do; but the only real benefit to the corporation is that the offices should be built according to the plans. Here the board accepted the work, and used the plans in the sense that they gave them out in order to receive tenders upon them; but that is not a beneficial user by the board. Although, therefore, they accepted and partially used the plans, in my opinion, they obtained no real benefit from the contract. The result is that, even if the doctrine exists, and although the board were to be benefited by the contract, they have not actually received any



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benefit from it. I am therefore strongly of opinion that, even without the statute, the plaintiff could not have recovered, because this contract is within the general rule, and not within any recognised common law exception to that rule. I further think the statute is conclusive upon the subject, and I think so upon the view suggested by Mr. Marriott. The statute is both directory and mandatory; it really comes to this, that when the Act was passed the Legislature knew of the inconvenience arising from requiring that small contracts necessary for the daily carrying on of the corporation work should be under seal. They meant to get rid of the question with respect to these small contracts, and to say that all contracts which the board are properly authorised to make, if under 50*l.*, shall be brought within the exception; if above, shall in all cases be within the general rule. As to the accountant's case, it is not necessary to say whether it comes within the law applicable to the present case. But I think Crompton, J. assented to the judgment upon the assumption that the contract of the accountant was to perform work from day to day. The contract might have been fulfilled in one way or the other. It might therefore be considered a daily employment to a small amount, and Crompton, J. thought it came within the recognised exception. He did not state any new principle, but only brought the facts of that case within an existing rule of law. I agree that this appeal should be dismissed.

CORROD, L.J.—I also am of opinion that the judgment of Lindley, J. was right. A common law rule exists that corporations are not bound by contracts entered into by them, unless made under their seal. There are exceptions suggested to this rule. For instance, contracts made in the course of carrying on the ordinary daily business of the corporation, and involving small sums, need not be under seal. That exception cannot apply to this case. But is there an exception also showing that a corporation is liable where goods having been supplied, or work done under a contract not under seal, the corporation have had the entire benefit? Now I doubt whether a corporation like this can be held liable upon any such grounds, because the corporate body was not the persons who got the benefit of the contract, but the ratepayers for whom the corporation were trustees. The corporation as such cannot derive any benefit from their contracts. If the corporation could be bound, in my opinion there has not been such a beneficial user of the plans as to bring the case within the assumed exception to the statute. No doubt there was a certain user of the plans, but not a beneficial one. The matter went no further than using the plans for the purpose of obtaining tenders for the contemplated buildings. They were therefore not used for the more important purpose of erecting the offices. It is argued that such a contract is not within sect. 174 of the statute, because that section only applies to contracts made for the purposes of the Act, and the building of offices is not one of those purposes; but I think that sect. 197, which says that the local board shall provide and maintain such offices as may be necessary for transacting their business, disposes of that objection. If the board provide any offices at all, it must be for the purpose of carrying the Act into execution. I think it is

plain, therefore, that this is such a contract as is within the purview of sect. 173. As to sub-sect. 1 of sect. 174, that, in my opinion, must be considered as mandatory, that is to say, as preventing any contract under the Act being entered into except under the seal of the corporation. The Act provides in a particular way for the making of small contracts; its meaning is to say, "as to all contracts exceeding 50*l.* you shall not bind the rates except you enter into a contract under seal." As to the equity doctrine of part performance, which has been relied on, the cases of *Ungley v. Ungley (sup.)* and *Wilson v. The West Hartlepool Railway Company (sup.)* have been principally referred to. In former days the Court of Chancery would not have entertained a suit by the plaintiff to enforce a contract like the present. *Ungley v. Ungley (sup.)* was simply a case of part performance taking the case out of the Statute of Frauds. It was a contract relating to a house, entered into by a father at his daughter's marriage, and if the Statute of Frauds applied no action could be enforced, because there was no agreement in writing; but possession having been given, the Court of Equity said that the part performance of the contract enabled parol evidence of the contract to be given, acting upon the principle that where there exists a valid binding and enforceable contract, but the Statute of Frauds says that no action shall be brought upon it unless it is evidenced in a particular way, then, if the Court of Chancery finds an overt act by the party against whom the contract is sought to be enforced, such as possession, which is referable to the contract, parol evidence is allowed to ascertain what the original terms of the contract really are. This is the class of cases in which contracts are enforced in equity. Notwithstanding the Statute of Frauds, the equity is not administered on the ground of fraud, as is shown by the fact that in a suit for the specific performance of an agreement for the sale of land, payment of the price of the land is not such a part performance of the agreement as will take the case out of the statute. Then there is the case of *Wilson v. The West Hartlepool Railway Company (sup.)*. The judgment of Turner, L.J. was referred to, in which Knight Bruce, L.J. did not concur. I wish to speak with the greatest respect of the opinion of Turner, L.J., and I should have great hesitation in giving judgment against his opinion if he really decided on the point; but really, to a great extent, he was dealing with a difficulty under the Statute of Frauds, and dealing with a corporation governed by the Companies Clauses Act 1845, and to a very great extent his observations apply to the case of private individuals who had a contract for the sale of his land, but not a contract in writing. He deals with a corporation in the same way. They were a railway governed by the provisions of the Companies Clauses Act 1845, and that Act says that contracts which, if made by individuals, must be in writing, will bind the company if signed by two directors. The Act does not say that contracts shall be, but that they may be made in this way, and Turner, L.J. is applying the doctrine of part performance to cases where they have not been so made. There are other parts of his judgment which are not applicable to the case of a private individual, but there he refers to another class of action entertained by the Court of Chancery, independently of contract,

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namely, where the court says that if any individual having a title to land allows another person who believes that his own title is a good one, to enter into possession of and expend money upon the land, and "stands by" without interfering, a court of equity will not afterwards allow him to assert his title to the injury of him whom he has allowed so to enter into possession. This equity has no application to the present case.

*Judgment affirmed.*

Solicitor for plaintiff, *W. T. Foster.*

Solicitor for defendants, *W. H. Whitfield.*

Nov. 19, 21, 22, and Dec. 10, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

THE ECCLESIASTICAL COMMISSIONERS OF ENGLAND  
v. ROWE. (a)

*Limitation of actions—Ecclesiastical Commissioners—Corporations sole—Statute of Limitations (3 & 4 Will. 4, c. 27), ss. 2, 29—3 & 4 Vict. c. 113, ss. 50, 57.*

*Sect. 50 of 3 & 4 Vict. c. 113 enacts, that all the estate and interest of the holder of a deanery in any lands, &c., shall be vested absolutely in the Ecclesiastical Commissioners for England for the purposes of the Act; and sect. 57 provides that they shall, for the purpose of obtaining possession of lands, &c., vested in them have all rights, powers, and remedies, which belonged to the holder of the deanery.*

*Held, that, with respect to lands vested in the commissioners under sect. 50, their right of entry or action for recovery was barred under sect. 2 of the 3 & 4 Will. 4, c. 27, after twenty years had elapsed without their having taken possession, and that they were not entitled to enter or recover within sixty years, as the holder of the deanery might have done under sect. 29.*

APPEAL from a decision of Mellor, J., on further consideration, giving judgment for the plaintiffs in an action for the recovery of land.

The facts of the case and the arguments are fully set out in the judgment of the Court of Appeal (*post*).

*McIntyre, Q.C. and C. Higgins* appeared for the plaintiffs.

*Herschell, Q.C. and Morgan Lloyd, Q.C.* for defendant.

*Our. adv. vult.*

Dec. 10.—COTTON, L.J. delivered the following judgment of the court:—This was an appeal of the defendant from a judgment of Mellor, J., in favour of the plaintiffs after trial without a jury. The action was brought to recover two closes of land called 137 and 137A, which at the time when the action was brought were in the possession of the defendant. After the action was brought the defendant admitted the title of the plaintiffs to the parcel of land No. 137, but defended the action so far as it sought to recover 137A. In the year 1808 an Act was passed authorising the inclosure of certain common lands in the parish of St. Asaph. In the year 1827 the commissioner (acting in the execution of this Act) made his award whereby the parcel of land in question was awarded as follows: "To the personal representatives of Robert Morris, late of St. Asaph, aforesaid, inn-

keeper, deceased, assigned and allotted in right of the lease of the George and Dragon and other premises in St. Asaph, under the said Dean of St. Asaph." Though the award was not completed until 1827, it appears that the allotment was made in 1816. The George and Dragon, in respect of which the allotment was made, was the property of the Dean of St. Asaph, and until the year 1820 was held under a lease granted by the then Dean of St. Asaph to two persons named Lloyd, as trustees for the next of kin of Robert Morris. This lease was in the year 1820 sold to Hugh Jones, who in 1820 obtained on the surrender of the old lease a new lease. There were several leases of the George and Dragon made after 1820, but none of them included the allotment now in question. By 3 & 4 Vict. c. 113, the estates of all deans passed to the Ecclesiastical Commissioners, but under the 75th section of the Act this was to be subject to the right of every dean then living to the estates of his deanery during his life; and it appears from the statement of claim, that the Dean of St. Asaph, living at the time when the last-mentioned Act passed, died in April 1854, and that thereupon the plaintiffs became entitled in possession to the estates of the deanery. It is admitted that the freehold and reversion of the George and Dragon formed part of the estates of the deanery, and the plaintiffs in the year 1850 purchased the then subsisting lease of that inn, and acquired possession thereof. But they never obtained possession of the allotment now in question, and this action was not commenced until the year 1877. Two questions were raised on the part of the appellant, the defendant in this action: first, that the plaintiffs had not shown that the Dean of St. Asaph ever had any title to the allotment in question; and secondly, that if this was decided in the plaintiffs' favour, the Statute of Limitations was a bar to this action. Mellor, J. found as a fact, that the defendant had been in possession adverse to the title of the plaintiffs for twenty years, but not for sixty years; that is, the right of the plaintiffs to bring this action accrued more than twenty years, but not sixty years, before the issuing of the writ, and he decided the question of title and the question raised under the Statute of Limitations in favour of the plaintiffs. The question whether the Dean of St. Asaph ever had any title to this allotment is not free from difficulty. Neither the private Act, which has been already mentioned, nor the general Act in force when the award was made (41 Geo. 3, c. 109), contains any express enactment as to the title of a reversioner to an allotment made to his tenant in respect of his lease. We have not been furnished with a copy of the award, and there is no evidence as to the circumstances under which the allotments mentioned in the award were made to the dean, and, as we are of opinion that the Statute of Limitations affords a good defence to the action, even assuming that under the award the reversion of the allotment made in respect of the George and Dragon vested in the dean, we think it better not to give any opinion on this question. As regards the defence of the Statute of Limitation, the plaintiffs contend that Pears, from whom the defendant bought in 1863, had been in possession of the allotment in question as tenant of the dean. If this point was raised at the trial, Mellor, J. found as a fact against

(a) Reported by W. AFFLETON, Esq., Barrister-at-Law.

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the plaintiffs, and we are of opinion that there is no ground for disturbing his finding, if any, on this point, and further, that the evidence shows that the plaintiffs' contention in this respect is not well founded. In our opinion the allotment referred to in the deed relied on by them is that described in the statement of claim as 137, in respect of which no question now arises. But then it is urged on behalf of the plaintiffs that the Dean of St. Asaph would, under sect. 29 of the 3 & 4 Will. 4, c. 27 (a), have been able to

(a) By 3 & 4 Will. 4, c. 27, s. 1, the word "person" shall extend to a body politic, corporate, or collegiate.

Sect. 2. After the 1st day of December 1833 no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.

Sect. 29. It shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual alms-house corporation sole, to make any entry or distress, or bring such action or suit to recover any land or rent, within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall have first accrued; that is to say, the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said 31st day of December 1833 no such entry, distress, action, or suit, shall be made or brought at any time beyond the determination of such period.

The 3 & 4 Will. 4 is now partly repealed by the Real Property Limitation Act 1874 (37 & 38 Vict. c. 57), which takes effect from and after Jan. 1, 1879.

By 6 & 7 Will. 4, c. 77, s. 1, the Ecclesiastical Commissioners of England were constituted a body corporate with power to sue and be sued, and to hold lands, &c.

By 3 & 4 Vict. c. 113, s. 50: Subject to the provisions herein contained, all the estate and interest which the holder of any deanery or canonry not suspended by or under the provisions of this Act, and his successors, have and would have in any lands, tithes, and other hereditaments or endowments whatsoever annexed or belonging, or usually held or enjoyed with such deanery or canonry (except any right of patronage), or whereof the rents and profits have been usually taken and enjoyed by the holder of such deanery or canonry, as such holder, separately and in addition to his share of the corporate revenues of such chapter, shall, without any conveyance or assurance in the law other than the provisions of this Act, accrue to and be vested absolutely in the Ecclesiastical Commissioners for England, for the purposes of this Act.

By sect. 57: The Ecclesiastical Commissioners for England shall, for the purpose of enforcing payment of all profits and emoluments to be paid to them, and of obtaining possession of all lands, tithes, or other hereditaments vested in or accruing to them as aforesaid, and of recovering the rents and profits thereof, have and enjoy all rights, powers, and remedies, at law and in equity, which belonged or belong, or would belong or have belonged, to the holder of the deanery, canonry, prebend, dignity, or office, or the rector of the rectory in respect of which such profits and emoluments, lands, tithes, and other hereditaments and endowments respectively are by or under the provisions of this Act to be paid or accrued to and be vested in the said commissioners.

bring his action within sixty years from the time when his right to do so first accrued, and that the effect of 3 & 4 Vict. c. 113, s. 57, was to give the plaintiffs the same time to bring their action. Mellor, J. found, and it is conceded by the defendant correctly, that the defendant had not been in possession for sixty years, and he decided as matter of law that under these circumstances the plaintiffs' action was not barred by the statute. We are unable to agree with this decision. The plaintiffs are within the 2nd section of 3 & 4 Will. 4, c. 27, unless they show any statutory enactment which exempts them from the statutory bar of twenty years. The plaintiffs contend that the combined effect of the 57th section of 3 & 4 Vict. c. 113, and of sect. 29 of the Act of Will. 4, gives them such exemption. It is urged that sect. 29 of the Act of Will. 4 gives deans and other corporations sole mentioned in it such a privilege in the nature of a right or power, as by sect. 57 of the Act of 3 & 4 Vict. vests in the Ecclesiastical Commissioners. But this, in our opinion, cannot be maintained. The 29th section, it is true, begins with the words, "Provided always it shall be lawful," words which, if taken without reference to the rest of the statute in which they occur, look as if they conferred a right or power on the corporations therein mentioned. But the statute is not one which confers any right or power. On the contrary, it restricts the rights, powers, and remedies which, independently of its provisions, owners of property would possess, by prescribing a limited time within which they must enforce the rights and pursue the remedies which they, independently of the Act, possess. Although the 29th section seems to be enabling, yet, in truth, this and the 2nd section are statutory enactments, that deans and other ecclesiastical corporations sole shall not bring any action to recover land except within the period mentioned in sect. 29, and that all other persons shall not do so except within twenty years from the time when the right first accrued. It was much pressed upon us that the consequence of holding that the Ecclesiastical Commissioners are within sect. 2 of the 3 & 4 Will. 4, c. 27, would be that at the time of the passing of 3 & 4 Vict. c. 113, the Ecclesiastical Commissioners might have no power to recover property belonging to the deanery, for which the then dean would have forty years to sue, and that it could not have been intended that the Ecclesiastical Commissioners should thus lose property which the dean could have recovered. It is probable that the attention of Parliament was never directed to this point, and that there was no intention either way. But the supposed inconvenience is much lessened by the fact that, during the life of a dean living at the time when the Act of 3 & 4 Vict. c. 113 was passed, the dean and not the Ecclesiastical Commissioners would be entitled to bring an action to recover property of the deanery, and during this period the Ecclesiastical Commissioners could make inquiries as to the property of the deanery, and might arrange with the dean to recover any property in those cases where, though an action by them would be statute barred, the dean could still bring an action. In our opinion the decision on this point in favour of the plaintiffs would lead to this result, that the Ecclesiastical Commissioners could always bring an action to recover land vested in them

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under 3 & 4 Vict. c. 113, s. 50, even that of which they had at one time had possession, at any time within sixty years from the time when the right to do so first accrued, and that they would not be barred from bringing an action to recover land acquired by them under the last-mentioned Act till the lapse of the period mentioned in sect. 29 of the Act of 3 & 4 Will. 4, c. 27, while they would be barred by the lapse of twenty years from bringing an action to recover other estates derived from persons not mentioned in sect. 29. These are inconveniences at least as startling as that suggested by the plaintiffs as the result of a decision that twenty years is a bar. But the question is not one of convenience or inconvenience. It is whether there is sufficient to prevent an action by the Ecclesiastical Commissioners being barred by the limitation contained in sect. 2 of the Act. We are of opinion that there is not, and that an action brought by them is barred not by the period given by sect. 29, but by that enacted in sect. 2.

*Judgment reversed.*

Solicitors for the plaintiffs, *Jennings, White, and Buckstone.*

Solicitors for the defendants, *Field, Roscoe, and Co.*

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

*Tuesday, Jan. 21.*

(Before JESSEL, M.R.)

#### MULLINER v. MIDLAND RAILWAY COMPANY.

*Railway company—Grant of right of way through arch underneath station—Right of railway company to use arch as warehouse for goods—Interference with user of right of way—Injunction.*

The B. Railway Company, having the usual powers under their special Acts, had acquired lands whereon they had constructed a station built upon arches. In the schedule to one of their special Acts were certain heads of arrangements which were affirmed by one of their special Acts, amongst them being an arrangement with the defendant company to work the B. Company's line as soon as it was completed. After the line and works were completed, the B. Company sold certain superfluous lands adjoining the station with a right of way to part thereof through one of the arches, and the same afterwards became vested in the plaintiff. The defendant company, requiring the arch for the purpose of using it as a bonded warehouse, caused it to be blocked up and thus interrupted the plaintiff's right of way. On an action by the plaintiff to restrain the defendant company from interfering with his right of way:

*Held*, that the B. Railway Company had no power to grant the right of way, it being over land required for the purposes of the railway, and that the grant was invalid.

*Held* also, that the defendant company was entitled to the exclusive use of the arch for the purpose for which it was intended to be used.

By the Bedford and Northampton Railway Act 1865, which incorporated the Lands Clauses Consolidation Act 1845, and the Railways Clauses

Consolidation Act 1845, the Bedford and Northampton Railway Company were incorporated and authorised to make and maintain a railway from Northampton to Bedford, and to construct certain works including a station in the town of Northampton. By sect. 4, the company were empowered to purchase, take, hold, and dispose of lands and other property for the purposes, but subject to the restrictions, of the Act, and to put the Act in all respects into execution. By sect. 65, the company had power to enter into agreements with the defendants the Midland Railway Company with respect to the maintenance, working, and user by them of the railway.

Certain heads of arrangement between the two companies were scheduled to the Act, and by sect. 64 these arrangements were confirmed and were to have full effect according to the terms and intent thereof.

By the third clause of the heads of arrangement, after the Bedford and Northampton Railway should be authorised to be open for public traffic, the Midland Company were at all times at their own expense to maintain, manage, stock, work, and use the Bedford and Northampton Railway, and to work and use the same so as properly to develop and accommodate not only the through traffic but also the local traffic of the district by the Bedford and Northampton Railway.

The Bedford and Northampton Railway Company made the railway and works authorised by the special Act of 1865 as subsequently altered by two other special Acts of 1866 and 1867, and for the purposes of such Acts purchased a piece of ground in the parish of All Saints, in the town of Northampton. Part of the railway was made on the said piece of land, and certain works were constructed thereon, consisting of Northampton station with the requisite platforms and other conveniences. The line of railway was above the level of the said land, and the railway was in consequence built upon arches. After the completion of the railway, portions of the said piece of land on the north and south sides of the railway which had become "superfluous lands" were by an indenture of the 20th Aug. 1873, and made between the Bedford and Northampton Railway Company of the one part, and Messrs. Clark and Punchard of the other part, in pursuance of the agreement under which the latter had constructed the railway, conveyed to them in fee together with an uninterrupted right of way for Messrs. Clark and Punchard, their heirs and assigns, and all lessees, tenants, and other persons for the time being occupying or having any interest in the hereditaments thereby conveyed, or any part thereof, either on foot or with horses, carts, or other conveyances, to pass and repass over and along two roads, one being an occupation road and another being marked "Right of way" in the plan attached to the conveyance, and being a right of way through one of the above-mentioned arches. This arch was within the limits of deviation.

The right of way was not a way of necessity, as the land on the side distant from the railway abutted on a public street in Northampton, known as Bridge street.

In Nov. 1876 Messrs. Clark and Punchard conveyed their interest in the said pieces of land, with the appurtenant rights of way, to the plaintiff, his heirs and assigns. The plaintiff

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said that the right of way was a convenient and valuable means of access between John-street, Northampton, and one of the pieces of land conveyed to him, and from the date of the conveyance until shortly before the commencement of the action it had been uninterruptedly used by the plaintiff. The Midland Railway Company, which had been in the occupation of the line and works, including the station, under the heads of arrangement as sanctioned by the special Act, had recently stopped up the archway so as completely to interrupt the plaintiff's right of way. There appeared to have been no consideration for the grant of the right of way to Messrs. Clark and Punchard, and under the agreement with them they were entitled only to the superfluous lands, and the Midland Railway Company alleged that the grant of the right of way was inoperative. The plaintiff by his action claimed a declaration that he was entitled to a free and uninterrupted right of way through the archway, and an injunction restraining the defendants from interfering with life same.

*Chitty, Q.C. and Dryden* for the plaintiff.

*Davey, Q.C. and Beale*, for the defendants, referred to *Bostock v. North Staffordshire Railway Company* (5 De G. & Sm. 584; 4 E. & B. 798), but were not called on.

JESSEL, M.R.—This case raises two questions, the one an important question of general law, and the other, no doubt, an important question, for it affects not only these parties, but a great many other parties similarly circumstanced, though it can hardly be called a question of general law. The first question, which is, as I said before, a question of general law, though it turns upon the terms of a special Act of Parliament, is still general law, because I believe those terms are *verbatim* the same in all the Acts—if not *verbatim* they are substantially the same—therefore I treat it as general law. Again, the second point relating to the right of user of the railway company, though, of course, it turns on the actual expressions used in the agreement, still the words used are so common, and there is so little special about them, that there again they might fairly be considered to be the words ordinarily used in similar agreements. Therefore, on both points, the matter has an importance far beyond the decision of the actual case between the parties. [After stating the facts his Lordship continued:] Now the first point, which is that of general law, is this: Has a railway company any power by law to alienate either for value or without value any portion of the land actually used for the railway or works? It appears to me that, looking either at the terms of the Act of Parliament, or the general policy of the law, or one express decision upon the subject, a railway company possesses no such power, unless, of course, it is conferred upon them by special enactment. Now, first of all, we must consider what the railway company is empowered to do. It is to make a railway, or "railway and works," to use the definition in the Act of Parliament, and that includes the station. The station, of course, is a work, and is a part of the railway. This is a case in which the railway comes into the station as it generally does. It is part of the works of the railway itself; it is within the limits of deviation; and it is used merely for the purposes of the railway. It is not the less a

station because it is built on arches, nor is the land below less used for the station because it supports the arches on which the upper part of the station stands. The whole thing is the station—the land below the arches, and the pavement, works, and passenger station above the arches—that is all the railway station; and that railway station is a portion of the railway according to this definition of the "railway and works." Now, for what purpose is that to be used? It is to be used for the purposes of the Act—that is, for the general purposes of a railway. It is a public thoroughfare subject to special rights on the part of the railway company working and using it. But it is in fact a property devoted to public as well as to private purposes; and the public have rights, no doubt, over the property of the railway company. It is property which is allowed to be acquired by the railway companies solely for this purpose, and it is devoted to this purpose only. It would be a very odd thing, under any notion of the rights of an ordinary proprietor of land, even if there were no enactment to the contrary, to allow a corporation formed to hold land for a special purpose, and to take that land compulsorily from the owners for that purpose only, to devote the land to another purpose, or to alienate the same generally. But when I look at the actual terms of the Act of Parliament, I think there can be no possible question that what we should expect to find expressed there is clearly expressed. It is here expressed to be a body corporate, and to have power "to purchase, take, hold, and dispose of land for the purposes, but subject to the restrictions, of this Act;" so that you can only dispose of the land for the purposes of the Act. Now, of course, a gratuitous disposition could never be for the purposes of the Act. That is quite clear. There might be cases in which it might be alleged that a disposition for value might, but under no circumstances could a gratuitous disposition, be for the purposes of the Act. Nor, as I read the Act of Parliament, could a sale of the railway be a purpose of the Act. By the 20th section, "subject to the provisions of this Act, the company from time to time may enter upon, take, and use, and appropriate all or any of the lands defined on the deposited plans." The provision in the Act is, that the company is to "take and use" the land, and not to take and sell it; besides which, by the 19th section, you find they have power to take ten acres for extraordinary purposes. There is, therefore, no provision in the Act enabling the company to do more than use the lands for the purposes of the railway, except so far as the Railway Clauses Act and the Lands Clauses Act are incorporated. Now in the Lands Clauses Act there is a section of great importance, namely, the 127th section, relating to superfluous lands, under which the company may sell such lands, and one part of the argument addressed to me was, that the land under the arch might be treated as superfluous land, or at all events that the right of way granted might be treated as being an easement within the term "superfluous land," that "the lands" included, by the definition of the Act, all easements and other hereditaments. It appears to me quite impossible that this can be so. First of all the preamble to the section is this, "And with respect to lands acquired by the promoters of the undertaking under the provisions of this or the special Act, or

any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows." Now it is quite plain that all the land under the station is "required for the purposes thereof," not only for the support of the arch, as regards the portions of it actually beneath the piers of the arches, but also that which is under the top of the arches is required, and although the actual surface of that piece of land is not utilised for the moment, it might be utilised at any instant by the arch subsiding or tumbling in, when scaffolding or supports would be required upon that part of the land. It is quite plain, therefore, that the land cannot be treated as not required for the purposes of the railway. It is an integral part of the station; but besides that, when we look at the words of the section, we see that this cannot be superfluous land. The section is in these words: "Within the prescribed period, or, if no period be prescribed, within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands and apply the purchase money arising from such sales to the purposes of the special Act, and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same." Of course you can never dream of supposing that the Legislature intended to take away what I will call the base of the arch, or that which underlies even the crown of the arch, as being not wanted in any event for the purposes of the undertaking. It is, in my opinion, quite an inadmissible contention. Then under the Railways Clauses Act, the 45th section, there is a power to take land for extraordinary purposes, and there is a power of selling the land which shall be so taken. The prescribed number of acres in the present Act is ten acres, and it is for the purpose, amongst other things, of additional stations, and convenient roads and ways, and so on. There is a power to sell the land which they so take; but beyond those two powers, there is no power of selling that I can find. Now the argument, of course, was used that, as they took the property in fee, they have the ordinary rights of fee simple proprietors; but even that is not so. It is not necessary now to go fully into that point, because the right of selling they clearly have not. In the first place, as I have said before, they have only to hold it for the purposes of the special Act. They can only dispose of it for the purposes of the special Act, and the very fact that they have special powers of sale over other lands, which would be wholly unnecessary if they could sell the land used for the railway and works, shows that they cannot sell this land. But it is a mistake to suppose that they themselves have the ordinary rights of proprietors in every respect to use the lands. Their rights are no doubt limited, though it is not necessary to state the exact limits. That point came before the Court of Queen's Bench in the case of *Bostock v. The North Staffordshire Railway Company* (sup.), which is really not distinguishable from the present case. In that case the majority of the Court of Queen's Bench were clearly of opinion, though the words were "for the

purposes of this Act and for no other purpose"—which words, as I said before, are implied without being expressed—that they could not use the land except for the purposes of the Act. They had not the ordinary rights of ordinary proprietors, but the Legislature empowered them to acquire and hold and use the lands merely for the special purposes of the Act. This is no new doctrine, at all events to an equity court, for we have very many instances of corporations with limited powers of enjoyment, limited powers of alienation, and limited rights of control over their property. One large mass of corporations must occur to the mind of everyone—I mean the ecclesiastical corporations sole or aggregate. As regards ecclesiastical corporations sole, it has been long since decided, in the case of rectors, vicars, and others, that though in a certain sense owners in fee simple, yet in many respects they have only the powers of tenants for life. Of course no owner in fee simple can actually enjoy beyond his life; and therefore to that extent they were no better and no worse off than other owners in fee simple; but it was said that being seised in right of their churches they had not the ordinary powers of other proprietors in fee simple, and such powers as opening mines and so on were denied to them, and they were not allowed to use their property in the same way as ordinary owners of land. Then there was a large body of corporations with which the old Court of Chancery had a great deal to do, but with which the High Court I am happy to say has not so much to do, there being charity commissioners appointed to do a great part of that work, namely, charity corporations, which, as we all know, had very limited powers of disposing of their land. Since the Municipal Corporations Act we have a number of other corporations, namely, municipal corporations, who have also restricted ownership and restricted rights. Therefore there is nothing at all new or remarkable in the fact that the railway company has only these restricted and limited rights. It appears to me quite impossible that the railway company can have a right either to sell, grant, or dispose of this land or of any easement or right of way over it, except for the purposes of their Act; that is to say, with a view to the traffic of their railway; and therefore that disposes of the plaintiff's case on the ground of the general law being against him. But now I come to the next point, which is a very important one, and that is the right of a railway company which uses another railway company's property under these agreements. Now, the user is for the purposes of the traffic, either present or future traffic—in fact, that agreement states that developing traffic is one of the objects. What the Midland Company say is this—they say: "We now require two of these arches for the purpose of bonded warehouses to be used for the purposes of our traffic. We have been applied to by traders on the line to enable them to store their dutiable goods in bonded warehouses temporarily when they require, either to be sent from Northampton, or to Northampton." That is quite a legitimate object, and one which the directors of the railway company wish to comply with. They further say that, in order to do this, they must lock up the bonded warehouses, and so secure them, in order to satisfy the Board of Customs, who, of course, are very particular upon this point, because they must be very careful that the goods do not get out without the duty being paid, and the reasonable



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requirements of the Board of Customs must be complied with in this respect before bonded warehouses can be established. They further say there are no warehouses at the top of the station. The only warehouses they could get would be from the use of the arches at the bottom; and, in addition to locking up the arch, they want space, which can only be conveniently afforded under the arch, for loading and unloading goods and turning the waggons. Mr. Allport, their manager, explained that the best way of doing all that would be to lock up the arch at the end, and then they would have a yard formed under the arch in which they could load and unload and turn their waggons and discharge their contents, or load them from the bonded warehouse under the other arches. All that appears to me quite reasonable, and entirely within the purview of the agreement. These arches are a part of the station. They were, in fact, as we were told in evidence, built for the very purpose. The original design was to carry the line at this part on an embankment, but arches were substituted afterwards, at Mr. Allport's own suggestion, for the purpose of being used as warehouses in the way they are going to use them. It seems to me to be a very reasonable thing to say that, if they are to use these arches for warehouses, they should want to utilise one of the arches as a yard for the purpose, which I understand to be a legitimate use of this arch. It is also quite reasonable to say, "We wish to exclude the public from the right of way over our yard; it would be very inconvenient to us, and it might lead, as has been suggested, to robbery, and the unrestricted admission of the public would interfere with us in the ordinary conduct of our business." It seems to me that those who have granted to the Midland Railway Company the right to use the station for traffic purposes have granted to them the right to use it in the way I have mentioned; that is to say, to use the land under the arch for the purpose of a yard for loading and unloading, including in that right of user the right of excluding the public from access, which means the right of exclusive user. That being so, the company's title being prior to the plaintiff's, and he having purchased with notice of that title, it appears to me that he has no right to call upon this court to interfere in his favour with that exclusive and reasonable user by the Midland Railway Company, and on this ground also the plaintiff's action fails. The action will be dismissed with costs.

Solicitors: J. W. Whitthouse; Beale, Marigold, Beale, and Groves.

Feb. 1 and 4.

(Before BACON, V.C.)

LONGBOURNE v. FISHER. (a)

*Practice—Conduct of proceedings—Executor.*

*Where proceedings are necessary against persons who have had dealings with the testator whose estate is being administered, the executor has the right to the conduct of the proceedings in preference to the beneficiaries, unless misconduct on the part of the executor is clearly proved, or it is made out that the course of justice will be impeded thereby.*

*An executor having commenced an action, and being*

Reported by W. COWELL DAVIES, Esq., Barrister-at-Law.

*willing to continue it, not deprived of his strict right at the instance of the beneficiaries, even though the action was against his own father and uncle.*

#### ADJOURNED SUMMONS.

The action of *Longbourne v. Fisher*, which was commenced in Aug. 1875, was for the administration of the will and codicil of the Rev. James Henry Alexander Philipps, of Pictou Castle, Pembrokehire, and was instituted by James Vickerman Longbourne, the sole acting trustee, out of the four original trustees appointed by the testator. The defendant Mary Philipps, the wife of the defendant Charles E. G. Fisher (who had since assumed the name of Philipps), was under the will the equitable tenant for life, for her separate use, of the settled estates, with remainder to her first and other sons in tail male, and the defendant Amy Octavia Gwyther Philipps was entitled to a charge on the settled estates of 100,000*l.* in favour of herself and her husband and children (if any).

On taking the accounts in this administration suit, it was discovered that certain sums of money, viz., 2623*l.*, 255*l.* 3*s.* 3*d.*, and 25*l.* 13*s.* 8*d.*, amounting to 2904*l.* 1*s.* 11*d.*, had been improperly obtained and retained by the solicitors to the estate in administration in the lifetime of the testator, and also in the lifetime of Lord Milford, the testator's predecessor in title.

The members of this firm of solicitors, who were liable to account in respect of these misappropriations, were William Thomas Longbourne and Charles Ranken Vickerman, the father and uncle of the plaintiff John Vickerman Longbourne.

On the 2nd Aug. 1878 the plaintiff, J. V. Longbourne, took out a summons in the suit of *Longbourne v. Fisher* for leave to take proceedings to recover these sums for the benefit of the estate, but before any order was obtained he commenced the action of *Longbourne v. Vickerman*, against his uncle and father before the Master of the Rolls.

The action of *Longbourne v. Vickerman* claimed a declaration that the payment out of court in the year 1859 of the sum of 2623*l.* had been obtained by the fraud of Vickerman, and asked that Vickerman and William Thomas Longbourne might be ordered to repay the sums of 2623*l.*, 255*l.* 3*s.* 3*d.*, and 25*l.* 13*s.* 8*d.* The statement of claim contained an allegation that leave to prosecute this action had been obtained.

The day after the issue of the writ in *Longbourne v. Vickerman* another action of *Eyre v. Longbourne* was commenced before the Master of the Rolls with the same object; the plaintiffs in this last action were the legal personal representatives of Lord Milford, the testator's predecessor in title, and the defendants were the same as the defendants in the action of *Longbourne v. Vickerman*. As two actions with the same object were pending against them, the defendants, Charles Ranken Vickerman and William Thomas Longbourne, applied to have one of them stayed, and the Master of the Rolls, on the 30th Nov. 1878, without going into the merits of these actions, and declining to hear the affidavits filed upon this point, stayed proceedings in the action of *Eyre v. Longbourne* so far as it sought to recover the sums claimed in *Longbourne v. Vickerman*.

On the 6th Dec. 1878 a summons in the suit of *Longbourne v. Fisher* was taken out on behalf of



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the defendants Mr. and Mrs. Philipps, that the conduct of the action of *Longbourne v. Vickerman* might be given to them, with liberty to use the name of the plaintiffs in that action so far as it might be necessary for the purposes of that action. This summons and that of the plaintiff Longbourne of the 2nd Aug. 1878 now came on to be heard together.

In support of the second summons there was evidence to the effect that the plaintiff John Vickerman Longbourne had issued the writ in *Longbourne v. Vickerman* immediately upon learning that the action of *Eyre v. Longbourne* was about to be commenced, in order, it was alleged, to obtain the conduct of the litigation for himself; and it was further alleged that his intention was to shield his father as much as possible. Fraud and misconduct were alleged in both the actions, but in the action of *Longbourne v. Vickerman* the charges of fraud were directed chiefly against Vickerman to the exoneration of William Thomas Longbourne.

Sir H. M. Jackson, Q.C. and B. B. Rogers for the first summons.—The plaintiffs in the action of *Longbourne v. Vickerman* are the executors of the estate now being administered, and the proper persons to have the conduct of such an action. Mr. Longbourne, the plaintiff, the acting executor, and the trustee who knows most about this matter, is a plaintiff against his own father; but nevertheless his action is properly framed to obtain all the relief that can be had. It has not been shown that there has been any misconduct on the part of Mr. Longbourne in the conduct of this litigation, painful though it must be to him. As a matter of strict right, Mr. Longbourne is entitled to the conduct of this matter, and he can only be displaced on misconduct being clearly made out:

*Harrison v. Richards*, 15 L. T. Rep. N. S. 137; L. Rep. 1 Ch. 473;

*Daniel's Ch. Prac.* 5th edit. 1063.

Notwithstanding the insinuations made in the affidavits, no misconduct is made out.

Kay, Q.C. and Whitehorn for the second summons on behalf of Mr. and Mrs. Philipps.—We are the persons really interested in the money to be recovered by the action of *Longbourne v. Vickerman*, and ought therefore to have the conduct of that action. Mr. Longbourne's summons is simply the ordinary summons in an administration suit for leave to institute proceedings which he has already instituted without leave, stating in his statement of claim that he had obtained the leave which by his present summons he now seeks. The Master of the Rolls only allowed Longbourne and Vickerman to proceed in preference to *Eyre v. Longbourne*, because the plaintiffs in the latter action were not so much interested in the recovery of the moneys as the plaintiffs in the former action; he never decided that Longbourne was to have the conduct of the action as against us, at whose instance the action of *Eyre v. Longbourne* was really instituted. Besides, as is obvious from the averments in the two statements of claim, the object of the plaintiff Longbourne in commencing this action is to shield his father at the expense of his uncle, and by getting the conduct of the litigation to frustrate the other action against his father. Under these circumstances, we are clearly the proper persons to have the conduct of the litigation.

*Chapman Barber*, for Amy Octavia Gwyther Philipps, and *Jaw*, for the recently appointed trustee of the testator's will, supported the second summons.

BACON, V.C.—Sir Henry Jackson, I shall not trouble you now to reply. I should have disposed of this case on Saturday, but I wanted to look at the shorthand writers' notes of what had taken place on the 30th Nov. before the Master of the Rolls. I was led to suppose that that might have some bearing upon the summonses which are before me; I have now done so, and I find that it has nothing whatever to do with it. It has no similarity to the present case. The name is somewhat the same, but it has no kind of connection with it; for in that case there were two suits instituted by different plaintiffs for the same purpose, and with the same object. Of course, it was not to be endured that two such suits should go on, and an application was made in chambers to stay one of them. The Master of the Rolls preferred the older one, and that having been the order in chambers, the other party chose to have it adjourned into court. The Master of the Rolls, thinking he ought to have been contented with the order in chambers, made him pay the costs of the adjournment into court. Therefore, as I have said, it has nothing in the world to do with the case before me, in which one of the parties to a suit being interested in the estate of the testator—an estate administered in this court—desires to have the conduct of a suit in which one of the executors of the testator is plaintiff, committed to him. The principle upon which the court only takes from an executor the legal power which he possesses is well understood and established. It is in cases of misconduct, cases where justice may be thwarted or impeded by permitting the individual who is named to carry on the suit, notwithstanding his legal right to do so. But no such order has ever been made, according to the practice of this court, unless there was a case of clear misconduct made out. No misconduct is imputed here. It is suggested that the conduct of the suit is to be taken away from the plaintiff, according to the tenor of the summons, because he has commenced an action against his uncle and his father for the purpose of restoring to the testator's estate sums of money which are mentioned in the pleadings, which he says ought to be recouped to the testator's estate, and which he says were abstracted from the testator's estate by the misconduct of one of the defendants, and so applied that it made both of them liable, although one only was culpable in the sense of having misappropriated the money. I do not see any reason why Mr. Longbourne, the plaintiff in the suit, should not properly exercise his legal right. Therefore I cannot accede to the suggestion of this summons, and it must be dismissed. There will be an order on the first summons that Mr. Longbourne's action should go on, and no order on the second summons. Costs to be costs in the action.

Solicitors: *J. V. Longbourne*; *Law, Hussey*, and *Hulbert*; *Iliffe, Russell, Iliffe*, and *Cardale*.

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THE GENERAL MEAT SUPPLY ASSOCIATION (LIMITED) v. BOUFFLER.

[CHAN. DIV.]

Feb. 9 and 11.

(Before BACON, V.C.)

THE GENERAL MEAT SUPPLY ASSOCIATION  
(LIMITED) v. BOUFFLER. (a)

*Voluntary settlement—Avoidance of settlement—27 Eliz. c. 4—Vendor and purchaser—Contract for sale of part of the land in settlement under power of attorney—Defective title—Recovery of purchaser's deposit—Conveyancing costs by way of damages.*

*B. executed a voluntary settlement of land in favour of his wife and children, which contained a power of sale; subsequently, B. being about to leave England, executed a power of attorney to E., authorising him to sell all or any of his lands, but in general terms. E., as B.'s attorney, agreed to sell a portion of the land comprised in the settlement to the defendant; and the defendant contracted, the next day, the 4th May 1876, to sell the same piece of land to the plaintiffs. On the execution of this contract a deposit of 200l. was paid, and the purchase was to be completed on the 1st Jan. 1877. The title was objected to by the plaintiffs on the ground that the power of attorney did not authorise the sale to the defendant, and an action was commenced in the Exchequer Division in Aug. 1877, for the return of their deposit, and for damages for breach of the contract; the defendant asserted that the contract was binding and the title good, and by his counter-claim asked for specific performance. An order had been obtained by consent in another action to administer the trusts of the settlement, confirming the proposed sale by E. to the defendant, and it had also been decided in the same action that an order might be made directing a person to convey for B.*

*The defendant subsequently offered a conveyance direct from B. or from the trustees of the settlement, which was declined.*

*Held, that the power of attorney did not authorise E. to sell to the defendant any portion of the land comprised in the settlement; and that such a sale was not sufficient to call into operation the statute 27 Eliz. c. 4; that the plaintiffs could not be affected by the order in the administration action, and that, the title being defective, the plaintiffs were entitled to recover their deposit, with the costs of the action; the damages to be ascertained to be limited to the conveyancing costs.*

*The established practice that a perfect title is shown whenever it appears by the abstract that a vendor either already has, or will necessarily before the time fixed for completion be able to acquire, an immediate and indisputable right to the legal and equitable estate, has no application to a case in which the vendor has no title at the date of the contract.*

## ACTION.

This was an action to recover a sum of 200l. paid by the plaintiffs to the defendant as a deposit on the purchase of a freehold piece of land at Battersea, together with interest on the same, from the 4th May 1876, the date of the deposit, and damages for the breach or non-performance of the contract for sale, including costs and expenses incurred by the plaintiff in investigating the defendant's title.

By an indenture dated the 10th Sept. 1873,

(a) Reported by W. COWELL DAVIES, Esq., Barrister-at-Law.

Richard John Bell, in consideration of natural love and affection, conveyed certain land at Battersea, comprising the land the subject of the contract, unto and to the use of trustees and their heirs for the benefit of his wife and children, with a power of sale in the trustees.

In 1875, Bell, being about to leave England, executed a power of attorney to a Mr. C. A. Edmonds, dated the 4th Sept. in that year, whereby, after empowering him to receive and collect the rents of and to manage all the real property of which he (Bell) should be seised or entitled to for any estate or interest whatever, Edmonds was empowered to sell or exchange to or with any person or persons whomsoever all or any of the farms, messuages, lands, tenements, and hereditaments (whether freehold, customary freehold, copyhold, or customary leasehold) of which or to which he or any person or persons in trust for him then was or were, or at any time or times hereafter should become, seised, possessed, or entitled for any estate or interest whatever, or which he then had, or at any time or times hereafter should have, power to dispose of, for such price or prices and by such ways and means, as his said attorney should think reasonable, and so that any sale either of real or personal property under the power thereby conferred might be, either by public auction or private contract; and also to enter into, make, sign, seal, execute, deliver, acknowledge, and perform any contract, agreement, deed, writing, or thing that might, in the opinion of his said attorney, be necessary, or proper to be entered into, made, signed, sealed, executed, delivered, acknowledged, or performed for effectuating the purposes aforesaid or any of them, and for all or any of the purposes of these presents, to use the name of him the said Richard John Bell. And generally to do and execute and perform any other act, deed, matter, or thing whatsoever, which ought to be done, executed, or performed, or which, in the opinion of his said attorney, ought to be done, executed, or performed in or about his concerns and engagements of every nature and kind whatsoever as fully and effectually to all intents and purposes as he himself could have done if he were present and did the same in his own proper person, it being his intent and desire that all matters and things respecting the same should be under the full management and direction of the said attorney.

By an agreement dated the 3rd May 1876, and expressed to be made between Bell of the one part and the defendant Bouffler of the other part, a piece of land at Battersea, part of the land comprised in the settlement of the 10th Sept. 1873 was purported to be contracted to be sold to Bouffler by Bell. This agreement was executed by Edmonds, as Bell's attorney. On the following day, the 4th May 1876, Bouffler agreed to sell the same piece of land to the plaintiff company for 1650l. This contract contained stipulations as to the delivery of the abstract, payment of a deposit of 200l. on the execution of the agreement, from which time the purchaser was to be let into possession, and provisions for the payment of the rest of the purchase-money. The purchase was to be completed on the 1st Jan. 1877. Interest at the rate of 5 per cent. was to be paid on the balance from time to time remaining unpaid from the date of the contract; in default or noncompliance with the conditions the deposit and any

other sums paid on account of the purchase-money were to be forfeited, the vendor to have a right of re-entry and re-sale. Upon the delivery and investigation of the abstract the title was objected to by the plaintiffs on the ground that under the circumstances the power of attorney did not authorise a sale of any part of the land which had previously been conveyed by the settlement of the 10th Sept. 1873.

A long series of requisitions, and answers to them, and correspondence between the vendor's and purchaser's solicitors ensued, but which did not result in any satisfactory settlement of the questions in dispute; and on the 7th Aug. 1877 the plaintiff company commenced an action in the Exchequer Division against Bouffler, claiming a return of the deposit of 200*l.* with interest at 5 per cent. from the 4th May 1876, and damages for breach of the agreement. The defendant by his counter-claim insisted that the contract for sale was a good and binding contract, which he was able and willing to perform, and asked that the plaintiffs might be ordered specifically to perform the same.

The conveyance by Bell to Bouffler had not actually been executed by the 1st Jan. 1877, the date fixed for the completion, though an abstract of this deed, with the date in blank, had been furnished.

By an order dated the 22nd May 1876, made by consent in an action of *Davenport v. Bell*, instituted by the trustees for the administration of the trusts of the settlement of the 10th Sept. 1873, the sale by Edmonds to the defendant Bouffler was confirmed, and the money produced by that sale was ordered to be paid into court to the credit of the action *Davenport v. Bell*, and on a summons in chambers, under the Vendor and Purchaser Act 1874, to decide the question as between Bell and Bouffler, before Hall, V.C., it was decided that, under sect. 1 of the Trustee Extension Act 1852, an order could be made directing a person to convey for Bell, and under his name.

The defendant Bouffler now stated that he could procure a conveyance direct from Bell to the company, or from the trustees of the settlement under their power of sale.

The action was transferred from the Exchequer to the Chancery Division.

Sir H. M. Jackson, Q.C. and *Leaving* for the plaintiffs.—First, as to the defendant's counter-claim. Such a contract as this could not be enforced at the suit of the vendor against us, whatever we might be able to do as against the purchaser:

*Sugden V. & P. c. 22, s. 1, par. 19;*

*Dart V. & P., 5th edit. 998.*

Bell cannot be allowed to take advantage of 27 Eliz. c. 4, to avoid the settlement made by him by such a transaction as this:

*Dee dem. Newman v. Rusham, 19 L. T. Rep. 153; 17 Q. B. 723.*

The time of the issue of the writ is the time at which the validity of the title must be tested (*Edwards v. Noble, 36 L. T. Rep. N. S. 312; L. Rep. 5 Ch. Div. 378*), and at that time there was no satisfactory title. The power of attorney could not authorise Edmonds to sell the land already comprised in the settlement; besides, the right to avoid a voluntary settlement of this kind does not arise under a contract, but only under an

executed conveyance. Though the vendor is nominally Bouffler, Bell and those acting under him are the real vendors, and Bell cannot be allowed to upset the settlement. There is no satisfactory title made out, and our only way of trying the question is by an action for the return of the deposit with our conveyancing costs, as, after *Bain v. Fothergill* (31 L. T. Rep. N. S. 387; L. Rep. 7; H. & L. App. 158), that is all the damages we are entitled to. The decision before Hall, V.C., in the action of *Davenport v. Bell*, cannot affect us. We are not parties to that action, and further, it was by consent.

*Hemming, Q.C. and Pauli* for the defendant.—Edmonds had full authority, under this power of attorney, to sell this piece of land, and the contract entered into by Edmonds has been consented to by Bell. The abstract contained an abstract of the proposed deed of conveyance from Bell to Bouffler, which is sufficient. It has been the invariable practice not to require a complete title at the time the contract is entered into, provided the vendor shows that he can complete the title. A reasonable expectation of obtaining a title is all that the abstract need show:

*Dart V. & P., 5th edit. 284.*

And the title is perfect whenever it appears that the vendor either already has, or will necessarily before the time fixed for completion be able to acquire, an immediate and indisputable right to the legal and equitable estates. *Noble v. Edwards (supra)* has nothing to do with this case, because there time was of the essence of the contract, and it was virtually a common law action. The contract under the power of attorney for sale to Bouffler has been sanctioned by Hall, V.C. We have offered the plaintiffs a conveyance direct from Bell or from the trustees of the settlement, but they decline it, the real truth being that they have neither the means nor the wish to complete.

Sir H. M. Jackson, Q.C. in reply.

BACON, V.C.—This case presents some difficulties, but as I have been thinking about it since it was last before me I am prepared to dispose of it now. By the form of the pleadings two causes are here combined, and are presented in such a shape as that one judgment has to be pronounced which must comprehend all the questions raised in each and both of them. [His Lordship then stated the pleadings and facts as above, and continued:] It appears, however, necessary to consider, in the first place, the force and effect of the power of attorney. The instrument being read in its entirety as a whole, which for all purposes of construction it must be, I cannot conclude that it was the intention of the grantor to confer upon his attorney a power to sell any part of the land which he had previously conveyed by the settlement. It is not disputed that as against a subsequent purchaser for value from Bell the settlement was void under the statute 27 Eliz. c. 4. For what reason? Because in the purview of the statute it was fraudulent and covinous, and because, by repeated decisions, it has been established to be the law that a merely voluntary conveyance falls within the provision of the statute. I do not think I am at liberty so to construe this apparently harmless instrument as if it had contained a recital that the grantor had made a conveyance absolute in its terms, and that having thereby committed fraud and covin he was desirous never-

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theless to sell to a purchaser, with or without notice of the fraudulent settlement, the land which he had so conveyed; and yet so I must hold if I adopted the contention of the defendant that Edmonds was enabled to sell for and in the name of Bell. Nor do I think that the words in the power of attorney "which I am entitled to," extends the authority of the attorney to this land. For, although the statute by its supreme and paramount power enables the grantor in a fraudulent deed to make that deed void by a subsequent sale, it is by the effect of the statute alone, and not by any legal estate vested in him that the grantor is enabled to do this. But, however that may be, it appears to me that it cannot be concluded either by the true construction of the power of attorney or by the intention of the maker of that instrument to confer upon his attorney any power of dealing with the land in question, and as a consequence that under the contract for sale by Edmonds with the defendant no title to, or interest in, the land in question became vested in the defendant, and this was the state of things when the agreement between the plaintiff and defendant was come to, the same state continued at the time when the contract should have been completed, and so remains at this day. But then it is said by the defendants that this defect, if defect there was, has been effectually cured by what has subsequently taken place. For they say that there was a suit instituted by the trustees of the settlement in which the question of the sale by Edmonds to Bouffier came before the court in which that cause was depending, and that by an order made in that cause the sale by Edmonds to the defendant was confirmed, and that the money produced by that sale was ordered to be paid into court to the credit of that cause. The plaintiffs were no parties to that suit, nor can they be in any manner affected by what was done therein, even if those proceedings had not been, as they are stated to have been, by the consent of all parties thereto. The particulars of that suit have not been communicated to me further than I have stated, but as far as I can form an opinion on this, and from such communication I am induced to believe that the sale by Edmonds was confirmed only because the trustees and the other parties interested in the sale thought it was beneficial to them, that the land sold was their land, and the money it produced belonged to them. And if the court decided, as I am told it did, all these points in their favour, it seems to be an inevitable consequence that the court regarded the power of attorney as not containing any authority to Edmonds to sell the land, for if he had such authority there could be no necessity for any confirmation by trustees or *cestuis que trusts*, nor any colour of right for ordering payment into court of land sold by the settlor or his agent to a *bonâ fide* purchaser. I have no right to inquire further into what was there done, but I must also say that, considering only so much as has been alleged, there is no reason for doubting that all was properly done as between the parties to that suit. At the same time I must observe that the plaintiffs can in no way be bound, nor can their rights be in any manner affected by the proceedings in the cause referred to, and this further, that the adoption of the sale to the defendant by the parties to the settlement is a manifest proof that the sale by Edmonds was not

an exercise of the right which, under the statute, the settlor might have against a *bonâ fide* purchaser from him, but a right which the settlement conferred upon them and as against him. The defendant, however, insists further that if there was at any time any defect in his title, he has now the means of removing or supplying that defect, and he asks, in pursuance of his counter-claim, for a reference to chambers, where he will have an opportunity of showing a good title, and he proposes to do this by procuring, which he says he can do, a conveyance direct from Mr. Bell. No doubt, a vendor who has a title, though an imperfect one, at the date of the contract, is entitled to make that complete by getting in outstanding legal estates, procuring the release of charges, or the discharge of claims, and various other similar matters; and if he can thus complete his title, he may enforce the specific performance of the contract, subject to the question of costs relative to the period at which such complete title was shown. But this established practice has no application to a case in which the vendor has no title at the date of the contract. Besides the matters I have adverted to, the defendant has insisted that the plaintiffs' claim ought not to be entertained for various reasons of a moral rather than a legal kind. For he says the plaintiffs, being a company, the title of which indicates its object, desired to establish slaughtering-houses, and other conveniences applicable to its intended business, and with this view contracted for the purchase of the land in question as being suitable for their purpose, and for building thereon; that by an Order in Council, or some other authority, the company has been interdicted from erecting such buildings, and from making such use of the land as they had contemplated, and that it is for this reason, and because they are in a state of liquidation and unable to furnish the money required to complete the purchase, that they refuse to accept the vendor's title, and, by their claim, seek to be relieved from their contract. There is not only nothing of this upon the pleadings, but there is nothing in the case which enables me to listen to the defendant's suggestion in these respects, or to inquire whether they are to any extent well founded. I am therefore constrained to say that in my judgment the counter-claim for specific performance by the defendant of the contract of 4th May 1876, has failed for the reasons I have given, and that the plaintiffs are entitled to judgment for the amount of their deposit, but, as they have been in possession, without interest; to be paid within a month. The damages to be ascertained must be limited to the conveyancing costs, and the costs of the action.

Solicitors: J. J. Keily; E. F. B. Harston.

## QUEEN'S BENCH DIVISION.

Wednesday, March 5.

(Before MELLOR and MANISTY, JJ.)

BELL (app.) v. MORSON (resp.). (a)

Election of guardians—Falsely assuming to act—  
Voting paper—Conviction—14 & 15 Vict. c. 105,  
s. 3.

The appellant called at the house of a voter for an  
election of guardians of the poor during his  
absence from home, asked for his voting paper.

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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*placed the voter's initials against two of the candidates' names, signed his own name as witness to the voter's mark, and got another person who was present to make a cross. The voter was not an illiterate person, and had given no permission or authority to the appellant to write upon the paper. Although this voting paper was allowed by the returning officer at the election, it did not appear how it reached him or what the voter knew about it.*

*Held, upon a case stated, that these facts were not sufficient to justify a conviction of the appellant under 14 & 15 Vict. c. 105, s. 3, for falsely assuming to act in the name or on the behalf of a person entitled to vote.*

THIS was a case stated by justices of the peace in and for the county of Durham, under the statute 20 & 21 Vict. c. 43, on the application in writing of the appellant, who was dissatisfied with the determination upon the question of law, which arose, as hereinafter stated, on the 24th June 1878, at Bishop Auckland, in the said county, the appellant having duly entered into a recognisance to prosecute the appeal.

1. Upon the hearing of a certain information preferred by the respondent against the appellant, under sect. 3 of the Act 14 & 15 Vict. c. 105, that the said appellant between the 7th and the 10th April 1878, at the township of Crook and Billy Row, in the county of Durham, pending the election of guardians of the poor for the said township under the statutes in that behalf, wilfully, fraudulently, and with intent to affect the result of the said election, unlawfully did falsely assume to act in the name and on the behalf of one John Hewitson, being then a person entitled to vote at the said election, contrary to the form of the statute in such case made and provided. The justices convicted the appellant of the said offence, and adjudged him to be imprisoned in Her Majesty's prison at Durham, in the said county, and there to be kept without hard labour for the space of ten days.

2. The following facts were either proved or admitted by the parties:

3. That there was an election of guardians of the poor for the township of Crook and Billy Row aforesaid pending in the month of April last, and that one John Hewitson was a person entitled to vote at the said election.

4. That a voting paper, prepared by the clerk of the guardians, and produced at the hearing, was left at the house of the said John Hewitson, in which paper there was the name of the said John Hewitson as the person being entitled to vote at the said election, together with directions as to the voter filling up and signing the voting paper.

5. That Jane Hewitson, the mother, and Anthony Hewitson, the brother, resided with the said John Hewitson, and also that the two brothers had worked for several years at a colliery at which the appellant is the overman.

6. That on one day between the 7th and 10th April last the appellant went to the house of the said John Hewitson, that the said John Hewitson was not at home, and that the appellant asked the mother and brother, who were in the house, if the voting paper was filled up, upon which the brother said it was not, whereupon the appellant said he would fill it up for them, and asked for the paper, which was given to him by the mother, and he

(the appellant) then, without any further remark and without asking for whom John Hewitson voted, filled up the paper by placing John Hewitson's initials, "J. H.," against the names of Bell and Jones, two of the candidates, and writing the name John Hewitson, as the name of a voter who could not write, at the foot thereof, and signing his own name, "Thomas Bell," as witness to the mark of John Hewitson. Appellant then requested Anthony Hewitson to make a cross at the foot of the voting paper, which he accordingly did in the blank space opposite to where the appellant had written the name of John Hewitson. The appellant then asked the mother and brother if they voted for Bell and Jones, to which Anthony Hewitson, the brother, replied "No;" whereupon the appellant said, "It is filled up now," and then went away.

7. The voting paper so prepared and witnessed by the appellant, which was afterwards allowed by the returning officer on taking the poll at the said election, was produced at the hearing before the justices.

8. That John Hewitson had not given any permission or authority to the appellant or Anthony Hewitson to sign his name or mark to the voting paper, and that John Hewitson was not an illiterate man, but that he could write his name.

9. On the part of the appellant, it was contended that the mere preparation by the appellant of the voting paper to receive the mark of the voter was not sufficient in point of law to support a conviction of the appellant for falsely assuming to act in the name or on the behalf of a person entitled to vote.

10. The justices, however, being of opinion that the appellant was well acquainted with the two Hewitsons, and also that he did the act with which he was charged wilfully, fraudulently, and with intent to affect the result of the said election, gave their determination against the appellant in the manner before stated.

11. The question of law upon which the case is stated for the opinion of the court therefore is, whether the preparation and filling up of the voting paper by the appellant by the placing of John Hewitson's initials opposite the names of Bell and Jones, two of the candidates, writing at the foot thereof the name of John Hewitson as the name of a voter who could not write, and signing his own name as witness to the mark of John Hewitson, whilst the mark was placed on the voting paper by Anthony Hewitson at the request of the appellant, who knew that he was not John Hewitson, the person entitled to vote at the said election, is sufficient to support the conviction of the appellant for falsely assuming to act in the name and on the behalf of the said John Hewitson, being then a person entitled to vote at the said election.

By 14 & 15 Vict. c. 105, s. 3:

If any person, pending or after the election of any guardian or guardians, shall wilfully, fraudulently, and with intent to affect the result of such election, commit any of the acts following: that is to say, fabricate in whole or in part, alter, deface, destroy, abstract, or purloin any nomination or voting paper used therein; or personate any person entitled to vote at such election; or falsely assume to act in the name or on the behalf of any person so entitled to vote; or interrupt the distribution or collection of the voting papers; or distribute or collect the same under a false pretence of being lawfully authorised to do so; every such person so offending

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shall for every such offence be liable, upon conviction thereof before two justices, to be imprisoned in the common gaol or house of correction for any period not exceeding three months, with or without hard labour.

*Meek* argued for the appellant.—This is a conviction for falsely assuming to act in the name or on the behalf of a person entitled to vote; and it is not necessary to consider whether what the appellant did could properly constitute either of the other offences created by the section. There is nothing in the evidence to show any acting in the name or on behalf of John Hewitson; nor, indeed, does it appear that John Hewitson did not ratify and act upon what the appellant wrote. [Stopped by the Court.]

*J. Cook, contra*.—The chief ingredient of the offences under this section is the intention, and the justices have found that the appellant acted in the matter wilfully, fraudulently, and with intent to affect the result of the election. It does not appear that John Hewitson ever knew anything about the paper, either before or after the appellant wrote upon it. The voting papers are called for at the houses of the voters, and it never could have been intended that a vote should be given without any knowledge of it by the voter. The case of *Whitely v. Chappell* (38 L. J. 51, M.C.) failed as a conviction on the ground that the person whose name was assumed was dead; it is consistent with that decision that this conviction was right.

*Mellor, J.*—I think if, upon these facts, the justices had convicted the appellant of fabricating in whole or in part this voting paper, it might have been contended that the evidence was sufficient; but they seem to me to have proceeded on the wrong clause of the section. I see nothing to justify me in thinking that the appellant assumed to act in John Hewitson's name. It would be too much to infer this when it does not appear that John Hewitson was even called as a witness. Moreover it does not appear how the paper reached the returning officer; if the voter himself gave it him, he might have thereby ratified the appellant's fabrication. At all events the evidence is not enough for a conviction under this clause.

*Manisty, J.*—I agree; but I think the circumstances come very nearly within the offence charged. Possibly what the appellant did is consistent with innocence. I do not see how the justices could find what is stated in the case without John Hewitson's being called as a witness; and it is amazing that he was not further asked if he had adopted the vote which the appellant had written. I agree that the evidence is not sufficient as it stands.

#### *Judgment for the appellant.*

Solicitors for appellant, *Rogerson and Ford*, for *J. T. Proud*, Bishop Auckland.

Solicitors for respondent, *Scott and Olarks*.

*Wednesday, March 5.*

(Before *Mellor* and *Manisty, JJ.*)

*RIDDELL (app.) v. SPEAR (resp.). (a)*

*Nuisance—Sewer—Consent of occupier—Stoppage—38 & 39 Vict. c. 55, ss. 94 and 96.*

*The appellant rented land of the owner of houses*

(a) Reported by *M. W. McKellar, Esq., Barrister-at-Law.*

*and other land in the neighbourhood; and about two years ago the landowner, without the appellant's consent, made a sewer under the land he occupied. Pecuniary compensation was claimed at the time, but during the two years the sewage of several houses passed through the sewer; the appellant, being unable to get satisfaction from his landlord, at length stopped up the sewer, and the local board obtained a conviction against him under sects. 94 and 96 of the Public Health Act 1875, although no nuisance existed on his land.*

*Held, upon a case stated, that the appellant was a person by whose act the nuisance arose or continued; and that he was rightly convicted.*

THIS case was stated for the opinion of the court by two of Her Majesty's justices of the peace for the county of Durham, acting in and for the East Division of Chester Ward in the said county, in pursuance of the statute made and passed in the twentieth and twenty-first years of the reign of Her Majesty Queen Victoria, chapter 43, for the purpose of obtaining the opinion of this court in questions of law which arose as hereinafter stated.

On the 6th April 1878 the respondent, John Spear, of South Shields, in the county of Durham, medical officer of health of the local board of health for the district of Hebburn, in the said county, made a complaint that in or upon certain premises—the Caledonian Hotel, situate in Lyon-street, Hebburn Quay, in the said county, within the district of the said local board of health for the district of Hebburn, in the said county—the following nuisance then existed, the said premises being in such a state as to be a nuisance or injurious to health, arising from the reflux of sewage matter into the cellar of the said premises which are called or known by the name or sign of the Caledonian Hotel, situate at Lyon-street, Hebburn Quay aforesaid; and that the said nuisance was caused by the act, default, or sufferance of the above-named appellant, Edward Riddell, of Lyon-street, Hebburn Quay, in the said county of Durham, by placing an obstruction in the sewer in the locality of the said house and premises; and thereupon a summons was duly issued and served upon the said Edward Riddell, the above-named appellant, requiring him to appear before two of Her Majesty's justices of the peace of the county of Durham and answer the said complaint.

On the 30th April 1878 the said complaint came to be heard at the justice room, Waterloo Vale, South Shields, in the said division and county, when the respondent, by Thomas Grieves Mabane, a solicitor, who is also clerk to the local board of health for the district of Hebburn aforesaid, and the said appellant by his solicitor, appeared before the said justices.

The proceeding was under the Public Health Act 1875, sects. 91 to 111, both inclusive, and sect. 13 was also referred to.

It was satisfactorily proved by Henry Wilson, surveyor to the local board of health of Hebburn, and Richard Hill, the sanitary inspector of the board, that a sewer had existed within the said local board district for draining the Caledonian Hotel in question for at least two years previous to the complaint, and that such sewer belonged to the board, and was part of the main sewerage of the district, and that it drained other properties

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besides the Caledonian Hotel, and particularly that it drained all Lyon-street.

It was proved that the sewer in question was put in about the year 1873 by Mr. Carr Ellison, the owner of the land whereon the Caledonian Hotel is built, and of the surrounding land, and that the appellant alleged and complained to the local board that he had not received compensation from Mr. Ellison for putting the sewer through land of which the appellant was his tenant. The letter of appellant to the local board, of which the following is a copy, was put in evidence on behalf of the respondent:

Lyon-street, Hebburn, Feb. 7, 1878.

To the Urban Sanitary Authority, Hebburn.

Chairman and Gentlemen,—I respectfully inform you that I have not received payment for putting the sewer down my premises at Jarrow Wood House, a claim for which was forwarded to B. C. Ellison some time ago. If my demand be not complied with within fourteen days from this date I will cut off the sewer from your use. As you will be aware, I never received notice from you or any other party at any time that such sewer was wanted. I shall regret if such course has to be taken by me on account of other people's property, but I see no alternative.—Yours faithfully,  
E. RIDDELL.

J. Buchanan, Esq., Chairman.

It was further proved that the appellant between the 7th and 25th Feb. last, stopped up the passage of the sewerage from the Caledonian Hotel, by filling up the sewer at the manhole, thereby preventing the drainage of the Caledonian Hotel flowing through it, and caused such drainage to accumulate in the cellar of the said hotel; that such drainage there became a nuisance injurious to health, and that such nuisance existed at the date alleged by the complaint. The evidence of John Spear, medical officer of health to the said local board, was distinct, that the liquid accumulated in the cellar of the Caledonian Hotel was a nuisance injurious to health, and he also deposed that the appellant had admitted to him that he had stopped up the drain, giving as his reason that the local board had not made any acknowledgment for putting the sewer through his land.

It was further proved that a notice by the sanitary inspector of the local board requiring the appellant to abate the nuisance in question within twenty-four hours was duly served upon him on the 3rd April 1878.

The appellant contended that the summons or complaint ought to be dismissed on all or one of the following grounds:

First, that defendant is in possession of the land under a claim of right, and it was unnecessary therefore to consider his title.

Secondly, that the sewer not constructed by the board and not vested in them,

Thirdly, that the sewer is constructed through defendant's land and drains more than one house, so that it is a sewer which vests in the local board unless it was unlawfully made through defendant's land without his authority and without the local board having served notice under the Sanitary Acts.

Fourthly, defendant claims the right to prevent the sewage coming upon his land by the means he adopted, and that, as the sewage does not originate on his land, he is not responsible for any nuisance it may cause by its having been prevented by him from coming on to his land. The defendant claims the right to prevent foreign

sewage coming upon his land, and is therefore not liable to conviction under sect 96.

In support of appellant's contentions he relied upon the facts proved as above stated, and also upon the following evidence adduced upon cross-examination of Mr Wilson, wherein he stated as follows:

The local board was constituted two or three months before I was appointed surveyor in July 1873. The sewer was not put in, in consequence of a notice from the board. It is understood by me now to belong to the board, because owners of property put them in and hand them over. I cannot say when this sewer became the property of the board. I am not aware of this sewer being handed over to the board by any formal act. I have not seen Mr. Ellison as to this sewer. I prepared the plan produced. The manhole is 174 yards from the Caledonian Hotel. The manhole is in a field which I understood to be in the occupation of the defendant. The manhole is about 200 yards from the sewer mouth, which is an open field, and discharges itself into defendant's second field. It is about forty yards from the nearest dwelling, and the distance from the mouth to the foreshore (of the river) is 144 yards. All Lyon-street drains into the sewer. Defendant has complained of the sewer being through his land. No reply was given to the letter of the 7th Feb.

The appellant called Michael Pigg as a witness on his behalf, whose evidence was as follows:

Have known land at Jarrow Wood Farm for fourteen years, resided in it ten years. I know Humble by sight. He is a contractor at Gateshead. In Sept. 1874 the sewer was made. I heard George Riddell say to Humble, "By whose authority do you come here?" He replied, "Mr. Carr Ellison." George Riddell is defendant's brother, and they are joint occupiers of the land. George Riddell said they had not any right there; he would treat them as trespassers. I consider the discharge of sewage upon the land a nuisance. It has been complained of.

The justices gave the evidence and contentions on both sides their careful consideration, and were of opinion that it was satisfactorily proved that the sewer was in possession of the local board, and that the appellant was responsible under the Public Health Act 1875.

And on proof there had before them that the said nuisance so complained of did exist on the said premises, and that the same was caused by the act, default, or sufferance of the said Edward Riddell, the appellant, the justices, in pursuance of the Public Health Act 1875, ordered the said appellant within twenty-four hours of the service of their order, or a true copy thereof according to the said Act, to effectually abate the said nuisance by removing the said obstruction in the said sewer, and by cleansing and purifying the said premises situate at Lyon-street, Hebburn Quay, in the said county, and called or known by the sign of the Caledonian Hotel, so that the same should no longer be a nuisance or injurious to health as aforesaid. And they further adjudged the said appellant for his said offence to forfeit and pay the sum of ten shillings to be paid and applied according to law, and they also directed that the said appellant should pay the sum of fifteen shillings and sixpence, being the amount of costs incurred up to making of the order for abatement of the said nuisance; and if the said several sums were not paid forthwith they adjudged the said appellant to be imprisoned in the house of correction at the City of Durham, in



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the county of Durham, for the space of seven days, unless the said several sums and all costs and charges of the commitment and conveying of the said appellant to the said house of correction should be sooner paid.

If the court shall be of opinion that the said order is wrong in point of law, then the said order is to be quashed; but if the court shall be of opinion that the said order was legally and properly made, the same is to stand.

*Meek* for appellant.—It may be, as the justices have found, that this sewer was vested in the board under sect. 13 of the Public Health Act 1875; but the appellant is not the person under sects. 94 and 96 "by whose act, default, or sufferance the nuisance arises or continues." Sect. 94 continues: "Or, if such person cannot be found," the notice shall be served "on the owner or occupier of the premises on which the nuisance arises." Here the hotel is the premises on which the nuisance arises, and moreover the person by whose default the nuisance arises is Mr. R. C. Ellison, who improperly made the sewer, and not the appellant. An authority for this is *Brown v. Russell*; *Francourt v. Freeman* (L. Rep. 3 Q. B. 251), where the person whose premises were drained in one case, and the person who constructed the drain in the other, were held to be the persons by whose act respectively the nuisances arose.

*Cave*, Q.C. and *Cock* appeared for the respondent, but were not heard.

MELLOR, J.—I think our judgment must be for the respondent. There is some difficulty in applying the sections of the Act to this particular case; but the justices have found that this sewer has been vested in the board. Moreover, the sewage passes not only from the hotel, but from the whole street, and has done so for two years past. No doubt the appellant's claim might have been enforced upon Mr. Ellison either before or after the making of the sewer; but he could have no right to stop the sewage after the sewer had become vested in the board. It appears from the cases cited that there is some ground for arguing that Mr. Ellison or the occupier of the hotel might have been proceeded against as well as the appellant; but the ground upon which I based my decision in those cases is quite sufficient to support our judgment for the respondent here. "Suppose it to be a disputed question," I say (L. R. 3 Q. B. at p. 261), "whether an open drain was made through land with the consent of the owner, the public health is not to suffer until this question is determined. The proceedings are to be, in the first instance, against the person whose act causes the nuisance; if he cannot be ascertained, then against the person who has the misfortune to have such a noxious easement on his land." Here the appellant is the person whose act caused the nuisance, and it was within the justices' power to convict as they have done.

MANISTY, J.—I am of the same opinion. If the appellant has any remedy, it can only be against Mr. Ellison, his landlord. He has mistaken his course by stopping up the sewer.

*Judgment for respondent.*

Solicitor for appellant, *John Scaife*, for *Duncan and Duncan*, South Shields.

Solicitors for respondent, *Iliffe, Russell, Iliffe*, and *Cardall*, for *T. G. Mabane*, South Shields.

Wednesday, March 5.

(Before MELLOR and MANISTY, JJ.)

TYSO v. PETTIT. (a)

*Bankruptcy—Mutual dealings—Joint and separate debts—Agreement to be liable—32 & 33 Vict. c. 72, s. 39.*

*For twenty years the defendants had been accustomed to settle each year the balance between the goods supplied to them by a firm and the goods supplied by them to the several members of that firm. Upon the firm's liquidation under the Bankruptcy Act, the defendants sought to set off the amounts due for goods supplied to the separate members against the amount of goods received from the firm. A County Court judge found, in an action raising this set-off, that there was no agreement, either express or implied, to make the firm liable for the debts of the separate members.*

*Held, upon a rule nisi, that there could not be mutual dealings within the meaning of the 39th section of the Bankruptcy Act 1869, unless there were some agreement of the kind negatived by the judge's finding.*

THIS was an action by the trustee of the joint estate of Messrs. W. B. and J. Hilliard, drapers and clothiers of Wallingford, whose affairs were in liquidation by arrangement, to recover 36l. 15s. for goods supplied to Messrs. Pettit and Co., who are also drapers at the same place.

The amount of the claim was admitted; but the defendants had supplied goods beyond this amount for the separate and private use of the partners in the Hilliard firm, and they claimed to set off this sum against the amount for which the action was brought, on the ground that their transactions were "mutual dealings" between the two firms within sect. 39 of the Bankruptcy Act 1869:

Where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings; and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account and no more shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a bankrupt in any case where he had at the time of giving credit to the bankrupt notice of an act of bankruptcy committed by such bankrupt, and available against him for adjudication.

The case was tried at the Wallingford County Court on the 25th July last, when it was proved that for twenty-one years the defendants had set off the goods supplied by them to the separate partners against the goods supplied to them by the Hilliard firm; and that the balance, always in favour of the defendants, had been settled every year by a payment by the Hilliard firm. One of the defendants said in evidence:

At the first settlement I should think it must have been said by one of the partners that the accounts we were indebted to them should be deducted from the accounts owing to us by the partners, and they would pay us the difference. There was always a balance due to us at the end of the year. This has been the course of dealing with us ever since. There is no written memorandum to this effect. The goods were supplied to the heads of the two houses; but we looked to the firm

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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for payment. We never were paid by the individual members, but always by the firm.

Mr. W. B. Hilliard also gave evidence:

We have dealt with Messrs. Pettit for more than twenty years. I do not know that any arrangement about a set-off with the firm was actually made; but we always considered Messrs. Pettit's account as a set-off, and whoever was in the counting-house at the time they came to settle, always paid the difference. We found it more convenient to pay in goods than in money. It was always understood both by my brother and myself that the accounts due to Messrs. Pettit should be regarded as a set-off; but there is nothing to show for it. I did not keep a separate banking account.

The County Court judge held that there was no agreement, either express or implied, between the parties that these should be mutual dealings, and gave a verdict and judgment for the plaintiff.

The defendants had obtained a rule nisi calling upon the plaintiff to show cause why this verdict should not be set aside and a verdict be entered for the defendants, or a new trial had, upon the ground that there was evidence upon which the judge ought to have found that the said defendants were entitled to set off their claims against the liquidating debtors as showing mutual credits, mutual debts, or other mutual dealings between the parties.

Brown, Q.C. and Howard Smith appeared to show cause for the plaintiff, but were stopped by the Court.

E. Pollock supported the rule.—These were "mutual dealings" within the Bankruptcy Act, notwithstanding the finding of the judge. The existence of an agreement is not necessary to bring mutual dealings within the section; this was held with respect to a lien in *Ex parte Barnett, Re Devese* (L. Rep. 9 Ch. 293), Mellish, L.J. having, at p. 297, expressly distinguished on this ground between a set-off in bankruptcy and in ordinary cases. [MELLOR, J.—Surely mutual dealings must be founded on some agreement, either express or implied, to make them so. The judge's finding is that there was no express agreement, and none was to be implied from the dealings.] *Kimberley v. Hosack* (2 Taunt. 170) is an authority that the agreement need not be in respect of the specific debts to be set off; a general agreement to set off joint debts against separate debts is sufficient. The judge has not found that these were not mutual dealings; he has only found that an agreement to set off these debts was not proved. This is consistent with the defendants' set-off being good, and there ought to be at least a new trial.

MELLOR, J.—If it were not for the finding of the judge, we might have desired to hear the plaintiff's argument further; but we must take his view of the facts, and I am satisfied that there could be no mutual dealings within the meaning of the 39th section of the Bankruptcy Act 1869, upon the circumstances of this case, unless there had been some agreement to make the settlements of these transactions mutual between the firms. There seems to have been no evidence of an express agreement that the Hilliard firm should be responsible to the defendants for the separate debts of the partners; but the practice of over twenty years might, I think, go far as evidence of an implied agreement. I desire, however, to give no opinion as to whether the evidence of mutual dealings was sufficient; the verdict cannot be set aside on the

ground that it was against the weight of evidence; and as the judge has found there was no implied agreement to make these mutual dealings, the rule must be discharged.

MANISTY, J.—I am of the same opinion, I do not think it can be contended that the dealings with separate members of a firm are dealings with the firm, without some agreement to that effect. Here the defendants' dealings were distinctly with the two members of the firm, and although an implied agreement that they should be settled by the firm might have been enough, the judge finds there was no such agreement, express or implied. Whether he was right in so finding does not arise. It is sufficient for us that the judge had some ground for finding as he has done.

*Judgment for respondent, the plaintiff.*

Solicitors for plaintiff, *Thos. White and Sons*, for *Hedges, Son, and Marshall*, Wallingford.

Solicitors for defendants, *Angell and Imbert-Terry*.

#### COMMON PLEAS DIVISION.

*Monday, March 3.*

(Before Lord COLERIDGE, C. J. and DENMAN, J.)

VAL DE TRAVERS ASPHALTE COMPANY v. LONDON TRAMWAYS COMPANY.

*Practice—Parties—Substituting plaintiff—Order XVI., r. 2.*

*The plaintiff company having laid down certain asphalt paving on roads under the control of the Newington Vestry, the pavement to become the property of the vestry on completion, contracted with them to keep the said roads in repair for a specified term, for a fixed price, and became entitled to go upon the roads at any time, and exercise a general control over them for the purposes of their contract. The defendant company had laid down tramways over the roads in question under the powers of an Act of Parliament, and it was alleged by the plaintiffs that they had done so so negligently and unskilfully as to cause unnecessary injury to the asphalt paving, whereby the plaintiffs were put to additional expense in carrying out their contract to repair.*

*Held, without deciding that the plaintiffs had not such a right over the roads as to entitle them to maintain the action, that the vestry were undoubtedly entitled to maintain it; and order made without the consent of the vestry to substitute them as plaintiffs in the action under Order XVI., r. 2.*

SPECIAL CASE stated by consent of the parties.

The plaintiffs were an asphalt paving company, who had contracted with the Newington Vestry in 1871 to lay down certain asphalt paving on roads under the control of the vestry by a contract under which the asphalt paving when complete was to become the property of the vestry; the plaintiffs, under the same contract, were bound to keep the asphalt paving in repair for a term of fifteen years, for a fixed payment, and to indemnify the vestry against any loss or damage caused by the defective state of the pavement. After the pavement had been laid down, and repaired from time to time by the plaintiffs, the defendants, under the authority of an Act of Parliament, laid down a tramway on the road. The

(c) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

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plaintiffs alleged that they had exercised their statutory powers so unskillfully as to cause unnecessary damage to the asphalt pavement, whereby the plaintiffs were put to additional expense in carrying out their contract.

The questions for the opinion of the court were:

(1) Whether the action by the present plaintiffs was maintainable?

(2) Whether, if not, the vestry should be added as plaintiffs, or substituted in their place, under order XVI., r. 2?

If either question was answered in the affirmative, the action was to be remitted to an arbitrator to determine the issues of fact.

By order XVI., r. 2, of the Rule of Court, it is provided that where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the court or a judge may, if satisfied that it has been so commenced through a *bond fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be substituted or added as plaintiffs upon such terms as may seem just.

C. Russell, Q.C. (with him A. L. Smith) for the plaintiffs.—The plaintiffs have entire control over the pavement, with a right of entry at any time for the purpose of examining and repairing it. That is such a *quasi* possessory right as to entitle them to bring this action; at any rate, the vestry can be added, or substituted as nominal plaintiffs even without their consent. [COLERIDGE, O.J.—Do they consent?] It is believed not, but they would be added merely as trustees for the present plaintiffs. *Duckett v. Gover* (L. Rep. 6 Ch. Div. 8) is an authority for applying the provisions of Order XVI., r. 2, to a mistake in law.

Kemp, Q.C. and Humphreys for the defendants.

Lord COLERIDGE, C.J.—We think that the order to substitute the vestry as plaintiffs ought to be made. It must be part of the order that they are not to be damnified in any way, or put to expense. It is unnecessary to decide the first question.

DENMAN, J. concurred.

*Order to substitute the vestry as plaintiffs.*

Solicitors for the plaintiffs, Ellis and Crossfield.

Solicitor for the defendants, Godfrey.

Saturday, March 1.

(Before COLERIDGE, C.J. and DENMAN, J.)

WRIGHT v. FREEMAN. (a)

*Practice—Interpleader—Sale of horse—Warranty—Order I., r. 2—1 & 2 Will. 4, c. 58—23 & 24 Vict. c. 126, s. 12.*

*The plaintiff sued the defendant, the proprietor of a horse repository, for breach of warranty of a horse sold by action, claiming as damages the price paid, and also for injuries sustained by the vice of the horse while in his possession. The defendant had sold the horse for Q., the former owner, who gave the defendant notice not to part with the purchase money paid by the plaintiff. The defendant took out a summons under Order I., r. 2, to obtain an order that the plaintiff and Q. should interplead.*

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

*Held (affirming the decision of Field, J.), that the order should not be made.*

APPEAL from a decision of Field, J. at chambers, refusing to make an interpleader order under Order I., r. 2.

The defendant was the proprietor of Aldridge's Horse Repository, and the plaintiff had purchased there a horse, belonging to one Quick, for 19*l.* 19*s.*, with a warranty. Under the conditions of sale, a purchaser so buying was entitled, if dissatisfied, to return the horse purchased within a prescribed time, with a certificate from a veterinary surgeon of the unsoundness or fault complained of.

The owner of the horse, if he disputed the alleged unsoundness or fault, had then a right to send a certificate from a veterinary surgeon chosen by him as to the animal's state; and the conditions provided that, in case of disagreement, the defendant, the proprietor of the repository, might nominate a third veterinary surgeon to decide the question.

The plaintiff sent back the horse he had purchased within the prescribed time with a certificate from a veterinary surgeon; and on the next day, Quick, the former owner, sent a certificate to the contrary effect from his veterinary surgeon. The plaintiff thereupon repudiated the conditions, and brought an action against the defendant for breach of warranty, claiming a return of the price paid, and also damages for injuries alleged to have been caused by the animal's vice while in his possession. Quick having given the defendant notice not to part with the purchase money which was in his hands, the defendant took out a summons calling upon Quick and the plaintiff to interplead. Field, J. refused to make the order. The defendant appealed.

*Lord for the appellant.*—This is a proper case for an interpleader. The action is substantially, though not technically, for the same subject-matter as that which Quick claims, viz., the purchase money paid for the horse. The fact that the plaintiff in form seeks to recover this sum as damages for a breach of warranty is immaterial. Nor does the fact that the plaintiff claims further damages under the same head prevent the court from making the order asked for, part of the subject-matter of the two claims being identical:

*Attenborough v. St. Katherine Docks Company*, 33 L. T. Rep. N. S. 404; L. Rep. 3 C. P. Div. 450; *Tanner v. European Bank*, 14 L. T. Rep. N. S. 414; L. Rep. 1 Ex. 361.

*Petheram* for the claimant, Quick.—The two claims are distinct, and the order for an interpleader should not be made. The proper course for the defendant to pursue is to give us notice under Order XVI., rr. 17, 18, so that we shall be bound by the result of the action. The case of *Attenborough v. St. Katherine Docks Company* (*ubi sup.*) only decides that the court has power to make the order asked for, at most; and the words of sect. 12 of the C. L. P. Act 1860, "It shall be lawful for the court or judge, &c." show clearly that a discretion is to be exercised.

*Sims and Melsheimer* for the plaintiff.—The subject-matter of the two claims is not the same; and in addition we claim damages, *ultra* the price paid, for injuries sustained by the animal's vice. The purchaser has a right to look to the man from whom he purchased for his remedy. It is notorious that many of the persons who send

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horses to these repositories for sale are men of straw.

LORD COLERIDGE, C.J.—I think this order must be refused. The case of *Attenborough v. St. Katherine's Docks Company* is no doubt a binding decision upon us; and if I thought that I was deciding contrary to that case, I should not so decide. But taking the view which I do of that decision, I think it best simply to say that I refuse this order, without giving any reason for so deciding.

DENMAN, J.—I agree that the order should not be made. My reason for refusing it is that I think the two claims have substantially no element in common.

*Appeal dismissed.*

Solicitors for the plaintiff, *Dixon, Ward, Letchworth, and Weld.*

Solicitor for the defendant, *F. C. James.*

Solicitors for the claimant, *Venn and Woodcock.*

## HIGH COURT OF JUSTICE IN IRELAND.

### EXCHEQUER DIVISION.

Wednesday, Nov. 27, 1878.

(Before FITZGERALD, B.)

JONES v. QUINN. (a)

*Practice—Pleading—"Puffer," meaning of—Allegations in statement of claim generally denied, how far allowable—How the fulfilment of conditions precedent should be stated—Irish Judicature Act, schedule, rr. 23, 25 (Eng. Order XIX., rr. 4, 20); Order XVIII., rr. 10, 14, 19 (Eng. Order XIX., rr. 17, 22, 28); Appendix C., forms 11, 14, 19 (Eng. App. C., forms 15, 20, 8).*

*The plaintiff by his statement of claim set out facts upon which he relied to show that the defendant had purchased certain premises at an auction. The first paragraph of the defendant's statement of defence was, "The defendant denies all and every the allegations in the several paragraphs of the statement of claim respectively contained." The only other paragraph of the defence relied upon the auction not having been bond fide, because some of the biddings had been made by a "puffer." On motion by the plaintiff to strike out both paragraphs:*

*Held, that the first should be struck out as being a general denial instead of dealing with the facts which the defendant desired to traverse specifically; and that the second should be struck out, inasmuch as the word "puffer" was insensible, there being nothing to show that it was used as defined in sect. 3 of 30 & 31 Vict. c. 48 for the purposes of that Act.*

*The averment that all conditions were performed is still material and proper in the same form as before the Judicature Acts.*

This was an action for damages for breach of contract by the defendant in not completing a purchase of certain lands and premises purchased by the defendant at an auction.

The present motion was on behalf of the plaintiff to set aside the first paragraph of the statement of defence, as amounting to the general issue; and the second paragraph as ambiguous and embarrassing, inasmuch as the word "puffer" employed in it was ambiguous and insensible.

(a) Reported by JAMES GORDON McCULLAGH, Esq., Barrister-at-Law.

The statement of claim was as follows:

1. The plaintiff in or about the month of March 1878 offered for sale by public auction his interest in certain premises held under lease for a term of years unexpired. 2. The said auction was duly held, and the sale thereby was subject to the following amongst other conditions, that the highest bidder should be the purchaser, that the purchaser should pay a deposit in part payment of the purchase money, and the residue thereof within a reasonable time, and upon such latter time the vendor should execute a conveyance of and deduce good title to the said premises, and that if the purchaser failed to comply with the said conditions his deposit should be forfeited, and the vendor be at liberty to resell the said premises by public auction or private contract. 3. The plaintiff says, that upon such putting up for sale of the said premises, the defendant was the highest bidder for the same, and purchased the said premises from the plaintiff for the sum of 1070*l.*, upon and subject to the terms aforesaid; and the defendant subsequently secured such deposit aforesaid by his bill of exchange or promissory note. 4. All conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to maintain this action. 5. The defendant did not within such reasonable time as aforesaid pay the remainder of the said purchase-money, nor complete the said purchase on his part, whereby the plaintiff has been deprived of the advantages which would have accrued to him by the completion of the said purchase, and has lost the expense of the said sale, and the expenses incurred in endeavouring to procure the completion of the said contract by the defendant. 6. The plaintiff afterwards, according to the said conditions of sale, resold the said premises for a less sum than the price aforesaid, and there was a deficiency thereon in the sum of 300*l.*

The defendant delivered as his statement of defence:

1. The defendant denies all and every the allegations in the several paragraphs of the statement of claim respectively contained. 2. In the alternative the defendant, admitting that he was the highest bidder for the premises in the statement of claim mentioned at the auction therein also mentioned, and that he was declared the purchaser of the said premises, nevertheless says that several biddings by persons other than the defendant were made at the said auction for the said premises, and the defendant bid for the said premises on the faith that all the said several biddings were bond fide, whereas at least three of the said several biddings were made by a "puffer," and the defendant accordingly repudiated the said sale, and refused to be bound thereby.

*T. O'Shaughnessy* in support of the motion.—The first paragraph of this statement of defence violates the 25th schedule rule (Eng. Ord. XIX., r. 20), because it denies generally the facts alleged in the statement of claim, instead of dealing specifically with each which the defendant intended to traverse. It also contravenes Order XVIII., rr. 10 and 14 (Eng. Ord. XIX., rr. 17, 22), inasmuch as it does not answer the point of substance which is the foundation of the plaintiff's claim. The English rules corresponding to those have been explained by Jessel, M.R., in these words: "It is the very object we have always had in view in pleading to know what the defendant's version of the matter is, in order that the parties may come to an issue. . . . The whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing": (*Thorp v. Holdsworth*, 3 Ch. Div. 637.) The same judge remarked with reference to the mode by which the former system brought the parties to an issue, "The same rules of pleading which prevailed under the old law prevail now, unless there is anything in the Judicature Acts, or in the new orders or rules, which prevents it": (*Evans v.*

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*Buck*, 4 Ch. Div., at p. 434.) Again, *Thesiger*, L.J. says, "The new rules were expressly framed to make the defendant take matter by matter and traverse each of them separately": (*Byrd v. Nunn*, 7 Ch. Div., at p. 287; 37 L. T. Rep. 585.) This defence amounts to the general issue, with which in the above passage the Lord Justice was contrasting the present system of defence. The second paragraph of the statement of defence is immaterial and insensible. Three bids at the auction at which the defendant purchased the premises are alleged to have been made by a "puffer." But, in the first place, this is no defence, inasmuch as there is no connection alleged to have existed between the plaintiff and the "puffer." Besides "puffer" is not a word known either to legal phraseology, or, in the sense in which it is apparently intended to be taken, to the English language. The only meaning given to it by the dictionaries is exemplified by the following passage from the *Observer*: "Our advertising quacks or empirics are a numerous and ancient class of puffers."

*P. O'Brien, contra.*—The word "puffer" is used in this pleading with perfect intelligibility, inasmuch as it is a term defined by statute. Its meaning is stereotyped by the interpretation clause, sect. 3 of 30 & 31 Vict. c. 48, as "a person appointed to bid on the part of the owner." Therefore the defendant has a right to use the word here. Its meaning is perfectly well known, and could not be otherwise expressed without an awkward periphrasis. It would be hard to compel a pleader to add to a definition given by statute. The form of defence here objected to, as amounting to the general issue, "the defendant denies all and every the allegations in the several paragraphs of the statement of claim respectively contained," is one which is sanctioned by general use in England. In a late work, *Cunningham and Mattinson's Precedents of Pleading*, we find several specimens of traverses similar to that in this defence. For instance, in the form of defence to an action on a cheque (p. 149), the traverse is in these words: "The defendants deny all and every the allegations in the 2nd, 3rd, 4th, and 5th paragraphs of the statement of claim respectively contained," precisely similar to the words here objected to. The same form occurs in the defence to an action on a breach of warranty (p. 639), and in an action on the sale of goodwill (p. 334). The first paragraph of this defence is intended to put in issue every one of the allegations of fact in the statement of claim. [FITZGERALD, B.—Every one of those allegations is material and distinct, and the plaintiff, under Order XVIII., r. 14 (Eng. Ord. XIX., r. 22), is entitled to know what allegation in particular you deny. Whether, for instance, you deny that the plaintiff held such an interest as stated in the first paragraph of the statement of claim, or that he offered it for sale by auction, or that the conditions were such as are stated in the second paragraph.] We desire to deny everything alleged in this statement of claim so as to put the plaintiff upon proof. This is a very different thing from the general issue, because in the general issue every allegation is put in issue, though the defendant only means to rely upon one point, whereas here we rely upon a denial of every point. It would be open to us to take any allegation singly and traverse it, and why should we not be

allowed to deny them *in toto*, and to use the denials singly and severally? In *Thorp v. Holdsworth* (*ubi sup.*) the denial held to be bad was a denial not of any one paragraph in particular, or of each paragraph of the statement of claim in particular, but the defendant there alleged that he denied that the terms of arrangement were definitely agreed upon as alleged. Those words made the traverse a negative pregnant, because the fact was denied with all the circumstances; but denying the allegations of a particular paragraph merely puts in issue the material allegations in that paragraph. This principle we have applied to each and every paragraph of the statement of claim, and we submit, in so doing, we have followed not only the forms given in the volume of precedents to which we have referred, but those contained in the appendix to the Orders themselves. In Appendix C. form XI. (Eng. App. C., form XV.) we find: "The defendant denies the allegations of the sixth paragraph of the statement of claim;" in form XIV. (Eng. Form XX.), in reply to a paragraph setting forth numerous circumstances, the only defence of the defendant is, "The defendant does not admit the statements of the third paragraph of the statement of claim;" and in form XIX. (Eng. Form VIII.) the defendants "deny the truth of the allegations contained" in three paragraphs of the statement of claim. [FITZGERALD, B.—Taking the forms by themselves, no doubt a great deal might be said in favour of the propriety of general traverses, but the expressions in the rules are distinctly against them.] Even if this defence be too general in its traverses, the statement of claim is bad also, because it avers generally that all conditions were fulfilled, and all things happened, and all times elapsed necessary to enable the plaintiff to maintain the action. The Common Law Procedure Act 1853 provided by the 66th section (Eng. C. L. P. A. 1852, sect. 57) that the performance of conditions precedent might be thus generally averred, but that provision appears to have been repealed by schedule rule 23 (Eng. Ord. XIX., r. 4); and the pleading should not now contain such a general allegation, inasmuch as it is to be a concise statement of material facts. This allegation also violates Order XVIII., r. 19 (Eng. Ord. XIX., r. 28), as it would have been for the defendant to aver the non-performance, if such there were, of conditions precedent.

FITZGERALD, B.—As to the second paragraph of this defence—that which is called an "alternative defence"—I cannot say what is meant by the word "puffer." The Act of Parliament cited does for the purpose of its construction give a meaning to that word; but I have nothing here to show me that the word is used in this defence in the meaning given to it by that statute for the purposes of the statute. Considering the first paragraph as a substantial defence, it seems to me to differ in no respect from the much abused general issue. It only professes, and that in a most general form, to put the plaintiff on the proof of all and every the allegations in his statement of claim, and, having regard to the authorised form and some of the precedents cited, I will not take upon myself to say, without necessity, that this can in no case be done; but I am of opinion that it cannot be done in any case in which specific traverses of each material fact averred in the statement of claim in the terms of the respective averments would not be admissible. That is so in

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this case. It is only necessary to refer to one averment. The averment that all conditions were performed seems to be material. The statement that this averment is not admitted is quite consistent with the admission of the performance of some of the conditions, or of all but one. This mode of refusal to admit them appears to me to be inapplicable in the present case. By allegations of fact in the rule is meant the averment of material facts, and those material facts, though each of them be so far a material one, may be compounded of elements, each of which, though essential, is not itself a material fact.

*Motion granted.*

## Judicial Committee of the Privy Council.

Jan. 30, 31, and Feb. 15.

(Present: The Right Hons. Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and Sir ROBERT COLLIER.)

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THE COMMERCIAL BANKING COMPANY OF SYDNEY v. CAMPBELL. (a)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

*Law of New South Wales—Real Property Act—Mortgagor and mortgagees—Notice—Excessive demand—Tender—Practice—Costs.*

*The Real Property Act of New South Wales (Stat. 26 Vict. No. 9) enacts (sect. 55), that in case of default made by a mortgagor, the mortgagees "may give to the mortgagor . . . notice in writing to pay the money then due or owing on such memorandum of mortgage;" and (sect. 56), if the mortgagor continues in default after the service of such notice, "such mortgagees is hereby authorised and empowered to sell the land so mortgaged, or any part thereof."*

*Held (affirming the judgment of the court below), that a notice under this section is not bad because it demands more than is due, and that where a demand is made for a larger amount than that which is really due, such demand does not dispense with the necessity of tendering what is actually due, unless there is at the same time a refusal to receive less than the sum demanded.*

*Seem, that such refusal may be inferred from an excessive or wrongful demand.*

*The Norway (3 Moo. P. O. N. S. 245) discussed.*

*The Judicial Committee will not interfere with the discretion of the judges in the courts below with respect to the costs of and incident to a motion for a new trial.*

THERE were cross appeals from a judgment of the Supreme Court of New South Wales (Martin C. J., Hargrave and Faucett, JJ.), making absolute a rule for a new trial in an action in which John Campbell was plaintiff and the Commercial Banking Company of Sydney defendants.

The facts and pleadings appear fully in the judgment of their Lordships.

Herschell, Q.C. and Crackmall appeared for Campbell.

Benjamin, Q.C. and Boddam for the Banking Company.

(c) Reported by C. E. MALDEN, Esq., Barrister-at-Law.  
Vol. XL., N. S., 1011.

The following cases were referred to in the arguments:

*The Norway*, 3 Moo. P. C. N. S. 245;  
*Baker v. Gray*, 1 Ch. Div. 491; 33 L. T. Rep. N. S. 721; and the case of

*The Dublin, Wicklow and Wexford Railway v. Slattery*, 39 L. T. Rep. N. S. 365; 3 App. Cas. 1155, on the question of what evidence should be left to the jury;

And the following sections of the Real Property Act (Stat. 26 Vict. No. 9).

Sect. 55:

Mortgage and incumbrance under this Act shall have effect as security, but shall not operate as a transfer of the land thereby charged, and in case default be made in the payment of the principal sum, interest, annuity, or rent charge, of any part thereof thereby secured, or in the observance of any covenant expressed in any memorandum of mortgage, or of incumbrance registered under this Act, or that is hereinafter declared to be implied in such instrument, and such default be continued for the space of one calendar month, or for such other period of time as may therein for that purpose be expressly limited, the mortgagees or incumbrancees may give to the mortgagor, or incumbrancer, notice in writing, to pay the money then due or owing on such memorandum of mortgage or of incumbrance, or to observe the covenants therein expressed or implied, as the case may be, and that sale will be effected unless such default be remedied, or may leave such notice on the mortgaged or incumbered land, or at the usual or last known place of abode in the colony of the mortgagor or incumbrancer, or other person claiming to be then entitled to the said land, or with his known agent.

Sect. 56:

After such default in payment or in observance of covenants continuing for the further space of one calendar month from the service of such notice, or for such other period as may in such instrument be for that purpose limited, such mortgagees or incumbrancees is hereby authorised and empowered to sell the land so mortgaged or incumbered, or any part thereof, and all the estate and interest therein of the mortgagor or incumbrancer, and either altogether or in lots, by public auction or by private contract, or both such modes of sale, and subject to such conditions as he may think fit, and to buy in and resell the same without being liable for any loss occasioned thereby, and to make and execute all such instruments as shall be necessary for effecting the sale thereof, all which sales, contracts, matters, and things hereby authorised shall be as valid and effectual as if the mortgagor or incumbrancer had made, done, or executed the same, and the receipt or receipts in writing of the mortgagees or incumbrancees shall be a sufficient discharge to the purchaser of such land, estate, or interest, or of any portion thereof, for so much of his purchase-money as may be thereby expressed to be received; and no such purchaser shall be answerable for the loss, misapplication, or non-application, or be obliged to see to the application of the purchase money by him paid, nor shall he be concerned to inquire as to the fact of any default or notice having been made or given as aforesaid; and the purchase money to arise from the sale of any such land, estate, or interest shall be applied first in payment of the expenses occasioned by such sale; secondly, in payment of the moneys which may then be due or owing to the mortgagees or incumbrancees; thirdly, in payment of subsequent mortgages or incumbrances, if any, in the order of their priority; and the surplus, if any, shall be paid to the mortgagor or incumbrancer, as the case may be.

At the conclusion of the arguments, their Lordships took time to consider their judgment.

Feb. 15.—Their Lordships gave judgment as follows:—This appeal and cross appeal have arisen out of long and complicated transactions between John Campbell, the plaintiff, and the Commercial Banking Company of Sydney, the defendants, in the suit. On the 29th May 1867 the plaintiff executed, in favour of the bank a memorandum of mortgage in the form prescribed by the Real Property Act of New South Wales,

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whereby he pledged, subject to a subsisting mortgage, three parcels of land, of which he was the registered proprietor in fee simple under the provisions of the Act, for the purpose of securing the repayment to the bank of 5000*l.*, advanced by them with interest at 9 per cent. per annum during the continuance of the mortgage. These parcels may be shortly described as the Wharf property, the Coogee property, and the Warehouse property. This mortgage in favour of the bank was duly registered as No. 1607. On the 28th Feb. 1870 the plaintiff executed in favour of the bank a similar memorandum of mortgage in the nature of a further charge upon the same premises for the purpose of securing the repayment of the further advance of 1000*l.*, admitted to have been received, and also of any further advances the bank might make to him, whether upon bills, promissory notes, or otherwise, with interest thereon. By a covenant in this instrument it was stated that the interest was to be at such rate per centum per annum as the bank usually charged on similar transactions, and was to be payable or chargeable as before, with half-yearly rests. This second mortgage was registered as No. 4513. It is upon these two mortgages that the questions to be determined on this appeal principally arise. The bank, however, held other securities, of which it is only necessary to particularise an equitable mortgage under an agreement executed by the plaintiff, on the 29th May 1867 (the date of the first-mentioned memorandum of mortgage), upon certain jetties attached to the wharf property, not being lands subject to the provisions of the Real Property Act, and a mortgage legal or equitable upon certain property of the plaintiff, known as Ballina. The former, which seems to have covered also the wharf and warehouse properties, was expressed to be a security for the general balance due or to become due from Campbell to the bank. During the year 1870 and the first half of 1871 the parties were in a state of active hostility. On the plaintiff's part, he had brought an action against the bank, claiming large damages in respect of a transaction with which we have no concern. On their part they had brought an action against him for the balance which they alleged to be due to them, and, notwithstanding an ineffectual attempt on his part to restrain that action by proceedings in equity, had recovered a judgment against him for a sum of between nine and ten thousand pounds. On this judgment they had taken out execution, and had seized, and were about to sell through the sheriff, his interest in certain properties, including the three which were the subject of the mortgage of the 29th May 1867. In this state of things a negotiation for a settlement took place. Of this it is sufficient to state that the plaintiff agreed to release, and did release his action; that the bank abandoned their proceedings in execution, but insisted upon his executing, as he did, a legal mortgage of the jetties with a power of sale; that, early in June 1871, he went over the accounts with the officers of the bank, when it appeared that, after making certain deductions which he claimed, amounting to 1512*l.* 5*s.* 11*d.*, there remained due from him a balance of 18,804*l.* 3*s.* 8*d.*; and that, on the 16th June 1871 the arrangement touching this balance, and the mortgages by which it, or any part of it, was secured, was embodied in the two following documents:—"Commercial Banking Company of Sydney. Sydney, 16th June

1871. To Mr. John Campbell. Sir,—In consideration of your agreeing to release, transfer, and surrender to the Commercial Banking Company of Sydney, whenever required so to do, your equity of redemption and interest of and in your wharf, King-street, Coogee, ship, and all other properties now under mortgage to the said company (excepting that upon the Ballina property), and of your having given to them possession of the said properties, I hereby undertake and agree on the part of the said company to release you personally from all claim and demand on their part in respect of any liability which you may now be under to them in respect of any balance of account, promissory note, or bills of exchange, it being, nevertheless, expressly understood that nothing herein contained shall prejudice the rights of the said company against any other person liable for the payment of the said balance of account, promissory notes, or bills of exchange respectively, whether as drawers, acceptors, indorsers, or otherwise, or in respect of any securities held collaterally or otherwise against such liabilities. For the Commercial Banking Company of Sydney (signed) T. A. Dibbs, manager." "To the Manager of the Commercial Banking Company, Sydney. Sir,—In consideration of your agreeing to release me personally from all claim and demand of the Commercial Banking Company of Sydney in respect of any liability which I may now be under to them in respect of any balance of account, promissory notes, or bills of exchange, I hereby for myself, my heirs, executors, administrators, and assigns, agree to release, transfer, and surrender to them my equity of redemption and interest of and in my wharf, King-street, Coogee, ship, and other properties respectively now under mortgage to the said company (except the Ballina property), and when required to execute any deed or documents necessary for effecting such release, transfer, and surrender, and I hereby assent to the said company taking immediate possession of the said several properties. Dated at Sydney this 16th day of June 1871. (Signed) John Campbell." On this same 16th day of June 1871 the plaintiff also signed the following memorandum:—"Memorandum that I, the undersigned, John Campbell, of the city of Sydney, merchant, the registered proprietor of the properties comprised in the two certificates of title under the Real Property Act, registered, Vol. XXVIII., folio 51 [the Warehouse property], and Vol. XXX., folio 201 [the Coogee property], do admit and acknowledge that all notices required by the said Real Property Act have been duly given to me by the mortgagees under the two several mortgages notified on the said certificates, namely, No. 1607, dated 29th May 1867, and No. 4513, dated 28th Feb. 1870." The terms of this memorandum, and the fact that it was signed on the date at which the compromise was completed, afford strong grounds for believing that it was then the intention of both parties to effect the transfer of the mortgagor's registered title by proceedings under the 55th, 56th, and 57th sections of the Real Property Act,—a waiver of notice being treated as equivalent to a default after notice; and if this memorandum had not unfortunately, and possibly from inadvertence, omitted one of the three properties included in the mortgages in question, viz., the wharf property, the present contest between the parties would never have arisen. But,



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however that may be, it is clear that the effect of this compromise of the 16th June 1871, and of the two documents above set forth, was to give the bank, for good and sufficient consideration, an equitable title to the equity of redemption and other interest of the plaintiff in the mortgaged premises, and to leave him no beneficial interest therein. Their Lordships have thought it right to preface their consideration of the particular questions raised in the appeals by this statement of the earlier transactions between the parties, because it is by the unfortunate adoption of proceedings, ostensibly at least, inconsistent with the real rights and relations of these parties that the principal difficulties in this case have been occasioned. The agreement of 1871 did not altogether rest *in fieri*. The bank was put into possession of the mortgaged properties, other than Ballina, the plaintiff becoming their tenant of two rooms in the warehouse. He presumably retained Ballina freed from the bank's incumbrance. In Oct. 1872 the Bank sold the Coogee property for 800*l.*, and the purchaser seems to have obtained the statutory certificate of title by means of the before-mentioned memorandum of waiver of the 16th June 1871. In the following month, however, a difficulty arose. The bank, having tried in vain to sell the wharf and warehouse properties by public auction for an adequate price, on the 19th Nov. 1872 entered into a private contract with one Mr. Struth for the sale to him of those properties, including apparently in the former the jetties attached to the wharf, for the lump sum of 9000*l.*, subject to the conditions of sale embodied in the contract. It was provided by one of these that the purchaser should, within seven days from the day of sale, tender to the vendor for execution a memorandum of transfer, in conformity with the provisions of the Real Property Act; and by another, that if the vendor should be unable or unwilling to remove any objections which the purchaser might be entitled to make under the conditions, the vendor should be at liberty to rescind the contract, and, upon returning to the purchaser all moneys and securities deposited in pursuance of the contract, should not be liable to any sum for damages, costs, charges, or expenses incurred by the purchaser in or about the contract. It is obvious that this contract could only be carried into effect by a transfer by means of the machinery of the Real Property Act of the statutory title in the properties, which, subject to the incumbrances thereon, continued to stand on the register in the name of the plaintiff. For a direct transfer of such a title by the person in whose name it is registered a form is prescribed by the Act. The bank, however, attempted to complete their contract, as in the case of the Coogee property, under the 55th and the following sections of the statute, and would, no doubt, have succeeded in so doing if the memorandum of waiver of the 16th June 1871 had included the wharf as well as the warehouse property. The registrar, however, seems to have objected that there was no waiver of notice as to the wharf property; and thereupon the bank tendered to Mr. Campbell for his signature a further memorandum of waiver. This he refused to sign, saying that he had already signed papers enough, and would sign no more. The bank about this time had obtained the transfer of the first mortgage upon the property, which has already been mentioned. In this state of things the bank, instead of taking the

more direct and regular course of instituting proceedings in equity to compel the plaintiff specifically to perform his contract of June 1871, so far as it remained unperformed, determined, in order to save time and expense, to proceed under the 55th and 56th sections of the Real Property Act, and accordingly served him with a notice under the former section, claiming the sum of 20029*l.* 8*s.* 3*d.* due upon the several mortgages, their solicitors sending to him at the same time a letter, to which he replied. The effect of these documents will be afterwards considered. Nothing further seems to have been done by the plaintiff, and on the expiration of the month limited by the notice the bank succeeded in obtaining from the registrar a memorandum of transfer, dated the 25th Feb. 1873, in favour of Struth. The admitted effect of these transactions was to give to Struth an indefeasible title in the wharf and warehouse properties, and to leave to the plaintiff, if he had been wronged by them, no remedy but that of an action for damages against the bank. The Plaintiff accordingly in August 1876 commenced his action. His declaration altogether ignores the arrangement of June 1871, and all that had been done under it, though it does not complain of the sale of the Coogee property. Their Lordships entirely concur with the Chief Justice in thinking that the real cause of action is, that though the plaintiff was ready and willing to pay what was really due, the defendants refused to accept it. If, then, the plaintiff's readiness and willingness to pay what was really due had been regularly put in issue, it would have lain on him to prove that issue. The defendants, however, before pleading, filed a demurrer, upon which, as the Chief Justice states, the court held that the statements in the declaration were equivalent to an allegation that a tender had been dispensed with by the defendants. There was no appeal against that ruling. Ultimately the defendants pleaded—1st, that they were not guilty; 2ndly, that they did give the notice required by the law; 3rdly, that they did not dispense with the tender by the plaintiff of the amount of principal and interest which was actually due on the memorandum of mortgage as alleged; and 4thly, that the sale in the declaration mentioned took place by the leave and licence of the plaintiff. On these four issues the parties went to trial, and there was a verdict for the plaintiff for damages to the amount of 3,000*l.* The defendants thereupon moved the court for a rule to show cause why the verdict should not be set aside, and a new trial had. They moved upon eight different grounds, viz.:—1st, that the verdict was against evidence and the weight of evidence; 2ndly, that the damages were excessive; 3rdly, that the judge should have told the jury that there was no evidence of a dispensation by the defendants with a tender of the amount actually due; 4thly, that he was wrong in holding that there was no evidence in support of the plea of leave and licence; 5thly, that the plaintiff was estopped by his deed from denying that he was indebted at that date to the bank in the sum of 18,804*l.* 3*s.* 8*d.*, and that the judge ought to have so ruled; 6thly, that the moneys paid by the defendants in respect of certain past due indorsements were further advances under the mortgage, as were also the amounts paid for repairs to wharf, and other charges incidental to the management of the wharf property, and that

the judge should so have ruled; 7thly, that the judge should have told the jury that the waiver of notice signed by the plaintiff on the 16th June 1871 was a waiver of notice as to all the properties under mortgage; 8thly, that the judge ought to have told the jury that it was immaterial what amount was mentioned in the notice of demand, and that he should not have told the jury that the notice was bad if given for an amount unreasonably in excess of what was actually due. The Court, on the 13th March 1877, granted the rule to show cause moved for on the 1st, 3rd, and 8th of these grounds, but refused it upon the 2nd, 4th, 5th, 6th, and 7th. Upon the 21st June 1877 the Court unanimously ordered that the verdict be set aside, and a new trial of the issues joined in the action be had. It further ordered that the plaintiff should pay to the defendants their costs of, and occasioned by, and incident to the said motion. The plaintiff has appealed against this order absolute, and the defendants have preferred a cross appeal against so much of the order made on the application for the rule *nisi* as refused to grant that rule upon the 2nd, 4th, 5th, 6th, and 7th of the grounds on which it was moved for. Their Lordships have come to the conclusion that the Supreme Court of New South Wales was right in setting aside the verdict of the jury in this case, and further that there ought to be a new trial of the issues joined in the action generally. It appears to them that, if the case be regarded as one between a mortgagor and a mortgagee who had sold under the provisions of the Real Property Act, the plaintiff must be taken to have failed to substantiate that which was the original foundation of his action, as stated in his declaration, viz., that he was ready and willing and offered to pay what was actually due upon the security. The decision on the demurrer, and the plea that was filed in consequence thereof, no doubt altered the question to be tried to this extent, that it lay upon the plaintiff, instead of proving a tender, to excuse his not having made one, by proof that the defendant had waived it. But it was essential to the maintenance of the action that the plaintiff should prove that there had been the alleged dispensation by the defendants of what he would otherwise have to show he had done, or was ready and willing to do. Their Lordships concur with the learned judges of the Supreme Court in thinking that, if there was any evidence to go to the jury on the issue raised by the third plea (a question which they do not decide, as there was no motion for a nonsuit), that evidence fell far short of being sufficient to support the finding of the jury in the plaintiff's favour. Of express dispensation there is no evidence whatever. The plaintiff, however, invokes the authority of the decision in *The Norway* (3 Moo. P. C. N. S. 245). In that case it was undoubtedly ruled, as between the master of a ship and the consignee of the cargo, that although the mere fact that the master claimed more than was due to him would not dispense with a tender on the part of the consignee of the freight really due, the demand of the larger sum might be so made as to amount to an announcement by the master that it was useless to tender any smaller sum, for that, if tendered, it would be refused, and that, if this were shown, it would amount to a dispensation with any tender. The application of such a rule obviously depends upon the special facts of each particular case. In order to bring

the present case within the rule, it is contended that the dispensation is legitimately to be inferred from the combination of the following circumstances: First, that the notice demanded payment of the sum of 20,029l. 8s. 3d. as due upon the mortgages; secondly, that the letter, after referring to the compromise and contract of the 16th June 1871, contained an intimation that the service of the notice was without prejudice to the plaintiff's undertaking to the defendants under that arrangement, and that their only object in taking their present course was to save the time and the expense which would be incurred by suing in equity for a specific performance of that undertaking; and lastly, that they had already contracted to sell the premises comprised in the mortgage to Struth. As to the first of these grounds, the learned judges of the Supreme Court have held, and in their Lordships' opinion have correctly held, not only that a notice under the Act is not bad because it demands more than is due, and that the jury should have been so instructed (a ruling which affects principally the finding on the second issue), but that where a demand is made for a larger amount than that which is really due, such demand does not do away with the necessity for tendering what is actually due, unless there is at the same time refusal to receive less. Let it be granted that on the authority of *The Norway* such a refusal may be inferred from the circumstances, and that an excessive and wrongful demand may be one of such circumstances. Looking at the memoranda of mortgage, and particularly at the stipulation in that of the 29th Feb. 1870 as to further advances, and looking at the accounts as subsequently rendered and settled, their Lordships are by no means satisfied that, if the relation of mortgagor and mortgagee had been re-established between the parties, and the account properly adjusted, the bank might not have been found entitled to all it demanded, and that without calling in aid the principle of consolidation of mortgages, to which Hargrave, J. refers. Faucett, J., who tried the cause, says that nearly the whole of the 20,000l. demanded was unquestionably due by the plaintiff, and their Lordships cannot think that, even if there were some excess, it was so large or so wrongful as to justify an inference that the defendants would refuse to accept what was justly due. As to the two other circumstances relied upon, they no doubt support the theory that the defendants never contemplated the redemption of the mortgaged premises when they took this mode of putting themselves in a position to complete the title of Struth as to one, and one only, of the properties contracted to be sold to him. It does not, however, necessarily follow that if the plaintiff, acting on the assumption that the defendants by their conduct had re-established the relation of mortgagor and mortgagee, had offered to pay what was really due, they might not have accepted it. Indeed, if that sum had approached that claimed, it might have been for their interest to accept it, considering the amount realised by the sale, and the circumstance that by one of the conditions of sale they had protected themselves against any claim by Struth for damages by reason of the non-completion of the contract with him. The plaintiff, however, did nothing but write a letter, the effect of which, treating the mortgage as open, is merely to suggest

that the account was to be stated on a principle clearly erroneous, and to say that if his principle were accepted he "would arrange" for the payment of the balance to be so arrived at, a balance far less than the amount actually due. It is pure matter of speculation what would have happened had he made a proper tender, or taken any of the other steps which Fauceett, J. suggests as capable of being taken for the protection of his interests, real or supposed. He was content to do nothing, he allowed the proceedings to go on, and more than five years after the completion of Struth's title brought this action of damages. He ought not to be allowed to escape the necessity of proving the allegations essential to the maintenance of his action, by means of an inference from the acts and conduct of the defendants, which is not deducible from them by necessary implication. Thus far their Lordships have agreed with the learned judges of the Supreme Court. They are, however, constrained to differ from them upon their ruling as to the amount of the damages awarded by the jury. The settlement of the 16th June was not pleaded; and, therefore, the question whether it was a bar to the action does not arise on the pleadings by way of defence. But the arrangement and all its circumstances were proved in the cause. The result was to show that, unless that arrangement had been completely and for all purposes rescinded, the plaintiff had not any beneficial interest in the property sold. When, therefore, the question arose what damage he had really sustained by the wrongful sale of the property, if wrongful it were, the answer should have been *nil*. The declaration ends with the following statement as to damages: "Whereby the plaintiff has lost and been deprived of the said lands so as aforesaid sold by the defendants, and his the said plaintiff's estate and interest therein, and the gains and profits which he would have made from the same," &c. It appears to their Lordships that the settlement of 1871 cannot be treated as rescinded. Such a rescission could take place only by mutual agreement, or by some proceeding which would restore the parties to their original position. There has been no such proceeding, and there has been no such agreement. The defendants, when they served the notice, expressly gave the plaintiff notice that they reserved, and insisted on, their rights under the settlement. They completed the sale of the warehouse property in strict conformity with the settlement, and by means of the plaintiff's memorandum of waiver of the 16th June 1871, for that property is not included in the notice. On the other hand, the plaintiff has done nothing to reinstate the defendants as mortgagors of Ballina or otherwise in their former position, if, indeed, it be possible to do so. Hence, if the plaintiff were to show that he had sustained an actionable wrong by means of the defendants having got rid of his registered title to the wharf property, by an irregular proceeding, he would not, in their Lordships' opinion, be entitled to damages calculated on the assumption of his having a beneficial interest in the property, or, indeed, to any but nominal damages. Upon the other points raised by the cross appeal, their Lordships do not think it necessary to say much. If the question had been as to the actual sale to Struth, there was, no doubt, abundance of evidence to prove leave and licence which should have been brought to the notice of the jury. But

the sale in the declaration mentioned, and as such referred to in the plea, is one not made in conformity with the settlement of the 16th June 1871, or by means of the actual contract with Struth, but one alleged to have been made subsequently to the notice, and by virtue of the power of sale given by the Real Property Act. Mr. Benjamin, as to the fifth ground on which the rule *nisi* was moved for, admitted that he could not contend there was an actual estoppel; though, and in that their Lordships agree, the admission in the deed referred to might be pregnant evidence as to the state of the accounts. Their Lordships, not having gone fully into those accounts, desire to say no more of the sixth ground than that the moneys paid by the defendants in respect of the past due indorsements would seem, *prima facie*, to fall within the category of further advances under the mortgages. The seventh ground, however, seems to be wholly unsustainable. Whatever the intention of the parties may have been, the wharf property was, in point of fact, omitted from the waiver of notice; and it could not be the duty of the judge to tell the jury that they were to treat it as included therein. Nor is it easy to see how such a direction could have effected the result of the trial. A point that has not yet been noticed has also been raised by the plaintiff's appeal. It is that of the propriety of ordering the plaintiff to pay to the defendants their costs of and incident to the motion. Their Lordships conceive that this question of costs must be regulated by the practice of the Supreme Court of New South Wales, and do not think it would be right to interfere with the discretion of the learned judges concerning it. The result is that their Lordships will humbly advise Her Majesty to dismiss the appeal of the plaintiff, and to allow the appeal of the defendants; and to affirm the order of the 21st June 1877, which is in terms one for a new trial generally. It does not appear to them to be necessary to advise Her Majesty to make any further order upon the questions raised by the defendants' appeal. They have sufficiently indicated their opinion upon those questions, and have no doubt that if the case should ever come on for a second trial due weight will be given to them. The respondents' costs of the appeal must be paid by the appellant.

Solicitor for Campbell, P. J. Gordon.

Solicitors for The Commercial Banking Company, Wilde, Berger, Moore, and Wilde.

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT LINCOLN'S INN.

Jan. 16, 23, and March 6.

(Before JAMES, BAGGALLAY, and BRAMWELL, L.JJ.)

Ex parte BALL; Re SHEPHERD. (a)

*Bankruptcy — Proof — Felony — Embezzlement by clerk — Omission to prosecute — Bankruptcy of injured person — Right of trustee to prove.*

*A banker's clerk embezzled money belonging to the banker and absconded. The banker did not apply for a warrant for his apprehension until ten days after the discovery of the crime, and by*

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

that time the clerk had left England, and consequently was never prosecuted. The clerk was adjudicated a bankrupt in his absence, and the banker tendered a proof in the bankruptcy for the amount of which he had been defrauded. The proof was rejected by the trustee in the bankruptcy, and the banker having filed a liquidation petition, the trustee in the liquidation applied to the Court of Bankruptcy for an order that the proof should be admitted:

*Held* (affirming the decision of Bacon, C.J.), that the proof must be admitted; James and Bramwell, L.J.J. so holding on the ground that, though the banker might not have been entitled to prove for a debt arising out of a felony in respect of which he had not prosecuted the felon (which *quare*), the obligation of prosecuting the felon was a personal one, and did not extend to the trustee in the banker's liquidation, who represented, not him, but his creditors; and Baggallay, L.J. and Bacon, C.J. so holding on the ground that the rule which prevents an injured person from obtaining civil redress for a criminal wrong if he has failed in his duty of bringing the felon to justice does not apply where prosecution has become impossible by reason of (amongst other things) the felon's escape from the jurisdiction before he could have been prosecuted by the exercise of reasonable diligence.

*Ex parte* Elliott (3 M. & Ayr. 110) and Wellock v. Constantine (2 H. & O. 146) considered.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy, who admitted a proof in bankruptcy in respect of a felony committed by the bankrupt under the following circumstances:—

John Dawson Shepherd, who was a clerk in the employ of Henry Willis, Samuel Tomkins, and Samuel Leith Tomkins, partners, carrying on business as bankers under the firm of Messrs. Willis, Percival, and Co., of Lombard-street, absconded on the 16th March 1877, and his employers then discovered that he had embezzled moneys belonging to them to the amount of a few hundred pounds, and on the 24th March they received a letter from him confessing that he had embezzled 7852l.

No application was made for a warrant for Shepherd's apprehension until the 26th March 1877, by which time he had gone abroad, and consequently he was not arrested, and had not been prosecuted.

On the 4th May 1877 Shepherd was adjudicated a bankrupt in the Greenwich County Court.

In May 1878 Messrs. Willis, Percival, and Co. tendered a proof in the bankruptcy for the 7852l. which had been embezzled by the bankrupt, but the proof was rejected by the trustee, and his rejection was in July 1878 confirmed by the registrar of the Greenwich County Court, who held that Messrs. Willis, Percival, and Co. were not entitled to prove in the bankruptcy in respect of a felony committed by the bankrupt on the following grounds: That they did not take proper steps to prosecute the bankrupt; that instructions for the warrant were not issued from the 16th to the 26th March; and that it appeared from evidence, practically uncontradicted, given by Henry Roome, the brother-in-law, and Thomas Gueyer Shepherd, the brother of the bankrupt, that Mr. Samuel Tomkins (a member of the firm of Willis, Percival, and Co.) was wholly adverse to a prosecution, and

that he was, in fact, desirous that the bankrupt should escape.

Before this decision was pronounced, Messrs. Willis, Percival, and Co. had filed a liquidation petition, and their creditors had resolved upon a liquidation, and appointed a trustee.

The trustee in the liquidation appealed from the registrar's decision to the Chief Judge in Bankruptcy, who ordered the proof for the 7852l. to be admitted on the ground that Messrs. Willis, Percival, and Co. had used due diligence in endeavouring to prosecute the bankrupt, and that the prosecution had become impossible without any fault of theirs.

The following is the evidence upon which the registrar of the County Court based his decision:

Henry Roome, the bankrupt's brother-in-law, was examined on behalf of the trustee in the bankruptcy, and deposed that he and Thomas Gueyer Shepherd, the bankrupt's brother, went on Saturday, the 17th March 1877, to the bank and saw Mr. Samuel Tomkins, senior. They were told that there was 100l. missing, and were desired to call again on Monday. They went again to the bank on Monday, the 19th March, and again saw Mr. Tomkins, senior, who after telling them that the matter was much more serious than they thought, suddenly asked witness, "Do you know where he is?"

Witness said, "No," and Mr. Tomkins replied, "Ah! I do not wish to know," or words to that effect. Being further questioned, witness added, "The words, as near as I recollect, were: 'My advice is that he should go out of the country, to America, or elsewhere'—something to that effect." Witness further deposed that Mr. Tomkins, junior, then came in, holding in his hand a slip of paper, on which were written four figures, beginning, witness thought, with a 2, and said, "This is much more serious than we thought," or something to that effect, "I think we shall have to take legal proceedings," whereupon Mr. Tomkins, senior, remarked, "Never mind; that need make no difference to what I have already told you," addressing witness and the bankrupt's brother. On Thursday, the 22nd March, witness, with the bankrupt's wife and brother, again called at the bank and saw Mr. Tomkins, senior. Witness deposed that the bankrupt's wife said she would use her influence to bring her husband back to the bank as soon as she heard from him, and that Mr. Tomkins replied, "No, if he comes back here we might have to take legal proceedings against him."

Thomas Gueyer Shepherd, the bankrupt's brother, confirmed the above evidence generally. His account of the conversation on Monday, the 19th March, was that Mr. Roome said to Mr. Tomkins, senior, "Would you wish to see John Shepherd?" and that Mr. Tomkins answered, "No, if he is not already out of the country, let him get away as quickly as possible." Mr. Tomkins further said that it was not John Shepherd that the bank wanted; they wanted the papers. As to the conversation on the 22nd March, witness deposed that "Mrs. Shepherd offered Mr. Tomkins, senior, for John Shepherd to come and throw himself on the mercy of the firm," whereupon Mr. Tomkins said, "No, if he did that we should be obliged to prosecute him, but of course we should not allow him to remain in England; if he were abroad I don't suppose we should trouble further for him."

Mr. Tomkins, senior, was examined, and denied

any recollection of having used on Monday, the 19th March, the other expressions deposed to, but admitted that he said it was not John Shepherd he wanted; he wanted the papers. He admitted that he might have said that, if Shepherd were abroad, he did not suppose that the bank would trouble for him, supposing at that time that there was not a sufficient necessity to put the Extradition Treaty in force against him. As to the expression, "throwing himself on the mercy of the firm," witness deposed that what he said was to the effect that it was undesirable that John Shepherd should come and throw himself on the mercy of the bank, as it would place them in the painful dilemma of proceeding against a man who trusted to their generosity, or of letting a criminal escape.

Henry Roome further deposed that on Monday, the 19th March, after the conversation with Mr. Tomkins, he himself had an interview with John Shepherd, but that since that day he had not seen him, and did not know where he was.

BACON, C.J., when the appeal from the registrar's decision was opened before him, said:—The law cast upon the bankers the onus of endeavouring to bring the culprit to justice. I take the law to be plain enough. No doubt the obligation is thrown upon a man who is robbed to do his best to bring the person who has robbed him to justice, and if he uses all fair endeavours and fails, then he is not prevented from proceeding for any debt that is due to him in a civil court. The question is whether the claimant has neglected the duty which the law cast upon him. I think I had better hear the other side. [Having heard counsel in opposition to the claim to prove, his Lordship gave judgment as follows:] No doubt the case involves a principle of the utmost importance. The rule of law is clear and plain; it is the bounden duty of a man who is robbed—a duty he owes to the State—to use all reasonable endeavours to bring the offender to justice before he sues for a civil remedy. That being the general principle, the circumstances of the case before me must be examined. A confidential servant of the bank absents himself, and, suspicions being aroused, his accounts are examined, and it is found that 100*l.* is deficient. A further inquiry takes place, and after a protracted investigation it is found that his defalcations are much larger. But are not bankers to have a reasonable time in order that they may know what they are to do? One irregularity of 100*l.* is discovered, and suspicion exists as to the misappropriation of much larger sums, which they are wishing to trace. A conversation takes place between the bankrupt's relatives and the bankers, and what is the upshot of that conversation? Mr. Tomkins, sen., speaking for himself alone, and not as a member of the firm, when it was suggested that the clerk should throw himself upon the mercy of the firm, bethought himself that, if he consented, he might be deprived of the right to prosecute him; and I think it must be conceded that he said something of this kind: "I wish him to keep out of my sight, and go to America, rather than that I should have the pain of prosecuting him." But, beyond that slight conversation, what promise was made and what act was done by Mr. Tomkins to deprive him of his right to prosecute or suspend his civil rights until after he had prosecuted? It is in evidence that he did all that could be reasonably expected from him to bring the clerk to justice. Even if the conversation to

which I have alluded had the effect of enabling the clerk to place himself out of the reach of his creditors, it would not, in my opinion, be sufficient to suspend or forfeit any civil right on the part of the bankers. Mr. Tomkins takes out a warrant, which is put into the hands of persons especially conversant with these matters, and afterwards the warrant is put into the hands of an officer, who does all in his power to bring the offender to justice. If it were an improper or incautious suggestion that the clerk had better go to America, I do not think that it is sufficient to justify the conclusion that Mr. Tomkins did not do his best to bring the offender to justice. I am therefore of opinion that the objection to the proof does not rest upon sufficient grounds, and the appeal will be allowed. The appellant must have the costs of the appeal.

From this decision the trustee in the bankruptcy of Shepherd appealed.

De Gex, Q.C. and F. H. Dickens (with them H. Winch) for the appellant.—This proof ought not to be admitted. In *Ex parte Elliott, Re Jermyn* (3 M. & Ayr. 110), it was expressly laid down that no proof for any sums of money feloniously embezzled by the bankrupt can be admitted until the bankrupt shall have been criminally prosecuted for that offence. In *Stone v. Marsh* (*Fauntleroy's case*) (6 B. & C. 551, 565) this rule was recognised by Lord Tenterden, who said that it is a rule of the law of England that a man shall not be allowed to make a felony the foundation of a civil action against the felon, adding further on, "public policy requires that offenders against the laws shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender by receiving back stolen property, or any equivalent or composition for a felony, without suit, and, of course, cannot be allowed to maintain a suit for such a purpose;" but it was held that the rule was not applicable to a case like that of *Fauntleroy*, who had suffered the extreme sentence of the law for another offence of the same kind. In *Crosby v. Leng* (12 East, 409, 413) Lord Ellenborough said: "The policy of the law requires that, before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect of the public offence." [BRAMWELL, L.J. referred to Addison on Torts, p. 32, where it is stated that if the injured party has preferred a bill of indictment, which has been thrown out, or not proceeded with, by the suggestion of the judge, he has satisfied the requirements of the law in respect of the prosecution of the public offence, and is remitted to his civil remedy; and to the case of the *Dudley and West Bromwich Banking Company v. Spittle* (1 J. & H. 14; 2 L. T. Rep. N. S. 47), in which that rule was laid down by Wood, V.O.] It is now well settled that the debt is not merged in the felony, and that where a prosecution fails, the injured party can then prove:

*Ex parte Jones*, 2 M. & Ayr. 193; 3 D. & C. 525;

*Ex parte Birks*, 2 M. & Ayr. 206.

No doubt was ever cast upon the rule for which we contend, and which has been recognised by very many judges, till the case of *Wells v. Abrahams* (26 L. T. Rep. N. S. 433; L. Rep. 7 Q. B. 554), in which Blackburn, J. used language which

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seems to imply a doubt as to the propriety of the rule, but the other judges in that case recognised the rule, and the decision was not at variance with it. In *Wellock v. Constantine* (2 H. & C. 146; 32 L. J. 285, Ex.), which was an action by a woman for assaulting her, and forcibly violating her person, whereby she was delivered of a child, the judge upon her evidence directed a nonsuit, and it was held by the court that the direction was right, for, if a rape had been committed, no action would lie until after the defendant had been prosecuted, and if the plaintiff had consented, she could not maintain an action for the assault. In that case, it is true, Martin, B. differed from the other judges, Pollock, C.B. and Bramwell, B. There may be an exception to the general rule when prosecution has become impossible by reason of the death of the offender, or otherwise, but the present case forms no such exception. Here, indeed, the evidence shows that the injured party desired the offender to escape from the country. [JAMES, L.J.—The appellant is the trustee in the liquidation of the injured party. The latter was under an obligation to prosecute the felon, and might perhaps have, by his omission to prosecute, been prevented from proving; but the trustee is under no such obligation, and what is there to prevent him from proving?] The trustee can be in no better position than the liquidating debtor, whose rights vest in him. They also cited

*Prosser v. Rowe*, 2 C. & P. 421;  
*Markham v. Cobbe*, Noy. 82;  
*Hale's Pleas of the Crown*, 546;  
*Dawkes v. Coveleigh*, Sty. 346;  
*Higgins v. Butcher*, Yelv. 89;  
*Cooper v. Witham*, 1 Levinz, 247;  
*Luttrell v. Reynell*, 1 Mod. Rep. 282;  
*Gimson v. Woodful*, 2 C. & P. 41;  
*Haynes v. Smith, Smith & Batty's Ir. Rep.* 373;  
*Wickham v. Gairill*, 3 Sm. & G. 353;  
*White v. Spettigue*, 13 M. & W. 603;  
*Owen v. Hurd*, 2 T. R. 643.

*Winslow*, Q.C. and *Bush Cooper* for the respondent.

At the conclusion of the arguments on behalf of the appellant, their Lordships intimated that they would take time to consider the case, and would hear counsel for the respondent on a future day, if necessary. Ultimately, judgment was given without hearing counsel for the respondent.

March 6.—BRAMWELL, L.J. now delivered the following written judgment:—In this case the debt which is sought to be proved arose from the felonious act of the bankrupt in embezzling the moneys of his employers. The question is whether, that being so, and no more having been than has been done towards prosecuting the bankrupt, the trustee of Messrs. Willis and Co., the employers, can prove. The law on this subject is in a remarkable state. For 300 years it has been said in various ways by judges, many of the greatest eminence, without a doubt, except in one instance, that there is some impediment to the maintenance of an action for a debt arising in this way. The doubt is that not so much expressed by Blackburn, J., in *Wells v. Abrahams* (26 L. T. Rep. N.S. 433; L. Rep. 7 Q. B. 554) as to be inferred from what he said. But, though such opinion has been entertained and expressed for all this time, there are but two cases in which it has operated to prevent the debt being enforced. These two cases are *Wellock v. Constantine* (2 H. & C. 146) and *Ex parte Elliott* (3 Mont. & Ayr. 110).

*Wellock v. Constantine* has been said to be no authority. If I may speak of myself, I have no doubt I concurred in the judgment, or the statement that I had would have been set right, but I am sure I must have done so in the faintest way, not only from what I think now, but from what I am reported to have said then, and from there being no reasons given for the judgment, which I should have desired to give, if I had thought there were any good ones to support it. But at all events there are the opinions of Chief Baron Pollock and Mr. Justice Willes—opinions which no one who knew those judges will undervalue. Then there is the judgment in *Ex parte Elliott*, besides the expressed opinion for centuries that a felonious origin of a debt is in some way an impediment to its enforcement. But in what way? I can think of only four possible:—(1) That no cause of action arises at all out of a felony; (2) that it does not arise till prosecution; (3) that it arises on the act, but is suspended till prosecution; (4) that there is neither defence to nor suspension of the claim by or at the instance of the felon debtor, but that the court, of its own motion, or on the suggestion of the Crown, should stay proceedings till public justice is satisfied. It must be admitted that there are great difficulties in the way of each of these. That the first is not true is shown by *Stone v. Marsh* (6 B. & C. 551), where it was held that, prosecution being impossible, a felony gave rise to a recoverable debt. It is difficult to suppose that the second supposed solution of the problem is correct. That would be to make the cause of action the act of the felon plus a prosecution. The cause of action would not arise till after both. Till then the Statute of Limitations would not run. In such a case as the present or where the felon had died it would be impossible. And it is to be observed that it is never suggested that the cause of action is the debt and the prosecution. The third possible way is attended by difficulties. The suspension of a cause of action is a thing nearly unknown to the law. It exists where a negotiable instrument is given for a debt, and in cases of composition with creditors, and these were not held till after much doubt and contest. There may be other instances. And what is to happen? Is the Statute of Limitations to run? Suppose the debtor or his representative sue the creditor, is his set-off suspended? Then how is the defence of impediment to be set up? By plea? That would be contrary to the rule that *allegans suam turpitudinem non est audiendus*. Besides, it would be absurd to suppose that the debtor himself ever would so plead and face the consequences. Then is the fourth solution right? Nobody ever heard of such a thing; nobody in any case or book ever suggested it till Blackburn, J., did as a possibility. It is left to the Court to find it out on the pleadings. If it appears on the trial, is the judge to discharge the jury? How is the Crown to know of it? There are difficulties, then, in all the possible ways in which one can suppose this impediment to be set up to the prosecution of an action. But again, suppose it can be, what is the result? It has been held that where the felon is executed for another felony the claim may be maintained. What is to happen where he dies a natural death, where he goes beyond the jurisdiction, where there is a prosecution and an acquittal from collusion or carelessness by some prosecutor other than the party



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injured? All these cases create great difficulties in my mind in the application of this alleged law, and go a long way to justify Mr. Justice Blackburn's doubt. Still, after the continued expression of opinion in the cases of *Ex parte Elliott* and *Wollock v. Constantine*, I should hesitate to say that there is no practical law as alleged by the respondent. It is not necessary for us to do so in this case, because, assuming that there is, and assuming that Messrs. Willis and Co. themselves could maintain no claim in this case until they had performed their duty (if it can be said there is any) to prosecute, we are of opinion that there is no such duty in the respondent, who represents, not them, but their creditors; that the debt is due at and from the time of the act causing it; that the disability to sue or liability to have proceedings stayed, if any, is personal to him in whom is the duty, and, consequently, that this claim may be maintained. Whether that would be so if the assignment of the debt was purely voluntary and not under the Bankruptcy Act, I do not say. I may further add that I doubt much if Messrs. Willis and Co. themselves would not be entitled to prove, otherwise the estate of the bankrupt might be distributed and injustice done. If it should be said in answer to this that a claim could be entered, the complainant must be admitted to be heard, even before he can make a claim, and his claim would not prevent the distribution of the assets as they are got in amongst the creditors who have actually proved, unless some were set aside especially to provide for it, which would be a strange anomaly if the principle be a true one. In *Ex parte Elliott* neither proof nor claim was admitted.

JAMES, L.J.—The judgment which Bramwell, L.J. has just read expresses my opinion as well as his, though it does not express entirely that of Baggallay, L.J., whose judgment I will now read. His Lordship then read the following written judgment of

BAGGALLAY, L.J.:—I agree with my colleagues in thinking that the appeal in this case should be dismissed, but I prefer to rest my decision upon the same grounds as those assigned by the Chief Judge. It appears to me that the following propositions are affirmed by the authorities, many of which, however, are *dicta* or enunciations of principle rather than decisions:—(1) That a felonious act may give rise to a maintainable action; (2) that the cause of action arises upon the commission of the offence; (3) that, notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress if he has failed in his duty of bringing the felon to justice; (4) that this rule has no application to cases in which the offender has been brought to justice at the instance of some other person injured by a similar offence, as in *Faulstich's case* (*Stone v. Marsh*, 6 B. and C. 551), or in which prosecution is impossible by reason of the death of the offender, or of his escape from the jurisdiction before a prosecution could have been commenced by the exercise of reasonable diligence; (5) that the remedy by proof in bankruptcy is subject to the same principles of public policy as those which affect the seeking of civil redress by action. It is unnecessary to refer to the authorities by which these propositions have been affirmed; the whole subject is fully discussed and the leading decisions commented upon in the cases

of *Ex parte Elliott*, *Wollock v. Constantine* and *Wells v. Abrahams*. I think, also, that the executors or administrators of the person injured by the felony, or his trustee in bankruptcy, can be in no better position than such person himself was at the date of his death or of the commencement of his bankruptcy; and if at such period prosecution of the offender had, by want of due diligence on his part, become impossible, and he had thereby been debarred from seeking civil redress, his estate must bear the consequences. The question then remains whether prosecution in the present case had been rendered impossible by reason of any want of due diligence on the part of Messrs. Willis and Co.; and upon this point I agree with the Chief Judge in thinking that there was no default on their part sufficient to have deprived them of a right to prove, had they continued solvent.

*The appeal accordingly dismissed, with costs.*

De Gex, Q.C. asked for leave to appeal to the House of Lords.

Winslow, Q.C. opposed the application.

JAMES, L.J.—A grave question of principle is involved, and personally I should be very glad that the matter should be discussed in the House of Lords.

BRAMWELL, L.J. concurred.

Leave was accordingly given, on the terms of the petition of appeal being presented within a month.

JAMES, L.J.—I wish to say this, that if it were necessary to decide the point, I should require to hear a good deal more to satisfy me that Messrs. Willis and Co. used due diligence in endeavouring to prosecute the bankrupt.

BRAMWELL, L.J.—I desire to add this, that I am not sure that the law may not turn out to be this: that if the man goes abroad and so the prosecution becomes impossible, that is the misfortune of the creditor, and he must wait till he comes back again.

Solicitors for the appellant, *Brook and Chapman*.

Solicitors for the respondent, *Lawrance, Flew, and Boyer*.

Monday, March 3.

(Before JESSEL, M.R., JAMES and BRAMWELL, L.JJ.)

STUART v. GLADSTONE. (a)

*Partnership, dissolution of—Power of expelling partner—Valuation of assets—Goodwill of business.*

*Articles of partnership executed in 1864 contained a provision that, as soon as possible after the 30th of April in each year, a full and general account should be taken by the partners of the stock, &c., and other the estate and effects of the partnership, and that a fair valuation and appraisal should be made of all the particulars which might be in their nature susceptible of valuation. It was also provided that the accounts of a partner ceasing to be a partner should be adjusted by payment to such partner of the sum which should appear to his credit, after the same should have been adjusted under the provisions thereinbefore contained.*

*On the 30th April 1875, the defendants, who were co-partners with the plaintiff, being dissatisfied with his conduct, served on him a notice dated the 28th*

(a) Reported by E. S. ROBEY, Esq., Barrister-at-Law.



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April, that the partnership would, as regarded him, be dissolved as and from the 31st Oct. then next. After this the plaintiff was treated as a stranger. The account up to the 30th April 1875 was made up without his being consulted, and in the valuation of the property the goodwill of the business was not included. It was held in the court below that, in determining what the plaintiff was entitled to receive on his exclusion from the partnership, the value of his share of the goodwill ought to be taken into account.

Held (reversing the decision of Fry, J.), that *prima facie* the goodwill ought not to be included in the valuation, and that the articles contained nothing to show that it was intended to include it. The words "susceptible of valuation," in the articles, meant susceptible in the ordinary way adopted by commission merchants. Goodwill, in such cases, was never sold alone, and was not in its nature susceptible of valuation.

THIS was an appeal by the defendants from so much of a judgment of Fry, J. as directed that in determining what the plaintiff was entitled to receive on his exclusion from the partnership, the value of his share of the goodwill was to be taken into account. The business was that of commission merchants, and the articles of partnership provided that an account should be taken in every year of the stock, moneys, debts, lands, buildings, factories, and other the estate and effects belonging, due, and owing to the partnership, and that a fair valuation should be made of all the particulars included in such account which might be in their nature susceptible of valuation. This account was to form the basis of the calculation of the profits arising from the business in each preceding year. The articles also provided that a majority of the partners might expel any partner, and, in that event, his share of the business was to accrue to the continuing partners, and there was to be placed to the credit of his account a sum of money equal to a proportionate part of one year's profit of the business up to the time of his expulsion, calculated upon the average profits of the three preceding years, and the continuing partners were to pay to him the sum which should appear to the credit of his account by instalments spread over three years. A further provision was to the effect that, if any partner was expelled, he should not enter into any similar business at any place where the partnership carried on business, nor solicit any of the customers of the firm, and each partner undertook in case of his committing any breach of this provision to pay to the other partners 10,000*l.* as liquidated damages.

The plaintiff having been expelled from the firm, it was held by Fry, J. that, in taking the accounts for the purpose (*inter alia*) of ascertaining what was due to the expelled partner, the goodwill of the business ought to be included in the valuation, as being an asset of the partnership susceptible of valuation. (Reported 38 L. T. Rep. N. S. 557, where the facts and arguments are fully stated.)

On the appeal,

Kay, Q.C., North, Q.C., and F. Thompson for the appellants.

Cookson, Q.C. and Everitt for the plaintiff.

The following cases were referred to:

Hall v. Hall, 20 Beav. 139;

Coventry v. Barclay, 8 L. T. Rep. N. S. 754; 33 Beav. 1; 3 De G. J. & S. 162;

Vyse v. Foster, 31 L. T. Rep. N. S. 177; L. Rep. 7 H. of L. 318;  
Hall v. Barrow, 9 L. T. Rep. N. S. 561; 4 De G. J. & S. 150;  
Smith v. Mules, 19 L. T. Rep. 25; 9 Hare, 556;  
Hart v. Clarke, 24 L. T. Rep. 185; 6 De G. M. & G. 232;  
Blisset v. Daniel, 10 Hare, 493;  
Const v. Harris, 1 T. & R. 496, 525;  
Wood v. Wood, and others, 30 L. T. Rep. N. S. 815; L. Rep. 9 Ex. 190;  
1 Lindley, Part. n. 621.

JESSEL, M.R.—The question we have to decide is whether, upon the true construction of certain articles of partnership, what is called the "goodwill" of a commission merchant's business ought to be valued. Before considering the actual words used in the articles, it may be as well to consider what is the so-called goodwill. The parties were commission merchants, carrying on business with the East; and when you talk of goodwill, that is not the way to describe such a business. We all understand the goodwill of a public-house. That is intelligible, for there is the resorting of customers to it; but it is difficult to see what the goodwill of a commission merchant's business can be. There is no resorting of customers, in the sense that there is to a public-house or shop. There may be, as was said here, a very old name, the use of which might be of some value, but practically it is difficult to understand what is meant by goodwill, and it is so difficult, that in other cases judges have differed as to what is comprised in it, and how it is to be sold; and I believe the result is, without exception, that it is never sold alone. That being so—it being a thing in its nature not easily susceptible of valuation, if susceptible at all—we have to consider what these people did when they went into partnership. First of all, although it appears by the articles of partnership to have been an old-established business carried on under the names of some former partners, we do not find a statement of anything being given for the goodwill, or the goodwill of the business being taken into account; but when we come to the 5th article we find that the capital of the partnership is treated as a money capital, and as a money capital only. Then when we turn to the 20th article, on which the present discussion has chiefly arisen, I think it will be found to be plain that the meaning of the article is merely to point out the mode in which the annual profits are to be ascertained: "As soon as possible after the 30th April in each year of the said partnership, a full and general account and rest shall be made and taken by the partners for the time being, of the stock, moneys, debts, lands, buildings, factories, and other the estate and effects belonging, due, and owing to this partnership, and of such debts and liabilities, and engagements, as shall be due and owing from or by this partnership, and of all such matters and things as are usually comprehended in matters of account taken by persons engaged in concerns of a similar nature, and a fair valuation and appraisement shall be made of all the particulars included in such accounts, which may be in their nature susceptible of valuation." Then copies are to be sent to the partners, and a period is fixed for the examination of the accounts by the partners, and for determining the profit and loss of the concern; fair and full statements of the partnership and of the accounts of each of the partners shall be made

out at Liverpool up to and inclusive of the 30th April in each year; then copies are to be sent, and so on, and if signed and approved, are not to be called into question. The whole of that article therefore comes to this, that you are to make out an annual balance-sheet, and in it you are to put on one side the assets of the partnership, and on the other the liabilities of the partnership; and you are to ascertain your annual profits. When that has been done, what is to become of the account? That is pointed out by article 21: "With all convenient speed upon the settlement of the account at the yearly time hereinbefore appointed for taking the same, all such sums as shall appear upon taking such account to be the net gains and profits arising from the said business from the commencement of the partnership, or from the time up to which the last previous account shall have been so settled, as the case may be, and also the interest which shall be due to each partner on his share of capital, shall be carried over to the credit of each partner's account in the books of the Liverpool firm." Then there are provisions, as we should expect, for drawing out what is to their credit, and not drawing out their capital. There are also provisions by which partners can be expelled from the partnership, or may retire; and then comes the 32nd clause: "If any partner for the time being in this partnership shall die or cease to be a partner in the concern by any means whatever, the concern shall not be thereby or thereupon wholly dissolved, except so far as regards the party so dying, or ceasing to be a partner as aforesaid, but the account between such partner or his representatives and the house shall be adjusted as follows: "The surviving or continuing partners shall pay to the representatives of such deceased partner, or to the party who shall so cease to be a partner as aforesaid, the sum which shall appear to the credit of the party so dying or ceasing to be a partner as aforesaid, after the same shall have been adjusted under the provisions hereinbefore contained." That refers to some provisions for ascertaining his share of profits for what I will call the broken part of the year. Then, in order to decide what the partner going out of the partnership is to receive, you have merely to take the account and find the sum put there, in order to ascertain what the sum standing to his credit is to be. Is it a fair construction of these articles to assume that in taking the annual accounts of the profits of the concern the parties were going to put a value upon the goodwill, so as to allow each partner to take year by year out of the partnership, the amount of his share of the value of the goodwill? Now, one cannot help feeling that no mercantile man ever dreamt of such a thing. It is not an available asset in the sense that you can draw upon it or that you can turn it into money or pay it out to the partners; and I should say with some confidence that no one ever saw such a thing in a merchant's accounts. It is entirely a novel idea. What they would value would be the things "ordinarily capable of valuation," which would not include any such thing as goodwill. It would not appear in the account of assets at all, and consequently when you ascertained the profits, nothing would be put down for increase of goodwill if it did increase, and nothing would be deducted for decrease of the value of the goodwill if it decreased. The sum which would be put to

the credit of the partner in his account, would be entirely independent of it. Of course, if the words were clearly the other way, these considerations would have no place, but as I read the words, their natural meaning is in entire accordance with the view I take of the construction of the articles. The article says, "Which may be in their nature susceptible of valuation." Everything, in a sense, is susceptible of valuation. There is no contingency which can be named which in one sense cannot be valued. As has been said in another case, the value of a thing is what it would bring. If put up to auction, somebody might bid something for it; but that is not the meaning of the words here, "in their nature susceptible of valuation." It means in the ordinary mode of valuation adopted by commission merchants and persons carrying on such a trade as this. It appears to me, therefore, when you look at the words fairly, that they entirely corroborate the view which I have taken of the meaning of the articles independently of a criticism of the words. There is only one other observation I have to make. These gentlemen carried on this business for years, and made annual valuations for years, and in no single instance did they value this goodwill. They adopted the very plan which I should have thought *a priori* they ought to have adopted, and their practice under the articles, if not amounting to a new article, would certainly show that the mode in which the profits were to be ascertained in this business, was the mode of not calculating the value of the goodwill. For these reasons, it appears to me, the direction complained of in the decree should be struck out and the appeal allowed.

JAMES, L.J.—I am entirely of the same opinion. It appears to me, with all deference to the view taken by the learned judge below, that the construction of these articles is reasonably plain, looking at the position and object of the parties, and the words of the several articles. The important article upon which everything turns in this case is the 32nd, to the effect that upon a party dying, or ceasing to be a partner, an account between such partner or his representatives and the house, should be adjusted by the surviving or continuing parties paying to the representatives of the deceased partner, or to the party who should cease to be a partner, "the sum which shall appear to the credit of the party so dying or ceasing to be a partner as aforesaid, after the same shall have been adjusted under the provisions hereinbefore contained by three equal instalments." How was that to be adjusted? "Under the provisions hereinbefore contained." Every year there was to be carried to the credit of the partners for the year ending the 30th April—to his account—the profit of the year, because he would have been credited with the interest on the capital of his account, and would have been debited with any drawings out, and with his share of the loss if it had arisen. But the account is to be adjusted with reference only to accounts which were to be taken as and for the end of each year, ending the 30th April. What was to be carried to his credit? Mr. Cookson was obliged to confess that it would not be consistent with the practice or with reason that there should be carried to his account, so as to enable him to draw out from it, the increased value of the goodwill as part of the business assets. If it could not be carried to his account for the purpose of being

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drawn out as a changing thing, it could not be carried to his account for any other purpose, because the account that is to be made with him is to be one account, and it is to be made with him as the one upon which the 32nd article is to be brought into operation. If the goodwill were capable of any valuation at all, it was a thing which probably had a small value one year and a greater value another year, increased or diminished year by year according to the state of trade in the countries in which the firm was carrying on its business, and according to the reputation which the house had acquired or had lost for integrity, punctuality, solvency, and mercantile prudence; the whole of which would be taken into consideration in the goodwill. How was it possible to suppose that that was to be valued from year to year, and that they were to say: "Our goodwill last year was worth 10,000*l.*; this year it is only worth 9000*l.*; then carry the 1000*l.* to profit and loss;" or, "last year our goodwill was only worth 10,000*l.*; this year it is worth 15,000*l.*; carry the 5000*l.* to profit"? That seems to me to be somewhat a *reductio ad absurdum* with reference to bringing it into the accounts under this article, and when you come to look at the 20th article, what are the words? "As soon as possible after the 30th day of April in each year of the said partnership, a full and general account and rest shall be made and taken by the partners for the time being, of the stock, moneys, debts, lands, buildings, factories, and other the estate and effects belonging, due, and owing to this partnership, and of such debts and liabilities and engagements as shall be due and owing from or by this partnership." Those words "estate and effects," in some sense might properly include goodwill, but beyond all question their true meaning, having regard to all the rest of the paragraph, is the estate and effects which are available for the purpose of discharging the debts and liabilities. "What are our estate and effects this year? What are our liabilities," of course, including amongst those liabilities the capital due to the several partners. It is only in a metaphorical sense that goodwill can be said to belong to a partnership in that way. No doubt, under a dissolution, it may be capable of being sold with the business. First, the business is sold, and then the goodwill is sold, but that is not the meaning in which the estate and effects include goodwill. Those words are followed by other words showing that things which had no immediate money value, but were matters of valuation, were to include only those matters which were usually taken in cases of the same kind, and which were in their nature susceptible of valuation. It appears to me that all these words point clearly and distinctly to an exclusion, if it were necessary to exclude such an imaginary thing as the changing value of the goodwill from year to year. I think, therefore, it ought not to have been taken into the account. It never could have been made an item in ascertaining what was the sum due to the credit of the partner in the accounts to be taken, and, if not, it is by the very terms of the 32nd article excluded from the principles upon which the account is to be adjusted between the outgoing partner and the house.

BRAMWELL, L.J.—I am also of the same opinion. The question turns upon the construction of the 20th article, and it is whether that article includes

in it anything in the nature of goodwill. Now, in order to see whether it does, one may properly consider whether it was likely that these parties would contemplate that there was a goodwill belonging to the partnership as such. I can understand that there is a goodwill belonging to the partnership while it subsists in this sense, that anyone leaving it is leaving a good and a profitable thing which he would pay money to join. I can understand that the old-established firm with the well-known names, the connection, and with debts owing to it, would be a better thing for a man to join, and consequently a worse thing for him to leave, than a new concern with no connection and no debts owing to it, and no name. In that sense there might be a goodwill, but I doubt extremely whether practically there can be any goodwill to to this partnership as such, so that upon its dissolution it would sell for anything. What is there to be sold? The name would be sold, but it would not preclude any of the old partners from carrying on business at the same place in the partner's own name, as I understand. If the debts were not sold with the goodwill there would be nothing to preclude the partners from immediately calling upon all the debtors of the concern to pay at once and sooner than they otherwise would, and other rights would exist on the part of the parties to the dissolved partnership, of such a character that no one would give a shilling for the goodwill. Under those circumstances, in fact, it would be buying nothing at all. If you were to suppose that they bought the connection by buying up the debts, what would be the consequence? Possibly half a million of money would have to be found by the purchasers, or, at all events, an enormous sum of money, so that practically you would not find a customer for such a thing at such a price. I think these observations are important for the purpose of showing that it is not likely this partnership would contemplate that as a partnership they were possessed of a goodwill, that is to say, a valuable goodwill which they could sell. If they did not think so, it is extremely unlikely they would suppose that in the event of any man being expelled he should have the benefit which would not accrue to him supposing there were a voluntary dissolution by the whole firm. It seems to me manifest, whether we look at the object for which the account is stated—that is to say, a division of the profits—or whether we look at the words of the 20th article, it was not intended that anything in the nature of goodwill should be taken into account. There would be this incongruity in it, that the goodwill would last only as long as the partnership lasted, and, therefore, if the parties drew out on the footing that there was a goodwill, when they came to the end of the partnership they would find that they had got nothing at all, and consequently there would be a serious overdraw. An account was to be taken of the "stocks, moneys, debts, lands, buildings, factories, and other the estate and effects belonging, due, and owing to this partnership." Now, I will not say that "effects" under no circumstances would include goodwill. I can conceive it might, but when I read that, and in connection with the words "susceptible of valuation," and with the objects of the articles generally, it is clear to me that it was not intended that the goodwill should be included in the accounts so taken.

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GRIFFITHS AND OTHERS v. BRAMLEY-MOORE AND OTHERS.

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Solicitors: *Harrison, Beale, and Harrison; Field Boscoe, Field, Francis, and Osbaldeston*, for *Bateson and Co.*, Liverpool.

## SITTINGS AT WESTMINSTER.

Friday, Nov. 29, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

GRIFFITHS AND OTHERS v. BRAMLEY-MOORE AND OTHERS. (a)

*Marine insurance—Charter-party—Freight—Deductions for sea-damage—Insurance against loss of freight—Underwriters' liability.*

A charter-party provided for payment of freight at a specified rate, and contained a clause that, "If any portion of the cargo be delivered sea-damaged, the freight on such sea-damaged portion to be two-thirds of the above rate." Plaintiffs, the charterers, effected an insurance "To cover only the one-third loss of freight in consequence of sea-damage, as per charter-party." A portion of the cargo became sea-damaged, and one-third of the freight payable in respect of that portion was deducted by plaintiffs from the whole freight.

Held (affirming the decision of *Denman, J.*), that the policy sufficiently described the subject-matter insured, which was the one-third loss in consequence of sea-damage, and not the whole freight; and that plaintiffs were entitled to recover from each underwriter such proportion of the loss of freight as the amount of his subscription bore to the whole sum subscribed.

APPEAL of defendants from a judgment of *Denman J.* on a trial with a special jury at Guildhall.

The action was to recover from the several defendants, who were underwriters, sums alleged to be due from each under a policy of insurance upon freight.

The statement of claim alleged that the plaintiffs, who were shipowners, agreed by charter-party that one of their ships should carry and deliver a cargo of rice, and "that the charterers should pay freight on true delivery of cargo, after the rate of 3*l.* 7*s.* 6*d.* per ton," subject to certain deductions. The charter-party also contained a provision as follows:

If any portion of the cargo be delivered sea-damaged, the freight on such sea-damaged portion to be two-thirds of the above rate, except only in case the vessel shall have been stranded.

The plaintiffs also entered into a policy of insurance, at the foot of which was the following clause:

To cover only one-third loss of freight in consequence of sea-damage, as per charter-party, unless the ship be stranded, sunk, or burnt.

The defendants' names and the amount of their respective subscriptions were written under this clause, and the consideration was expressed in the policy to be 10*s.* per cent.

The cargo was carried to London, and there discharged, but during the continuance of the risk a portion of the cargo was sea-damaged, and the plaintiffs thereby lost one-third of the freight on that portion. The total freight on the cargo was 3817*l.* 16*s.* 3*d.*, and one-third of the total freight was 1290*l.* 12*s.* 1*d.*, of which 1200*l.* formed the subject of insurance under the policy.

The one-third of the freight lost by the plaintiffs on the sea-damaged portion of the cargo amounted to 293*l.* 15*s.* 7*d.* The amount therefore due or payable under the policy was 273*l.* 13*s.* 8*d.*

(c) Reported by W. AFFLTON, Esq., Barrister-at-Law.

By reason of the premises the plaintiffs alleged that they had become entitled under the policy to recover from the defendants so much of 273*l.* 13*s.* 8*d.* as was proportionate to the sums for which the defendants respectively subscribed the policy.

The plaintiffs claimed the specific amounts so calculated to be due from each defendant and interest thereon.

The defence, so far as is material, was that, assuming the total freight to have been 3817*l.* 16*s.* 3*d.*, and the amount lost to have been 293*l.* 15*s.* 7*d.*, the plaintiffs were entitled under the policy to the proportion of the loss which the amount insured bore to the whole freight and no more, and that the defendants before action tendered the same, and, on the plaintiffs' refusal to accept it, paid it into court.

By paragraph 5 it was alleged in the alternative that, at the time of effecting the policy, it was represented by the plaintiffs to the defendants, and expressly agreed between them, that the policy should apply to cover the whole of the freight, and that any claim should be calculated on the whole amount of freight, and not on one-third thereof, and that the defendants executed the policy on the faith of such representation, and that the plaintiffs were endeavouring, contrary to their representations and to good faith, to avail themselves of a mistake in the form of the policy.

Issue was taken on this defence.

At the trial the only question left to the jury was the issue raised by paragraph 5, and the jury found for the plaintiffs on this issue, and negatived the defendants' allegations in paragraph 5.

*Denman, J.* thereupon ordered judgment to be entered for plaintiffs for the full amount of their claim.

The defendants appealed.

*Cohen, Q.C.* and *J. O. Mathew* for defendants.—The whole freight is insured, as is shown by the low rate of premium; the premium being calculated on the view that each underwriter's liability is determined, not by the proportion which his subscription bears to the amount of the loss, but by the proportion which his subscription bears to the total amount insured. It is an insurance of the whole freight, and the plaintiffs are entitled only to recover under the policy such a proportion of the loss as the amount insured bears to the whole freight. An underwriter, when he subscribes a policy, never agrees to pay on a proportion of loss, but always on a proportion of the assured's liability. The insurance here is against the contingency that the whole freight may be reduced under the charter-party by one-third. The underwriter compares the amount of his subscription with the assured's interest:

*Hendricks v. Australasian Insurance Company, L. Rep.* 9 C. P. 460.

Secondly, if the subject-matter of the insurance was not the total freight, the parties were never *ad idem* as to the subject-matter. There is a patent ambiguity, the subject-matter not being sufficiently described, and therefore no contract:

*Raffles v. Wichelhaus*, 2 H. & C. 906; 33 L. J. 160, Ex.

*Holl, Q.C.* and *Witt*, for plaintiffs, were not required to argue.

BRAMWELL, L.J.—I think this is as plain a case as could well be. It is possible, however, that

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there may be some understanding among underwriters which would cause them to put a construction upon this policy different to that which I am about to put. I think it is plain that the plaintiffs had freight coming to them which might come at one or other of two rates. If the cargo arrived safely, they would get one sum on the whole freight; if it arrived sea-damaged, they would suffer a deduction of one-third in respect of so much of the cargo as was sea-damaged. The plaintiffs being desirous of guarding against that loss, they insure for the one-third value of the freight. It is the same thing as if they said, "We will insure to the amount of 6s. 8d. out of every pound coming to us as freight." The words of the policy are plain enough, "to cover only the one-third loss of freight, as per charter-party;" and the charter-party explains what those words mean. Mr. Mathew argues that this is an insurance to cover the whole freight, and although the utmost loss can only be one-third, yet he says that the plaintiffs must insure the whole in order to cover it. He says, also, that this proposition is not an unreasonable one, because the underwriter, in consideration of the shipowner insuring the whole freight, takes one-third only of the premium. That seems a roundabout way of doing it. However, no such contract has been made out. This appeal must be dismissed.

BRETT, L.J.—The first point taken is, that there is no description of the subject-matter insured, because the description is not in the usual place in the policy. Is it a true proposition to say that, because the sentence is not in its usual place in the policy, therefore this is not a true description of the subject-matter? I cannot think it is so. In truth, this is the only description of the subject-matter insured, and if so, what is that subject-matter? It is not freight other than freight under the charter-party, because no other freight was under risk. It is shown to be freight under the charter-party by the reference to the charter-party in the description of the subject-matter insured. It is said there is no insurance of loss, but the words are, "to cover one-third loss of freight in consequence of sea-damage." That refers one to the charter-party to find out what was the subject-matter of insurance, and one finds that freight under the charter-party is to be payable on true delivery of cargo, at so much per ton. But then there is a further particular clause in the charter-party, that if a portion of the cargo is delivered sea-damaged, one-third of the freight on such portion is to be deducted. If, then, there is sea-damage, there is a loss upon the sea-damaged portion to the amount of one-third freight. Looking at the policy, the subject-matter of insurance is described to be the one-third loss which accrues on the charter-party under, and by virtue of, the above clause. The policy refers only to particular loss caused by sea-damage, and that is the subject-matter of insurance. Then what is the true construction of the whole policy? When once the subject-matter is made out, every part of the policy is to be applied that has reference to that subject-matter. It is said that some parts of the policy could not be applied to such a subject-matter, and therefore that it is not the subject-matter. That suggestion is answered by applying the rule of construction I have just mentioned. This and similar policies are of a peculiar nature, and though the subject-matter of insurance is accurately defined, the quantity of

it is not ascertained until the loss has occurred. It seems to me that the only loss that could be recovered under the policy is a total loss. If there is a total loss, then the insurer is liable to the full amount of his subscription. I think that he is so liable in the present case. The ordinary manner of calculating such a loss ought to be applied, and I am of opinion that the plaintiffs are entitled to recover the amount of it.

COTTON, L.J.—The questions are, whether there is a sufficient description of this subject-matter insured, whether that subject-matter is the total loss sustained, or whether the underwriters have a limited liability in respect of another subject-matter. Now I have no doubt on the construction of the charter-party. It is clear that, if the cargo arrives safely, the whole freight would be payable, but if any part arrives sea-damaged, then there is to be a deduction, in respect of that part, of one-third freight. I find that there is in the policy a reference to the subject-matter insured, which is to be the difference between the full freight and the freight payable if the cargo arrives sea-damaged. The words "to cover only the one-third loss of freight in consequence of sea-damage, as per charter-party," are not an inapt description of the subject-matter insured. I am of opinion that our judgment should be for the plaintiffs.

*Judgment affirmed.*

Solicitors for plaintiffs, *Pritchard and Son.*

Solicitors for the defendants, *Walton, Bubb, and Walton.*

Dec. 5 and 6, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

ELMSLIE AND OTHERS v. CORRIE. (a)

*Liquidation—Discharge—Omission of creditor from debtor's statement—Right of action—Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 125.*

*A debtor who has obtained his discharge in liquidation proceedings, under sect. 125 of the Bankruptcy Act 1869, is not liable, in respect of a debt provable in the liquidation at the suit of a creditor who, without fraud, was omitted from the debtor's statement of affairs, and had no notice of the liquidation. Decision of Lindley J. affirmed.*

APPEAL from a judgment of Lindley J.

The plaintiffs were solicitors, and the action was to recover 264l. 5s. 8d. for professional services. The defendant pleaded that on Dec. 9, 1878, after the time when the plaintiffs' claim was alleged to have accrued, the defendant being unable to pay his debts, filed his petition in the County Court of Hampshire, holden at Newport and Ryde, praying for a liquidation of his affairs by arrangement or composition; that thereupon a special resolution of the defendant's creditors was duly passed for liquidation by arrangement, that such resolution was duly registered, and that the defendant duly obtained his discharge.

Replication, that the plaintiffs were not inserted in the list of creditors delivered by the defendant to the registrar of the County Court, pursuant to the provisions of the Bankruptcy Act 1869; that notice of the first meeting of creditors was not given to them; that they neither voted nor proved their debt, nor received a dividend thereon under the said liquidation proceedings, of which they had always been altogether ignorant.

(a) Reported by W. AFFLETON, Esq., Barrister-at-Law.

Issue was joined upon this replication.

At the trial, on July 20, 1878, before Lindley, J. and a common jury, the facts as stated in the pleadings were admitted, and the plaintiffs' counsel submitted to a verdict for the defendant, admitting that, so far as that court was concerned, the case was governed by *Heather v. Webb* (see note to the report in the court below of *Elmslie v. Corrie*, 39 L. T. Rep. N. S. 107; and L. Rep. 2 C. P. Div. 1).

The plaintiffs now appealed.

*Herschell, Q.C.* and *F. O. Crump* for plaintiffs.—Sect. 125 of the Bankruptcy Act 1869 (a) does not operate to bar the claims of creditors who

(a) Sect. 125 of the Bankruptcy Act 1869 (32 & 33 Vict. c. 71) provides for the liquidation by arrangement of the affairs of a debtor unable to pay his debts.

Sub-sect. 1 enables the debtor to call a general meeting of his creditors, and such general meeting may, by a special resolution as defined in the Act, declare that the affairs of the debtor are to be liquidated by arrangement, and not in bankruptcy, and may appoint a trustee with or without a committee of inspection.

By sub-sect. 3: "The debtor, unless prevented by sickness or other cause, satisfactory to such meeting, shall be present at the meeting at which the special resolution is passed, and shall answer any inquiries made of him, and he, or, if he is so prevented from being at such meeting, some one on his behalf, shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom his debts are due."

By sub-sect. 9: "The provisions of this Act, with respect to the . . . discharge of a bankrupt . . . shall not apply in the case of a debtor whose affairs are under liquidation by arrangement; but the close of the liquidation may be fixed, and the discharge of the debtor may be granted by a special resolution of the creditors in general meeting, &c."

By sub-sect. 10: "The trustee shall report to the registrar the discharge of the debtor, and a certificate of such discharge given by the registrar shall have the same effect as an order of discharge given to a bankrupt under this Act."

Sect. 126 provides regulations for the arrangement of a debtor unable to pay his debts, by composition, and enacts that the creditors may, by an extraordinary resolution passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at a general meeting, to be held in manner prescribed in the Act, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor. The section further enacts that "the provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amount of the debts due to whom are shown in the statement of the debtor, produced to the meeting at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors."

By sect. 127: "The registration by the registrar of a special resolution of the creditors on the occasion of a liquidation by arrangement under part 6 of this Act, or of an extraordinary resolution of the creditors on the occasion of a composition under the 7th part of this Act, shall, in the absence of fraud, be conclusive evidence that such resolutions respectively were duly passed, and all the requisitions of this Act in respect of such resolutions complied with."

By rule 289 of the General Rules of 1870, made in pursuance of the Bankruptcy Act, 1869: "Every creditor in respect of a provable debt shall, in the event of a liquidation by arrangement being resolved upon, be absolutely restrained from commencing, or continuing, or enforcing any proceedings whatever against the debtor or his property, notwithstanding that such creditor has not received notice of the general meeting, unless the court shall be of opinion that such creditor's rights have been prejudicially affected by the resolution, and that the estate would yield a larger dividend if administered in bankruptcy."

have not assented to the liquidation. The liquidation proceedings could not be pleaded in bar to any creditor's claim; at all events, they could not be so pleaded to the claim of a creditor without notice of the meeting of creditors, and whose name is not inserted in the statement. Sub-sects. 9 and 10 of sect. 125 contain special provisions for the discharge of a debtor in liquidation, which differ from those with reference to a discharge in bankruptcy. There is this difference also, that in liquidation proceedings the creditors have to be satisfied, instead of the court as in bankruptcy. Sub-sect. 3 of sect. 125 is peremptory that all the names of the creditors shall be inserted in the debtor's statement. A similar provision to that contained in sect. 126, with respect to composition proceedings, that creditors, whose names are omitted from the statement are not bound, ought to be implied in sect. 125. Rule 289 of the General Rules of 1870 shows that the debtor cannot plead the liquidation proceedings in bar; he must apply to the court, as he would have to do in bankruptcy, in order to have the action restrained. The decision of Lord Coleridge in *Heather v. Webb* (*sup.*) was wrong, and ought to be overruled.

*Petheram*, for the defendant, was not heard.

BRAMWELL, L.J.—I think this case is a very plain one. I understand the question to be this. The Act speaks of a discharge in liquidation as having the same effect as a discharge in bankruptcy. Registration is taken as a proof that everything has been done as the Act directs, and everything has taken place which can make valid the proceedings under the Act. It is said that there is an implied exception to these general provisions, and that the debtor's discharge is not a discharge to a creditor with no notice of the general meeting of creditors under sect. 125, and whose name has not been inserted in the debtor's statement. Now, if that exception is not expressed in terms in the Act, nothing but the most cogent necessity could justify us in holding that it must be implied. I see no reason for implying any such exception. If Mr. Herschell's admission is correct, that although the creditor's name is left out of the statement, and he has had no notice, he can still prove for his debt under sub-sect. 3, and get a benefit out of the liquidation, it seems to me almost an inevitable conclusion that the debtor ought to be left at liberty to leave out a creditor's name in his statement. Suppose he *bonâ fide* disputes the debt; he is surely not bound to insert the creditor's name in the statement if that is the case. Whether that is so or not, I really can see no reason whatever for putting the suggested exception in the Act; although, no doubt, it may seem hard on the creditor who has not had notice, and is not in the same position as the other creditors whose names are in the statement, yet he is much in the same plight as he would be if the discharge had been in bankruptcy. He is in the same plight as in bankruptcy with two differences: first, that proceedings in bankruptcy do not depend upon the voting of the creditors, whilst in liquidation they do; and secondly, in bankruptcy there is no provision for a particular notice to some creditors, whereas in liquidation there is. But, to my mind, these provisions, which only show how a creditor is to be summoned, and why, do not afford any sufficient reason for putting into



the Act the exception contended for. If it was put in, the insertion of creditors whose claim the debtor disputes could not be said to be a condition precedent to the debtor's right to a discharge. The words in this Act express that the discharge shall be a discharge to the debtor of all his debts, and I am of opinion there is no reason for putting in the implied exception suggested. The plaintiffs are then driven to the other point, which was argued mainly by Mr. Crump. He says, supposing no implied exception of the kind suggested, you cannot leave a creditor's name out of your statement, and then plead the liquidation proceedings in bar to his claim, but you must go to the court under rule 289 and have his action restrained; and Mr. Crump says that there is a reason for the law, because, if the debtor went to the court under rule 289, the creditor would get the same share of the debtor's estate as the other creditors who had assented to the liquidation. But rule 289 seems to me not applicable here; it applies where an action is brought or continued after the resolution has been passed by the creditors, and before the discharge of the debtor, and it applies as well to creditors who have received their notice as to all others. The reason of the thing and the language of the Act are so clear, that I think the case is very plain and that the appeal must be dismissed.

BRETT, L.J.—I do not think our decision in this case at all prevents the court from acting in any case where there has been fraud on the part either of the debtor or of the creditors who have been summoned to the general meeting. If there was fraud by or towards the creditor who attended the meeting, the proceedings in liquidation might be entirely set aside; nor, if the debtor fraudulently and purposely left out a particular creditor from his statement, do I think the creditor could be prevented from suing him. Here there was no fraud, but an omission accidental and *bonâ fide* of the creditor's name from the statement. The words of sect. 125 are entirely general; it is suggested that we ought to add an exception to those general words. The answer seems to me clear, that in the very next section of the Act, when the Legislature intended to put in their exception they do so in express terms. It is a canon of construction that, where you find the Legislature omitting a thing in one part of an Act and dealing with it in another, you must take it that the omission was intentionally made. It was so here. The words in sect. 125 being general, we cannot imply an exception, which in sect. 126 is made in express terms. Mr. Crump founded an argument on rule 289, but, although I admired his ingenuity, it is to my mind clear that the rule applies only to the time between the resolution and the discharge, and does not apply here where the action is brought after the debtor's discharge has been obtained.

COTTON L.J.—I am of the same opinion. The question in this case is, whether the debtor's discharge can be pleaded in bar to an action by a creditor who has had no notice of the meeting, and whose name has not been inserted in the debtor's statement. It is conceded that, the omission was not fraudulent. I quite agree that in construing the provisions of an Act, or in giving effect to what is done under it, we are bound to see that those provisions which declare what it is essential to do in order to obtain the benefit of the Act are

fulfilled—not strictly fulfilled to the letter, but reasonably fulfilled. Now, fraud being out of the question here, we must take it that the creditor's resolution was duly passed, and the requirements of the Act complied with—that is to say, what has been done must be taken to be a good discharge of the debtor under sect. 125, with the result that all consequences of a good discharge follow. Then sub-sect. 10 of sect. 125 enacts that the certificate of discharge given by the registrar shall have the same effect as an order of discharge given to a bankrupt under the Act. If that is so, it is undoubted that a discharge in the case of bankruptcy would be an effectual bar to the claim of any creditor, although he had no notice, and his name was not in the debtor's statement. What is there that gives it a different effect in liquidation proceedings? It was first argued that in liquidation the discharge would not be pleadable in bar as against the claim of any creditor even with notice. In my opinion there are no grounds whatever for that argument. It would be setting aside the clear words of the Act. The only justification for the contention is, that there are no provisions as to discharge in liquidation as there are in bankruptcy. Rule 289 was referred to in support of that position. In my opinion that rule does not in any way derogate from the effect of a discharge. [His Lordship here read the rule.] The proper construction of that rule, in my opinion, is that after resolutions passed, and before discharge, no creditor shall be admitted to dispute the resolution, or enforce proceedings against the debtor, although such creditor has not had notice, unless the court are of opinion that the creditor's rights have been prejudicially affected by the resolution. I take it, therefore, that this discharge is pleadable in bar—there being no fraud—as against the claim of any creditor. In sect. 126 there is a special enactment that the provisions of a composition shall bind creditors only whose names, &c., are in the debtor's statement; that is to say, the discharge under that section is a bar as regards those creditors, and those creditors only, who are there named. It is very reasonable that when such power is given to creditors there should be a bar only as to those who have had notice, and are named in the statement; but as respects liquidation the Act only applies the machinery. In my opinion we must give these provisions the same effect with respect to a discharge in liquidation as in bankruptcy, and this appeal should be dismissed.

*Appeal dismissed.*

Solicitors for plaintiffs, *Elmelie, Forsyth, and Sedgwick.*

Solicitor for defendant, *Loy.*

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*Feb. 27, 28, and March 8.*

(Before COCKBURN, C.J., FIELD and MANISTY, JJ.)

REG. v. BISHOP OF OXFORD. (a)

*Mandamus—Ecclesiastical offence—Duty of bishop—"It shall be lawful"—Grounds for refusal—3 & 4 Vict. c. 86, s. 3.*

*A parishioner made a charge under sect. 3 of the Church Discipline Act 1840, to the bishop of his*

(a) Reported by M. W. McKILLAR, Esq., Barrister-at-Law.



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*diocese, that the rector of his parish had offended against the laws ecclesiastical. The bishop declined to issue a commission for the purpose of making inquiry as to the grounds of such charge, for the expressed reasons that the repeated failures in legal proceedings of this kind had tended to cover those concerned in them with ridicule, and to bring the Church into contempt; that the rector was of advanced age, and was held in respect and love; and that the charge was made in opposition to the wish of the majority of the parishioners.*

*Held, upon a rule for a mandamus, that the reasons alleged by the bishop did not justify him in declining to exercise his office at the instance of a parishioner under this section; and that the court, in the exercise of its discretion, would compel him to proceed.*

THIS was a rule nisi for a mandamus directing the Bishop of Oxford to issue a commission for the purpose of making inquiry as to the grounds of a charge, made by the applicant, Frederick G. Julius, a parishioner of Clewer, in the county of Berks, of certain offences under the ecclesiastical law, against the Rev. T. T. Carter, the rector of the said parish of Clewer.

On the 11th July 1878 the applicant made a complaint by letter to the bishop of certain alleged illegal practices by the rector at the celebration of the Holy Communion. The bishop acknowledged the receipt of this letter, and promised consideration thereof, on the following day; and on the 9th Aug. the applicant's solicitors wrote to the bishop asking the result of his consideration.

On the 10th Aug. the bishop wrote to the applicant's solicitors as follows:

In reply to your letter, I can only say that I have not yet been able to satisfy myself as to the best way of dealing with the complaint to which it refers. The repeated occurrence of failures during the last few years in the conduct of legal proceedings of this kind has had a tendency to cover all persons concerned in them with ridicule, and to bring on the Church itself some contempt, which I would not willingly increase. In this case I have further to consider that the complaint is made in opposition to the strongly-expressed wish of the great majority of the parishioners, and that the person complained of is a clergyman in advanced years generally respected, and even beloved, by those who know him. I mention these circumstances not as affording any answer to your complaint, but as reasons which impose upon me the duty of taking unusual care in deciding on the course which I ought to adopt.

On the 23rd Oct., in answer to a further application from the solicitors, the bishop again wrote:

My former letter will have explained to you in general the considerations which impose the duty of extreme caution upon me in the matter of complaint professionally intrusted to you. Further, I am led to believe that proceedings will be taken as to the late judgment of the Court of Queen's Bench which may affect the exercise of the jurisdiction of the Court of Arches and of the Judicial Committee of the Privy Council in some important respects. While these are pending, I am unwilling to add to the large amount of costly and abortive litigation from which the Church has already suffered so much discredit.

On the 12th Nov. the solicitors wrote to the bishop:

We are instructed to ask your Lordship for a definite reply to our client's application to your Lordship either to issue a commission for the purpose of making inquiry into the grounds of the charges set out in the application or to send the case by letters of request to the Court of Appeal of the province, to be there heard and determined in accordance with the provisions of the Act.

To this, on the 14th Nov., the bishop replied as follows:

In reply to your note I can only refer you to my former letter. As no change has occurred in the state of things in view of which that letter was written, I have nothing to add to it. I am not aware that there was any obscurity in the language.

On the 22nd Jan. 1879 this rule nisi for a mandamus was granted on the application of A. J. Stephens, Q.C. for the applicant.

Feb. 27 and 28.—The Bishop of Oxford in person showed cause against the rule.

Charles, Q.C. and Phillimore also showed cause on behalf of the Rector of Clewer.

A. J. Stephens, Q.C. and Jeune supported the rule.

The arguments and the authorities discussed sufficiently appear in the judgment of the court.

*Our. adv. vult.*

March 8.—COCKBURN, C.J. delivered the judgment of himself, Field and Manisty, JJ.—This was an application for a writ of mandamus to the Lord Bishop of Oxford, directing him to issue a commission under 3 & 4 Vict. c. 86, to inquire into the matter of a complaint of Frederick G. Julius, Doctor of Medicine, a parishioner of the parish of Clewer, in the county of Berks, and a member of the Church of England, against the Rev. Thomas Thellusson Carter, rector of the said parish, for offences against the laws ecclesiastical in respect of unauthorised deviations from the ritual of the Church in the Communion Service and the use of unauthorised vestments. The complaint was in due form, and it must be taken that the instances of alleged departure from the established ritual set forth in the complaint were according to the law as it had been laid down in the decisions of the Judicial Committee of the Privy Council offences against the ecclesiastical law, and therefore within the statute. The bishop has declined, however, to issue the commission as required, assigning as a reason, not that the matters complained of were not offences against the ecclesiastical law, or were of too unsubstantial and trivial a character to call for inquiry, but resting his refusal on the ground that the repeated failures which had occurred during the last few years in legal proceedings of this kind had had a tendency to cover those concerned in them with ridicule and to bring the Church itself into contempt, as well as on the advanced age of the incumbent, the respect and love in which he was held, and the fact that the complaint was made in opposition to the expressed wish of the great majority of the parishioners. The writ of mandamus being applied for under these circumstances, these three questions present themselves: 1. Assuming the Church Discipline Act (3 & 4 Vict. c. 86), the statute upon which this application is founded, to be still in force in such a case, is it obligatory on the bishop, as a matter of statutory duty, to issue a commission as prayed for, with the alternative of sending the cause to the Court of Arches in the first instance; or is it in his discretion to refuse to institute any further proceeding? 2. Is the Act in question still in force, or has it been superseded by the Public Worship Regulation Act of 1874? 3. If the Church Discipline Act is still in force and applicable to the present case, and the exercise of the power conferred by the statute is obligatory on the bishop, is the present case one in which this

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court should exercise the discretion which it possesses in the matter of *mandamus* and refuse the writ? With a view to these questions, it becomes necessary, in the first place, carefully to consider the Church Discipline Act under which this application is made, not only with reference to the 3rd section, on which the application is immediately founded, but also with reference to the general scope and purpose of the statute. The 3 & 4 Vict. c. 86, superseding the former modes and proceedings against clerics in orders, in sect. 3, enacts that "in every case of any clerk in holy orders of the United Church of England and Ireland who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission under his hand and seal to five persons, of whom one shall be the vicar-general or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report." The commissioners so appointed are to examine witnesses on oath for the purpose of "ascertaining whether there be sufficient *prima facie* ground for instituting further proceeding. If the commissioners report that there is sufficient *prima facie* ground for further proceeding, and if the bishop or the party complaining shall thereupon think fit to proceed against the party accused, articles are to be drawn up, which, with the depositions, are to be filed in the registry of the diocese. The bishop is then to cite the party accused to appear to make answer to the articles. If he appears and admits the truth of the articles, the bishop or his commissary specially appointed for the purpose is to pronounce sentences according to ecclesiastical law. If the party fails to appear, or, appearing, makes any other answer than an unqualified admission of the truth of the articles, the bishop is to proceed to hear the cause with the assistance of three assessors specially qualified by the Act; and, having heard the cause, is to determine the same and pronounce sentence thereupon according to the ecclesiastical law. There is, however, a special provision that before issuing the commission, or after the report of the commissioners, provided it be before the filing of the articles, "it shall be lawful for the bishop, if he shall think fit," to send the case by letters of request to the Court of Appeal of the province, there to be heard and determined. Such being the method of proceeding provided by this statute, the first question which presents itself is whether the enactment in the 3rd section, which says that on a complaint against a clerk in orders of an offence against the ecclesiastical law, it shall be lawful for the bishop to issue a commission of inquiry, simply confers a power to be exercised at discretion, or imposes a duty which requires the exercise of the power in the circumstances contemplated by the statute. It is said that the question is settled by authority, there having been a decision of this court to the effect that the Act simply confers a power to be exercised at discretion, in the case of *Reg. v. The Bishop of Winchester* (2 E. & E. 209). But when that case comes to be looked at it appears extremely doubtful whether such was

the ground of the decision of the majority of the court. The argument on the rule having been heard before Lord Campbell, and Justices Wightman, Erle, and Hill, before judgment was delivered, Lord Campbell had become Lord Chancellor, and Mr. Justice Erle had become Chief Justice of the Common Pleas; for which reason the only judgments delivered were those of Wightman and Hill, JJ., who, while they concurred in discharging the rule for a *mandamus*, proceeded on different grounds, Wightman, J. no doubt expressly holding that the bishop had a discretionary authority which could not be controlled by *mandamus*, while Hill, J. declining to act on this view, concurred in discharging the rule solely on the ground that the applicant not being a parishioner, and therefore not interested in the performance of the service in the church in question, the case was not one in which the court, having a discretionary authority in the matter of *mandamus*, ought to issue the writ. It is true that Wightman, J. at the close of his judgment adds that Lord Campbell and Lord Chief Justice Erle concurred in thinking that the rule should be discharged; but he does not say on which of the two grounds they so concurred, which makes it, to say the least, extremely doubtful whether it was in concurrence with his own view; for there being a difference of opinion between himself and Hill, J., had his own view been borne out by the opinion of the other two judges, or either of them, it may reasonably be inferred that he would have said so. It also appears from the statement of Dr. Stephens, derived from his own recollection of what occurred in the case of *Shepherd v. Bennett*, before the Judicial Committee of the Privy Council, and which is fully borne out by the shorthand notes, that in the later case Sir William Erle disclaimed having acted on the ground taken by Wightman, J. To which we may add that we have been recently informed by Sir William Erle that he did not authorise Wightman, J. to say more on his behalf than that he concurred in discharging the rule for a *mandamus*. It is true that in the *Newport Bridge* case (3 E. & E. 377), which occurred in the same year, Crompton, J. expresses his concurrence in the view taken in the previous case by Wightman, J.; but it is to be observed that Crompton, J. had not been a party to the judgment in that case, or to the discussion which had been held upon it. The same question came again before this court, in the case of Mr. Bennett, on an application for a *mandamus* to the Bishop of London, a report of which case have been published, and from which it no doubt appears that a strong intimation was thrown out, in the course of the argument, as well as in giving judgment, by Lush, J., of concurrence in the view of Wightman, J., in the *Bishop of Winchester* case, founded mainly, however, on what we cannot but believe to have been a mistake—viz., that Lord Campbell and Erle, L.C.J. had concurred in discharging the rule in that case on the ground taken by Wightman, J. It became, however, unnecessary to decide as to the construction of the statute in Mr. Bennett's case; and Lush, J. and the other judges expressly disclaim all intention of doing so; inasmuch as, there being already a proceeding pending against Mr. Bennett, under a commission issued by the bishop in respect of similar dec-

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trines contained in a former publication, the court, in the exercise of its discretion, refused to grant the *mandamus* as unnecessary and uncalled for. In this state of uncertainty we feel ourselves at liberty to form our own judgment as to the construction to be put on the enactment in question; the more so as, for reasons which will be explained further on, the ground on which the opinion of Wightman, J. was founded appears to us open to serious question. The question turns on the true sense of the term, "it shall be lawful" (as used in the 3rd section of the Church Discipline Act)—a term frequently used in statutory language, perhaps, owing to its ambiguity, too frequently, as it is one which admits of no less than three different meanings, in all of which it occurs in this very statute. (1) It may be used to confer a right or privilege, to be exercised for the benefits of other or not, at the option of the party to whom it is given; (2), it may be used to confer a power or authority, to be exercised for the benefit of himself at the discretion of the party on whom it is conferred; or (3), while it confers a power or authority, it may, at the same time, impose the duty of exercising the power or authority so conferred. Besides which the general sense of these words is sometimes restricted by some qualifying expression, such as "if he shall think fit," "if it shall appear to him right," or the like, which plainly indicate that the exercise of the power is to be subject to the discretion of him who is authorised to exercise it. In the absence of any such qualifying expression, the meaning of the words must be sought in the context of the particular enactment, or of the other sections of the statute, or by reference to its general purpose, and the alteration in the existing law which it was intended to effect, as also in certain canons of construction applicable to this and similar expressions in statutes of a particular class. In the statute before us the term "it shall be lawful" occurs, and that more than once, in the several meanings in which it can thus be used. It is used to confer a right or privilege, to be exercised at the option of the party, in the 4th section, which provides that "it shall be lawful for the party accused, or his agent, to attend the proceedings of the commission, and to examine any of the witnesses;" and again, in the 15th section, which provides that "it shall be lawful for any party who shall think himself aggrieved by a judgment pronounced by the bishop, or in the Court of Appeal of the province, to appeal from such judgment." It is used in the sense of conferring a discretionary power or authority in the 6th section of the Act, where it is said that where proceedings have been commenced under the Act "it shall be lawful" for the bishop, the written consent of the clerk accused and of the party complaining having been first obtained, to pronounce sentence without further proceedings. Three instances occur in which the words are used as imposing a duty. Thus, when in sect. 4 it is said that "it shall be lawful for the commissioners to examine on oath or solemn affirmation, and that such oath or affirmation shall be administered by them to all witnesses who may be tendered to them, either in support of the charge or by the party accused, as well as to all witnesses whom they may deem it necessary to summon, for the purpose of fully prosecuting the inquiry," there can be no doubt that the duty of so examining the witnesses is thereby imposed; and the same obser-

vation applies to the use of the same words in sect. 17, which has reference to the evidence of witnesses and documents in every stage of the inquiry. Equally clear is it that when by sect. 9 it is provided that, when the commissioners shall have reported that there is sufficient *prima facie* ground for instituting proceedings, "it shall be lawful for the bishop, by writing under his hand, to require the party to appear, by himself or his agent, to make answer to the articles," a judicial duty is cast upon the bishop which he has no alternative but to discharge. Three instances occur in which the effect of these words is restricted by qualifying expressions. Thus sect. 13 provides that "if it shall appear to the bishop that great scandal is likely to arise from the party accused continuing to perform the services of the church, or that his ministration will be useless while the charge is pending, it shall be lawful for the bishop to inhibit the clerk from performing any service till the sentence shall have been given." It is obvious that the exercise of the power here given must depend on the view taken by the bishop. So when, in sect. 13, where it is provided that "it shall be lawful" for the bishop, "if he shall think fit" at any time before articles are filed, instead of hearing and deciding the cause under sect. 2, "to send the case by letters of request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of that court," it is obvious that this is a discretionary power. These instances show that the framers of this Act were sensible of the necessity, where the authority conferred was intended to be discretionary, of appending words of limitation to the phrase in question. Of this a still more striking instance is to be found in the very section which we are called upon to construe, which, after providing that "it shall be lawful for the bishop to issue a commission on the application of any party complaining," proceeds to add, "or, if he shall think fit, of his own mere motion." Here the words "if he shall think fit" would appear to be have been introduced for the purpose of preventing the preceding words, "it shall be lawful," from precluding the exercise of the discretionary power which in the alternative it was intended to confer on the bishop. We now proceed to consider the rules of construction to be applied in determining the sense in which the words "it shall be lawful," in the 3rd section of the Church Discipline Act, are to be taken. In doing this we start with a settled canon of construction, that in statutes of a certain class, of which the statute under consideration is one, these words have acquired a settled meaning, unless controlled by the context of the particular enactment, or by the sense in which they are used in other parts of the statute, or, on the purview of the statute, by what is its apparent purpose; in determining which, the prior state of the law, and the end which the statute was intended to effect, may no doubt have to be considered. Whether or not these words are to be considered as simply conferring a discretionary power, or as imposing the duty of exercising the power conferred, when its exercise is called for, must depend in the first place on the subject-matter of the statutory enactment. In the ordinary run of statutes these words import, generally speaking, a faculty or power, to be exercised at the option or discretion of those on

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whom it is conferred; and such, it seems, is to be taken to be their *prima facie* meaning where the subject-matter will admit of it, or where the exercise of the power may depend on contingencies on which a judgment has first to be formed. Thus, in the case *Re Newport Bridge* (2 E. & E. 377), which was an application for a *mandamus* under 43 Geo. 3, c. 59, s. 2, which, with reference to county bridges, enacted that where any such bridge was narrow and incommodious, it should be lawful for the justices of quarter sessions to order the same to be widened and improved, Crompton, J., after saying that "the meaning to be attributed to the phrase 'it shall be lawful' in a statute must depend on the subject-matter in every instance," goes on to say: "*Prima facie* those words import a discretion, and they must be construed as discretionary unless there be anything in the subject-matter to which they are applied, or in any other part of the statute, to show that they are meant to be imperative." "In the present statute," he says, "not only does it not appear that the Act was intended to be compulsory upon the justices, but it appears from the subject-matter that it was intended to be left to their discretion. It seems to me that the Legislature must have so intended when I consider the nature of the court which has to decide whether the act shall be done, and the many questions of expense and expediency which may arise before the act can be prudently determined on." Hill, J. dwells more fully on the circumstances to be thus taken into consideration. Blackburn, J. says: "The words 'shall and may be lawful' are to be taken in their primary sense as permissive, and not compulsory, unless there be anything in the subject-matter of the enactment requiring that they shall receive a different construction. For a time I thought that the present enactment did require that the imperative construction should prevail, and that the object of the Legislature was that upon the one fact appearing that the bridge was narrow and incommodious, it should be widened as a matter of course. I now, however, agree in what has fallen from my brother Hill—that the justices have other matters, such as he has pointed out, to take into consideration, besides the narrowness of the bridge, before they decide whether or not to order it to be widened. That being the case, it is quite clear that the Legislature must have intended to leave them the discretion which the language of the statute *prima facie* imports." In statutes, however, of the class to which the Church Discipline Act belongs a different rule has prevailed for a very great length of time. So long ago as the year 1693 it was decided in the case of *Re v. Barlow* (2 Salkeld 609), that when a statute authorises the doing a thing for the sake of justice or the public good, the word "may" means "shall;" and that rule has been acted upon to the present time. In Bacon's Abridgment tit. "Statute, I.," the rule is so laid down, as also [in] Dwarries on Statutes, p. 264. Speaking of facultative words, it is there stated that where a statute directs the doing of a thing "for the sake of justice" or "for the public benefit," the word "may" shall be construed as "shall" or "must," and, of course, the same rule will apply to the words "it shall be lawful." Such a construction was put on these words by the Court of Common Pleas in the case of

*McDougall v. Paterson* (11 C. B. 755), in which it was held that the word "may" in the County Courts Extension Act (13 & 14 Vict., c. 61) which provides that in certain cases the court, or, a judge at chambers, may by rule or order direct that the plaintiff shall recover his costs, is not used to give a discretion but to confer a power, and that the exercise of such power depends not upon the discretion of a court or judge, but upon the proof of a particular case out of which such power arises. In that case Jervis, L.C.J. says: "When a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application." "For these reasons," continues the Chief Justice, "we are of opinion that the word 'may' is not used to give a discretion, but to confer a power upon the court and judges; and that the exercise of such power depends, not upon the discretion of the court or judge, but upon the proof of the particular case out of which such power arises." A similar construction was put on the words "it shall be lawful" in the case of *Morris v. The Royal British Bank* (1 C. B. N. S. 67), in which it was held that these words, in the 13th section of 7 & 8 Vict. c. 113, the Joint Stock Bank Act, were compulsory, and left no discretion to the court or judge. The case of *Orake v. Powell* (2 E. & B. 210) is to the same effect. But it is unnecessary to multiply cases in support of this position. "It has been so often decided," says Coleridge, J., in the case of *R. v. The Tithe Commissioners* (14 Q. B. 459, 474), "as to have become an axiom, that in public statutes words only directory, permissive, or enabling may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice." It may, however, be satisfactory to observe that the same sense has been ascribed to these words in the courts of the United States. In the case of *The Supervisors v. United States* (4 Wallace's Reports, p. 446), Swaine, J., in delivering the judgment of the Superior Court, after referring to the English and American cases, says as follows: "The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the Act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is, in fact, preceptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless." Now, the statute we are considering unites both the properties which have been referred to. It has reference to the administration of justice in the matter of ecclesiastical offences; and, as it relates to the maintenance of the doctrines and ritual of the established religion, for upholding the uniformity of which so many Acts of Parliament have been passed, it cannot be held to be other than matter of national interest and concern. Moreover, it is the undoubted right of every inhabitant of every parish in the kingdom, desirous of frequenting the parish church, to have the services of the church

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performed according to the ritual of the Church, as established by law, without having his religious sense shocked and outraged by the introduction of innovations not sanctioned by law or usage, and which may appear to him to be inconsistent with the simplicity of the Protestant worship, and to pertain to a religion which he believes to be erroneous, and the ritual of which is not that of the Church of England. It cannot admit of doubt that a statute, by means of which a right so important to the general sense of mankind was alone to be capable of being enforced and upheld—since it abolished the previous jurisdiction of the ecclesiastical courts in the matters of clerks in orders—is one of general interest and concern, in the construction of which the rule referred to would be applicable. This being so, we have next to see whether we find anything in the language or purpose of the statute which shows that the words were intended to have a less authoritative meaning. So far from this being the case, as regards the language of the 3rd section, we find, as has already been pointed out, that between that part of it which relates to the power of the bishop to issue a commission on a complaint addressed to him, and which enacts that it shall be lawful for him so to do, and that part which enables him to do so of his own mere motion, independently of any complaint, the words “if he shall think fit” are interposed. It is here obvious that if the words “it shall be lawful” had been intended to confer a discretionary power, as these words would, in the absence of the words “if he shall think fit,” have governed and controlled the whole sentence, the latter words would have been wholly superfluous. They can only have been introduced, therefore, for the purpose of qualifying the previous expression. Taken as a whole, it therefore seems to us from the collocation of the words that the passage affords the key to its own interpretation, and indicates the sense in which the words in question are to be taken. It was suggested on the part of the bishop that the words “if he shall think fit” in section 3 should be rejected as superfluous. To this we answer that in so doing we should violate a settled canon of construction—namely, that a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant (Bac. Abr.; tit. “Statute” I. sub-sect. 2). But this is not all. The words are significant, as indicating the sense in which the words “it shall be lawful” in the preceding part of the section had been used by the framers of the Act. They would in any point of view have been idle, if not introduced to qualify the effect of the words, “it shall be lawful,” as imposing a duty. Wightman, J., it is true, in *Reg. v. The Bishop of Winchester*, arrived at the opposite conclusion, derived from the enactments of the section in question. His opinion was founded on the ground that the power to issue a commission in the 3rd section applied equally to a case of scandal or evil report of having offended against the ecclesiastical law as to one of an offence charged to have been actually committed; and he argues, *ab inconvenienti*, that it cannot have been the intention of the Legislature to put it in the power of a prosecutor to call upon a bishop to issue a commission, and so initiate proceedings on what may turn out to be unfounded rumours; the more so as, according to the

learned judge, as the law before stood, “the office of the judge could only have been promoted in the case of some direct and positive charge of an offence against the laws ecclesiastical, and no proceeding upon the ground of scandal or evil report of having offended against these laws would have been admissible.” But, in the latter assumption the learned judge is, we cannot but think, in error. Public report or scandal was a ground of accusation in the ecclesiastical procedure, not only in the proceedings by inquisition, when the proceeding was taken by a bishop or an archbishop, *ex officio mero*. Here the articles, Oughton tells us (“Ordo Judic.” tit., 141, sect. 1), were to contain “*Tam causas conventionis (i.e., in jus vocationis) quam famam publicam.*” Again, he says (Ib. n.f. 22), “*Et si reus non tenetur respondere positioni criminose, tenetur tamen respondere positioni continenti famam publicam criminis articulati.* Igitur in his articulis famam publica objecti criminis est alleganda et objicienda.” Nay, so material was public scandal or evil report deemed to be as founding a charge against a party, that the judge was bound to summon and examine the fellow-parishioners of the accused as to its existence. “*Si reus negaverit criminem objectum et famam,*” says Oughton (“Ordo Judic.” tit. 145, sect. 1), “*tunc, si crimen objectum fuerit notorium et publicum, ac de eodem publica vox et fama, iudex producere et examinare curabit parochianos rei, vel alios quosquunque, ad famam probandam, eosque ad perhibendum testimonium, si rogati recusaverint per censuras ecclesiasticas compellere.*” Even though the proof of the alleged offence failed, if the evil report was established the accused might be sentenced to clear himself by purgation—that is, by producing a certain number of *compurgatores*, who were to swear they believed the report to be unfounded. “*Si fama confessata vel probata fuerit,*” says Oughton (tit. 144, sect. 7), “*iudex potest purgationem indicere.*” If the accused failed in his purgation, he might be enjoined to do public penance (Ib. 147, sect. 2). The same thing occurred on presentments by churchwardens (see tit. 152) termed by the civilians *Denunciatio*. Here again, as appears from Conset, Oughton, and the 115th canon, public scandal and report became part of the inquiry, it being, according to the old law, part of the duty of the churchwardens to present those against whom, whether ministers or parishioners, such scandal or report prevailed. Nor was this confined to the proceedings by inquisition or by presentment. On an accusation by a party promoting the office of the judge, the articles in like manner alleged the *publica fama* of the imputed offence; and here again it is laid down (Oughton, tit. 149, sects. 7 & 8), “*Si actor probaverit famam publicam, vel presumptiones vehementes, ob quas purgatio parti ree indicta fuerit, vel indicio possit et debuisset, quamvis non probaverit crimen objectum, tamen obtinebit sententiam purgationem esse indicendam, et reus est in expensis illius litis condemnandus.* Nam reus, negando famam, causavit actorem litigare, et expensas facere circa probationem ejusdem.” It thus appears that public scandal or report did play an important part in penal suits in the ecclesiastical courts, and was of itself sufficient to place the party against whom it was brought forward under the necessity of clearing himself by oath; and it is, we think, going too far to say that if a strong case of public

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scandal had been brought before the judge as the ground for allowing the office of the judge to be promoted, the application would have been refused. We think it not unlikely that the intention being, as we shall presently more fully show, to leave the substantive law as it stood, changing only the method of proceeding, these words were introduced as applicable to the cases in which public report might have formed matter of judicial inquiry. At all events, we think the argument afforded by the fact that in the passage in question the words "if he shall think fit," give, as seems to us, the key to the words "it shall be lawful" in the earlier branch of the sentence, the inference arising from the collocation of the words is far stronger than any which can be drawn from the supposed intention of the Legislature, which, after all, can only be matter of surmise. The language of the section, though it might have been more explicit, is, we think, too clear to warrant us in speculating on the legislative intention. It is, moreover, obvious that if it had been the intention of the Legislature that the issuing of a commission should be at the discretion of the bishop, nothing would have been easier than to say so, as has been done in the Public Worship Act. By placing the words "if he think fit" in an earlier part of the sentence, immediately after the words "it shall be lawful," all ambiguity would have been removed. We proceed to consider the purpose of the statute as a whole. On the purview of it, especially when looked at by the light of the report of the Ecclesiastical Courts Commissioners, which preceded it, and of the preamble, which is confined to the recital that "the manner of proceeding in causes for the correction of clerks required amendment," it appears plain that it has reference, not to the substantive law, but simply to the procedure applicable to a suit against a clerk in orders for an ecclesiastical offence. It leaves the law as to what shall constitute an offence under that law as it stood before. It nowhere professes to abridge or interfere with any existing right of instituting proceedings against a clerk in orders for an ecclesiastical offence. It is the method of proceeding alone with which the statute deals. Thus, by the effect of the 23rd section, it takes from the bishop the power of instituting proceedings by way of inquisition, as was held in the *Dean of York's case* (2 Q. B. 1), and make it necessary for the bishop, if he desires to prosecute *ex mero officio*, either to issue a commission under sect. 3, if he desires to prosecute the suit in his own court, or to send the cause in the first instance to the metropolitan court by letters of request under sect. 13. And whereas, in a penal suit instituted by a party promoting the office of the judge, leave to promote the office must first have been applied for and obtained in the court of the bishop, and, leave to promote the office of the judge having been obtained, articles would have been at once exhibited and the suit proceeded with—a matter generally involving much expense, and sometimes the vexatious harassment of the defendant—the statute, on an accusation of an ecclesiastical offence being brought forward, requires a complaint to be addressed to the bishop himself, and, except in the case just put, where the bishop thinks proper to exercise the power vested in him by the 13th section, and, dispensing with any preliminary inquiry, sends the cause at once by letters of request to the court of the province,

interposes, before the suit can be further prosecuted, a preliminary inquiry as to the facts by means of a commission, on whose report whether a *prima facie* case for further proceedings has been made out it depends whether the suit shall proceed—an institution analogous to the finding of a grand jury on a bill of indictment. In other respects, when the commissioners have reported that there is *prima facie* ground for further proceedings, the jurisdiction of the bishop remains very much as it was before, except that he may have to exercise the functions of a judge himself, instead of the cause being tried before his appointed judge. If the party admits the truth of the articles, the bishop, or his commissary appointed for the purpose, may at once pronounce sentence. If the facts are denied, the bishop can either try the cause himself, with the assistance of three assessors specially qualified under the Act, and himself determine it, this mode of trial being substituted for the trial in the diocesan court by the bishop's judge; or, the bishop, as he might have done before, on a suit being instituted in his own court, may send the suit by letters of request to the metropolitan court. In all this there is manifestly nothing which affects the right to institute proceedings, though the mode of initiating the suit is changed, and the party desirous of prosecuting a clerk in orders for an ecclesiastical offence, instead of obtaining leave to promote the office of the judge, must now prefer a complaint to the bishop, and, unless the bishop thinks proper to send the case at once to the provincial court, must abide by the report of a commission as to whether the suit shall be proceeded with. But, subject to this, the statute does not profess to deal with the right to prefer a charge against a clerk in orders, if the offence charged amounts to an offence against the ecclesiastical law; and it therefore becomes material to consider how the law stood in respect of the right of instituting proceedings against a clerk in orders prior to the passing of the statute. Two conflicting views have been pressed upon us: the one that though, in order to promote the office of the judge, it was necessary to obtain leave of the court, yet that this was, practically speaking, merely matter of form, and that the leave could be claimed as of right, provided the offence proposed to be prosecuted was one of ecclesiastical cognisance, and the promoter was of ability to pay costs if defeated in the suit. On the other hand, it was contended that to allow the office of the judge to be promoted was not matter of form, but one on which the judgment of the judge had to be exercised; from which it was argued that, in the present statute, it must have been intended to leave a like discretion to the bishop. In support of the first proposition, the old authorities, Conset and Oughton, are cited. Thus, Conset ("Practice," part 7, c. 2) says: "If any hath committed any crime (whereof the Spiritual Courts have cognizance) and is not detected, denounced, or presented for the same, or if the bishop or archdeacon have not proceeded against him by way of inquisition, yet any person (who offers himself ready to pay the party to be convened his charges, if he doth not prove the matters objected) hath interest voluntarily to implore and promote the office of the judge, and may call the delinquent to answer articles, and may administer articles to him when he appears, in the name of the judge, and of his office promoted, and may



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accus the delinquent." So Oughton, following Consist. says ("Ordo Judiciorum," tit. 150):—" (1) Si quis crimen, ad fori ecclesiastici cognitionem spectans, commiserit, et de eodem non fuerit detectus, denunciatus, vel presentatus, vel Episcopus, vel Archidiaconus non processerit contra eum per inquisitionem; quilibet tamen persona (si fuerit solvendo expensas parti conveniendæ, si objecta non probaverit) habet interesse (quoniam Reipublicæ interest ut delicta puniantur) et Judicis officium implorare, et voluntarie promovere; et delinquentem, ad respondendum articulis, ex officio Judicis promoti, ministratus, in just vocare potest, et parti comparenti articulos (nomine Judicis, et ex ejus officio promoti) objicere, et ministrare, et delinquentum accusare." That this principle continued to be acted on appears from several dicta of ecclesiastical judges. In *Argar v. Holdsworth* (2 Cases temp. Lee, 515) Sir George Lee says: "A clergyman may be prosecuted by anyone for neglect of his clerical duty." In the case of *Procurator-General v. Stone* (1 "Consist." 424) Sir William Scott says: "This is a prosecution originating in a citation in the name of the Bishop of London, though the bishop might be personally ignorant of the existence of such suit. It is the constant style of the court; and it is not in the power of the bishop by any intervention on his part to refuse the process of the court to any one desirous to avail himself of it in a proper manner." In *Turner v. Meyers* (1 "Consist." 414) the same learned judge had said: "The criminal suit is open to every one; the civil suit to any one showing an interest." These dicta were, however, only incidentally made, and were not necessary to the decision of the cases in which they were pronounced. What was said by Sir John Nicholl in *Carr v. Marsh* (2 Phill. R. 198, 204) is more directly to the point. The suit being *in personam*, in which the office of the judge was promoted, against a clergyman, for officiating in a chapel licensed by the bishop, but without the consent of the incumbent of the parish, it was urged that, the defendant having acted with the sanction and approbation of the bishop, the promoter ought not to be allowed to promote the office of the judge in the bishop's own court. Sir John Nicholl, however, says: "It is said that there is a discretion in this case, and that the court should not allow the office of the judge to be promoted in such a cause. But the cause must be tried before we arrive at this conclusion, otherwise we enter on the merits prematurely. Application is always made to the judge before a citation issues in a cause in which the office is promoted; but that is not for the purposes of considering the merits of the case, but from the nature of the suit, whether it be of ecclesiastical cognisance or the fitness of the person to be made responsible for costs to the other party. But dicta of an opposite tendency are brought forward on the other side. Thus, in *Maidman v. Malpas* (1 Consist. 205, 209), Sir William Scott, speaking of a suit in which the office of the judge is promoted, says: "The leave of the court should be first obtained, since it is a part of the ecclesiastical jurisdiction which is not to be exercised without discretion or to be left entirely to the judgment or passions of private persons." In *Lee v. Mathews* (3 Hagg. Eccl. R. 169), which was a case of brawling in a vestry, Sir John Nicholl certainly uses language which

tends to show that it is in the discretion of the judge in certain cases to allow his office to be promoted or not as he may think right. "This being," he says, "a case of office, the whole transaction should have been fairly and candidly stated at once in order that the judge might have an opportunity of considering whether both parties being involved in *part delicto* be ought to allow his office to be promoted." "Had all the facts appeared in the articles," he continues, "I doubt whether, considering that the promoter is not a disinterested officer of the parish proceeding in his official capacity, *ob publicam vindictam*, but a private individual proceeding for an offence committed against himself, I should have allowed the case to have gone on." It is, however, here to be observed that this by no means shows that if the suit had been promoted by a proper party and *in publicam vindictam* the office of the judge could have been properly withheld. The language of the same learned judge in *Carr v. Marsh* would lead us to think that under such circumstances the permission to promote the office of the judge would have been granted as of course. In *Sherwood v. Ray* (1 Moore P. C. 353), in a civil suit instituted by a father to annul the marriage of his daughter as incestuous, and which came before the Judicial Committee on appeal, the objection having been urged that the father had no civil interest to enable him to maintain the suit, Parke, B. in delivering the judgment of the court, of which Sir J. Nicholl had been a member, as a ground for holding that the possibility of having to support the offspring, if legitimate, under 43 Eliz. c. 2, was a sufficient interest to entitle him to sue, observes that "this may be the only form in which any individual can question the marriage as matter of right." "For," says the learned judge, "to promote the office of judge in a criminal suit requires the authority and consent of the court; and though this is obtained without difficulty in ordinary practice, it cannot be demanded *ex debito justitiæ*." But it is here to be observed that this was not the point to be determined in the cause, nor had it been adverted to in the argument, but appears to have been resorted to by the court as a technical, certainly not being a substantial, ground for holding that the very remote possibility of having to maintain the issue, if legitimate, furnished a sufficient interest to sue to annul the marriage. Though, technically speaking, it might be true that the office of the judge could not be claimed as of right *ex debito justitiæ*, no one can doubt that it would have been allowed as of course to a father seeking to set aside the incestuous marriage of his daughter. Moreover, one is at a loss to see how the absence of a right to sue criminally could be any reason for holding that the party had a civil interest entitling him to sue. Lastly, in *Elphinstone v. Purchas* (L. Rep. 3 P. C. 245, 254), also a case before the Judicial Committee, it is said by Sir Robert Phillimore, in delivering the judgment of the court: "It was decided by their Lordships in the case of *Sherwood v. Ray*, which was one of great importance, and very carefully considered by the eminent judges who sat upon it, among whom was Sir John Nicholl—perfectly acquainted with the practice of the Ecclesiastical Courts—that the promotion of the office of the judge, though generally permitted as a matter of course, cannot be demanded *ex debito justitiæ*."



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There is here, we cannot help thinking, some mistake. As has been observed, the point was not decided in *Sherwood v. Ray*, it was only thrown in by way of argument; but the language of Sir Robert Phillimore shows that he—himself an eminent authority—and the other members of the Judicial Committee who sat in *Elphinstone v. Purchas*, took the same view of the question as had been incidentally expressed in the former case. Looking to these authorities, it appears to us that neither of the conflicting propositions thus put forward is tenable to the full extent to which it has been urged. The result of the authorities as to the former law appears clearly to be that although, as may be gathered from *Maidman v. Malpas* and other cases, it was necessary for a party desirous of proceeding in a penal suit in an Ecclesiastical Court to obtain leave to promote the office of the judge, yet if the charge involved an offence against the ecclesiastical law, and there was no reason for doubting the *bona fides* of the complainant, and the complainant was a proper person to institute the suit, and of ability to pay costs if he failed in it, the leave was never withheld, but, on the contrary, was always granted as a matter of course—we had almost said of right—without any precognition of the case as to its intrinsic merits, or reference to the position of the accuser, whether parishioner or otherwise, beyond his fitness to carry on the suit. Theoretically it may be correct to say that leave to promote the office of the judge could not be claimed *ex debito iustitiæ*, and that if it had been refused the party would have been without redress—at all events, so far as the remedy by *mandamus* was concerned. But it is, nevertheless, plain that to refuse it, except in very special cases, would have been a denial of justice, to which we may presume that no ecclesiastical judge would have been a party. This being so, we do not feel warranted in assuming, in the absence of positive enactment, that, in transferring the jurisdiction of the Ecclesiastical Court to the bishop, the Legislature can have intended to place a party desirous of prosecuting a clerical offence in a less advantageous position than he would have been in before the statute. We find nothing in the provisions of the statute which has or, so far as appears, can have been intended to have the effect of taking away the right of instituting a suit against a clerk in orders where it existed previously, all that the statute does being to alter the mode of proceeding. Instead of obtaining leave to promote the office of the judge from the bishop's court, the prosecutor must now apply directly to the bishop, who, under the terms of the 3rd section, would have to see, as the judge had before, that the complaint involved an offence of ecclesiastical cognisance, it being to such only that the enactment applies. But with this limitation we see nothing that alters or affects the right of a party desirous to prosecute, or which debars him from calling upon the bishop, thus substituted for the judge, to set the law in motion by either issuing a commission under the 3rd section or at once sending the complainant to the court of the province under the 13th section. It is difficult to suppose that if the intention of the Legislature had been so to modify the right of a party desirous to prosecute as to make it contingent on the will of the bishop, it would not have said so in clear and unambiguous terms. Of

course nothing would have been easier than to do this. The transposition of the words "if he shall think fit" in the 3rd section so as to make them govern the whole instead of prefixing them to the action of the bishop *ex proprio motu*, would obviously have had that effect, whereas their present collocation leads strongly to the opposite conclusion. But we are invited to follow the history and origin of this legislation in order the better to apprehend the meaning and intention of the enactment in question. It is true that the Ecclesiastical Courts Commissioners, in their report of 1832, having pointed out the evil of the great delays and expenses attendant on the prosecution of penal suits in the Ecclesiastical Courts, and which had been strikingly exemplified in certain recent suits which had caused considerable scandal, recommended that the proceedings in the prosecution of offences against clerks in orders should be transferred to the bishop. But they further proposed as part of their scheme, as a protection against vexatious suits, that there should be a preliminary inquiry on oath before the bishop, with a view to his allowing or disallowing the suit to proceed, with, in case of his disallowing it, an appeal to the archbishop. The first part of this recommendation was adopted, but not the remainder. It was not till some years afterwards that—in 1840—the Government carried through Parliament the Church Discipline Act, in which, for the preliminary hearing before the bishop recommended by the commissioners, was substituted, the commission to be appointed under sect. 3, by whose report the bishop, except where he chose at once to institute proceedings by letters of request, was to be guided as to allowing the suit to proceed. We see nothing in the circumstances under which this statute was passed to lead us to think that it was intended to do more than to afford the accused clerk the protection of the preliminary inquiry by the commission. For the discretion proposed by the report of the Ecclesiastical Commissioners—to be given to the bishop to be exercised, it must be remembered, after inquiry on oath—was substituted the inquiry by the commission, upon whose decision the further prosecution of the suit was to depend. It is also, perhaps, not altogether beside the question to observe that the suits to which the commissioners were referring were for the most part suits against clergymen for immorality. The movement in the Church with respect to doctrine and ritual of a Roman Catholic tendency had not then as yet arisen, and it may well be doubted whether, if that movement could have been foreseen, the Legislature would have placed any additional restraint on the right of parishioners to bring innovations of such a nature to the test of legal decision. Far, therefore, from affording any proof of the intention of the Legislature to give an absolute and unfettered discretion to the bishop, the prior state of the law and the origin of the statute have rather a contrary tendency. But, instead of speculating on the legislative intention by reference to extraneous circumstances, we think it safer to found our view on the internal evidence afforded by the statute itself. Now, finding nothing in the enactments or language of the 3rd section or other parts of the Church Discipline Act which should have the effect of controlling or qualifying the words "it shall be lawful," but, on the contrary, finding the language of the section pointing, as it seems to us,

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the other way, we can see no ground which would justify us in giving to those words any other than the meaning which the established canon of construction had ascribed to them. With this rule before us, we do not deem ourselves called upon to enter into the subject of the inconveniences on which the Lord Bishop dwelt in his argument as likely to result from withholding from a bishop the free exercise of his discretion. These considerations, if well founded, might be well worthy the attention of the Legislature, but they cannot prevail against the Act as it stands. Moreover, it might be thought that any such inconveniences would be outweighed by the object to which so much legislation has been directed—namely, the maintenance of uniformity of doctrine and ritual in the Church. It should be observed that this construction of the statute will not take from the bishop the discretion which the judge previously exercised of judging whether the facts complained of constitute an ecclesiastical offence or not. For, as we have said, it is only to complaints of such offences that the Act relates; and the constitution of the commission, one member of which must be the bishop's officer, and the rest are to be of his own selection, will insure a careful consideration of the case, and protect clergymen against frivolous and vexatious charges. When it is said on the part of the bishop that if he is not invested with the discretionary power for which he contends he must issue a commission in every case in which it is applied for, no matter how frivolous or vexatious the proceeding may be, the answer is that no such consequence will follow; for if the application be of the character alluded to, this court, in the exercise of its discretion, would refuse to issue a *mandamus*. And that this court has the right to exercise such discretion cannot be doubted. (See *Res v. The Bishop of Chester*, 1, T. R. Rep. 396-403, and *Reg. v. The Bishop of Chichester*, 2 E. & E. 209-223). On the whole, therefore, the only conclusion at which we can arrive is that a duty is here cast upon the bishop, where complaint is made of that which constitutes in a clerk in orders an offence against the ecclesiastical law, of issuing a commission, unless he thinks proper—and herein he undoubtedly has a discretion—to send the case at once by letters of request to the provincial court. The view we take of the enactment in question is confirmed by the opinion of the late Dr. Lushington, we need not say a great authority in all matters of ecclesiastical law. His opinion on this point appears from a report of a case of *Ditcher v. Denison*, a proceeding against the Dean of Taunton, in which Dr. Lushington acted as assessor to the Archbishop of Canterbury, and which was cited by Dr. Stephens on an application to this court for a *mandamus* to the Bishop of London in the case of Mr. Bennett. Referring to the 3rd section of the Act, Dr. Lushington there says: "It is perfectly clear that if a bishop under this statute thinks fit, he has a discretion which he is entitled to exercise whether he will himself of his own mere motion direct proceedings to be commenced. It is not so with reference to an application made to the bishop, and for various reasons. If it were so, the ancient law of the Church would have been subverted by this statute, which there was no intention to do." Having cited the judgments of Lord Stowell and Sir John Nicholl with respect to the former state of the law, Dr. Lushington pro-

ceeds: "What would be the consequence, if the archbishop or bishop had a purely discretionary power to order the commencement of the proceedings according to his own judgment, or, I might also say, according to his fancy? Why, in every bishopric within a province or within the whole kingdom of England, it would rest entirely in the power of a single bishop either to permit a prosecution against any ecclesiastic for any alleged unsound doctrine or immoral conduct, or, according to his own mere opinion, he might prevent any discussion taking place and any charge, however serious, from being considered. The consequences of which would be that the uniformity which now happily prevails among the clergy of this country would be destroyed or subverted." In this view we entirely concur, and it is materially confirmed by the fact that the uniformity on which Dr. Lushington congratulated his hearers has unhappily ceased to exist. If the construction contended for by the bishop should prevail, looking at the wide differences of opinion prevailing among the clergy in reference to rites and ceremonies, it might well be that in a short time uniformity in the realm might disappear, and diocesan uniformity take its place, which again would be liable to vary with each succeeding ordinary. Whereas, if the law is to be enforced, any doubtful or disputed question of doctrine or ritual may be brought to the test of legal decision, if necessary by the appellate tribunal in the last resort. This being, in our opinion, the construction to be put on the Act of 1840, the question already adverted to presents itself, whether this statute has not been virtually abrogated by the Act of 1874, commonly called the Public Worship Regulation Act, the two statutes being *in pari materia*, and apparently inconsistent with one another. That the two statutes are *in pari materia* as regards offences relating to ritual is clear. Both were passed for the purpose of establishing a new method of proceeding in the trial of offences committed by clergymen in substitution for the previously existing procedure; the only difference in this respect being that, while the earlier Act refers to "any offence against the laws ecclesiastical" committed by any clerk in holy orders, the later statute enumerates the particular offences to which it is applicable—viz., "firstly, where any alteration in, or addition to, the fabrics, ornaments, or furniture of a church without lawful authority, or any desecration forbidden by law, has been introduced into it; secondly, where the incumbent has within the preceding twelve months used or permitted to be used in a church or burial-ground any unlawful ornament of the minister of the church, or neglected to use any prescribed ornament or vesture; or, thirdly, where the incumbent has failed to observe, or to cause to be observed, the directions contained in the Book of Common Prayer relating to the performance, in such church or burial-ground, of the services, rites, and ceremonies ordered by the said book, or has made, or permitted to be made, any unlawful addition to, alteration of, or omission from such services, rites, and ceremonies." It is, therefore, plain that, so far as relates to offences committed in the observance of the established ritual, both statutes apply to the offences which form the subject-matter of the complaint in the present instance. If the enactments of the two statutes are inconsistent, the rule would apply that where two statutes are

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*in pari materia*, and their enactments cannot stand together, the later statute shall prevail, as being the later exponent of the legislative will. Now when we turn to the later statute we find an entirely new and different system and scheme of proceeding. Though the charge is still to be addressed to the bishop in the form of a representation, it can no longer, unless when it is preferred by the archdeacon or a churchwarden, be made by a single individual, whether a parishioner or not, but requires the concurrence of three parishioners, or, in case of cathedral or collegiate churches, of three inhabitants of the diocese. The commission of inquiry, which was at once the creation and the distinctive feature of the Act of 1840, is entirely superseded, while an absolute discretion is given to the bishop, who is required to further the suit in the manner prescribed by the Act, "unless he shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation;" in which case he is to state in writing the reasons for his opinion, which statement is to be deposited in the registry of the diocese, apparently without any ulterior consequences, thus making the bishop the sole judge and arbiter whether the suit shall proceed, not merely with reference to the nature of the offence charged, or the facts on which the charge may be founded, but enabling him to take into account collateral circumstances, in themselves affording no answer to the accusation, or satisfaction to the parishioners complaining that the public worship is conducted otherwise than according to the ritual of the Church as by law established. It seems at first sight difficult to conceive, in the face of so entire a change in the system of proceeding, that the Legislature can have intended that the two statutes should stand together and the two modes of proceeding remain equally open to parties desirous of prosecuting such a suit, or that while three parishioners are needed under the later Act to set the bishop in motion, who then has an arbitrary discretion to determine whether the suit shall proceed or not, under the earlier Act it shall still remain open to a single individual, whether parishioner or not, to compel the bishop, however unwilling, to put the statutory process in motion. We should therefore have been disposed to hold, with reference to the rule just referred to, that the earlier statute was virtually repealed, and, consequently, that it was not open to the complainant to insist on its application in the present instance. But we are met by the positive enactment contained in the 5th section of the later statute, "that nothing in this Act contained, except as herein expressly provided, shall be construed to affect or repeal any jurisdiction which may now be in force for the due administration of ecclesiastical law." Now, not only was the jurisdiction given by the Church Discipline Act in force when the Public Worship Act passed, but, with the exception of the appellate jurisdiction of the Judicial Committee of the Privy Council in ecclesiastical suits, to which this saving provision can scarcely have been intended to apply, it was the only jurisdiction in penal matters then in force. And the 18th section of the later statute is conclusive, for it expressly provides that where sentence has been pronounced against an incumbent for an offence under the Act of 3 & 4 Vict. c. 86, he shall not be proceeded against under this Act, and where any judgment

has been so pronounced under this Act, he shall not be liable to be proceeded against under the former statute, thereby conclusively indicating that an offence within the Public Worship Act may still be proceeded against under the earlier statute. This apparently conflicting legislation may, however, be reconciled. The purpose and effect of it appears to be this: The proceeding by commission and the cumbrous procedure by articles in a formal suit being deemed too dilatory in cases of flagrant ritualistic excesses, a more expeditious mode of proceeding and a simpler procedure were made available, subject, however, to more rigorous conditions. If the more expeditious process of the Public Worship Act, in which preliminary inquiry is dispensed with, is invoked, the stricter conditions of the Act as to the number of the complainants and their subjection to the absolute discretion of the Bishop must be complied with. But it still remains open to a party who is willing to adopt the more elaborate process to claim under the former Act the remedy which it affords. All that remains to be considered is whether, the writ of *mandamus* being a discretionary writ, we should, in the exercise of the discretion which we are undoubtedly at liberty to exercise, decline to issue the writ in this instance. We cannot but be sensible of the apparent incongruity which is involved in the interference of a temporal court between a bishop and one of his clergy, in a matter of ecclesiastical discipline. But it must be remembered that there is a third element in the case which must not be lost sight of. In these questions of doctrine or ritual the laity are interested, and deeply interested, as well as the clergy. As an institution endowed and maintained by the State, the Church exists for the benefit of the laity. It is the right of the latter, being members of the Church, to take part, under the ministration of the clergy, in the public worship, as well as to have the benefit of the various rites and services of the Church, according to the ritual of the Church as by law ascertained and established. One of their most sacred and valued rights is infringed when they are driven to abandon their churches by the introduction of a ritual which is not that of the Church, and which appears to them to be an advance towards a religion which is not that of the Reformation. It is unnecessary to express any opinion as to the decision which was come to in this respect by this court in the case of *Reg. v. Bishop of Chichester*, further than that, as it must be taken to be clear that prior to the passing of the Church Discipline Act a stranger would have had no difficulty in obtaining permission to promote the office of the judge in such a suit, as one of the public, in a matter of so much concern to the community as the maintenance of the public worship of the Church as by law established, if the case of a stranger applying for a *mandamus* should again occur, we might think it necessary to reconsider the matter before we should be prepared to follow the precedent set in that case. But in this case we have no such difficulty as there presented itself. We have here a parishioner, who, as such, has an undoubted right to have the services of the Church performed in the church of the parish to which he belongs, according to the law of the Church as established by the rubric, the canons, and the Acts of Uniformity, complaining that by reason of unlawful practices introduced into the Com-

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munion service, his religious sense is so offended that he cannot conscientiously take part in the administration of the Sacrament and demanding inquiry. There cannot be a doubt that a person so circumstanced would, prior to the Church Discipline Act, have been admitted to prosecute as of right, or that his application to promote the office of the judge, the *bona fides* and substantial character of his complaint not being open to doubt, would have been granted as matter of course. We are of opinion that under such circumstances we have no alternative but to grant the writ. It would be a very different thing if the bishop had declined to grant a commission on the ground that the complaint was frivolous and vexatious, or that it had been prompted by sinister or unworthy motives. Under such circumstances we should have felt ourselves justified in refusing the writ; but nothing of the kind exists here. It is admitted that there has been such a substantial departure by the incumbent from the established ritual as amounts to an offence against the ecclesiastical law. It is not denied that the practices complained of were such as might give offence to the religious conscience of a member of the Established Church, and deter him from partaking in the service of the Communion when thus administered. The refusal of the commission by the bishop was founded, not on the nature of the complaint, or the claim of the applicant to redress, but on collateral and extraneous circumstances which do not alter or affect the offence, but are founded on considerations of expediency, or such as have reference to the person of the party against whom the application is made. Now, not only do we think that, on the construction of the statute, the bishop had no discretion in this matter, but we are further of opinion that the purpose of this legislation being to maintain uniformity of doctrine and ritual, and it being the right of the parishioners to have the services of the church performed according to the law of the Church, even if the bishop had discretionary authority in such a case, he ought, having here a judicial, or, at all events, a *quasi-judicial* duty to discharge, to have used it to allow an inquiry to take place. We do not think, therefore, that we should be justified as matter of discretion in withholding the writ. But it was suggested that the Public Worship Act having made the concurrence of three parishioners necessary to found a complaint to the bishop, we ought not, in the exercise of our discretion, to give effect by *mandamus* to the complaint of one. But the obvious answer is that if the Legislature had intended that any change in this respect should be made in the Church Discipline Act, which it advisedly keeps alive, it could have introduced such a provision in the later Act. If it was incumbent on the bishop to entertain the complaint on the application of a single parishioner—and we think he had no discretion in the matter—it cannot be open to us as a matter of discretion to withhold the redress which the applicant seeks at our hands. The rule for a *mandamus* to the bishop to issue a commission, or send the case at once to the Court of Arches by letters of request, must therefore be made absolute.

*Judgment for applicant.*

Solicitors for applicant, *Moore and Currey.*

Solicitors for Mr. Carter, Brooks, Tanner, and Jenkins.

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

Jan. 31, Feb. 1, 3, 5, and 11.

#### THE MARATHON.

(Before Sir R. PHILLIMORE and TRINITY MASTERS. (a))  
*Damage to cargo—Parties—Indorsees of bill of lading—Seaworthiness—Peculiar construction of ship—Stowage—Dunnage—Trinity Masters—Evidence of, as to report—18 & 19 Vict. c. 111, s. 2—24 Vict. c. 10, s. 6.*

*The ordinary warranty as to seaworthiness in a bill of lading is a warranty that the ship is seaworthy at the time, and reasonably likely to continue seaworthy on the voyage specified. If from special circumstances in her construction she requires special appliances to preserve the cargo from sea damage, the owner is bound to provide those appliances, and will be liable for damage to cargo arising from the want of them.*

*Steele v. State Line Steamship Company (3 App. Cas. 72; 37 L. T. Rep. N. S. 333) followed.*

*Where Trinity Masters are desired to inspect and report to the court, their report is not necessarily confined to those matters on which evidence has been given, but may include any circumstance in their opinion affecting the merits of the case.*

*An indorsee of a bill of lading has a right to sue for damage to the cargo arising from a breach of the contract contained in the bill of lading under the Bills of Lading Act 1856 (18 & 19 Vict. c. 111), and in the case of a foreign vessel to take proceedings in rem under the Admiralty Court Act 1861 (24 Vict. c. 10), though at the time of the institution of the suit he has sold the cargo.*

THIS was an action for damage to cargo. The original plaintiffs in the cause were D. and W. Murray, who were indorsees of the bills of lading of the cargo. At the trial, on the application of the plaintiffs, Holmes, who had purchased the cargo from the original plaintiffs as a damaged cargo before action brought, was added as a plaintiff.

The cargo, consisting of chopped and ground bark, was shipped at Adelaide on board the American ship *Marathon* by H. Wilke and Co., the vessel being chartered by her master on behalf of the owners to H. Wilke and Co. The charter-party guaranteed "that the vessel was classed A 1½," and contained the following stipulations, that

Being tight, staunch, and strong, with masts and rigging in good order, and every way well fitted and equipped for the voyage, and so to be maintained by the owners or their agents while under this charter, should load a full and complete cargo of ground bark in bags, with sufficient loose chopped bark for broken stowage amongst ground bark only . . . and being so laden and dunnaged in accordance with Lloyd's rules, shall proceed to Falmouth or Cork for orders to proceed to any one safe port in the United Kingdom, and there discharge . . . as ordered by the charterers or their agents . . . The cargo to be stowed at ship's expense; dunnage to be provided by the ship, and laid to the satisfaction of the charterers . . . The captain to sign bills of lading for cargo as presented at any rate of freight required by charterers or their agents . . . The ship guarantees to pass survey to the Adelaide Underwriters' Association, and to produce their surveyor's certificate of survey to the charterers or their agents before giving notice of being ready to load.

The captain signed two sets of bills of lading,

(a) Reported by J. P. ASPINALL and F. W. BAILES, Esqrs., Barristers-at-Law.

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of which the material parts of the first are as follows :

Shipped in good order and condition by H. Wilke and Co., on board the good ship *Marathon* . . . bound for a port in the United Kingdom, calling at Cork or Falmouth for orders as per charter-party, 2774 bags ground bark, and 384 bags chopped bark (used as broken stowage), being marked and numbered as in the margin, and to be delivered (subject to the exceptions and stipulations herein-after mentioned) in the like good order and condition . . . to order or to his or their assigns . . . The following are the exceptions and stipulations referred to . . . neglect or default of the pilots, masters, or crew in the navigation of the ship and all and every the dangers and accidents of the seas or rivers and navigation of whatever nature or kind are excepted. The ship is not liable for . . . loss or damage arising from vermin, heat, sweat, leakage, breakage, rust, or decay of contents or packages unless occasioned by improper stowage . . . weight, quantity, and contents unknown. . . . Several bags stained.

The second set were in precisely the same words, only differing as to the quantities and marks of the bark shipped, and the concluding clause was "Weight, quality, and contents unknown." It appeared that there were peculiarities in the construction of the ship, she having a main deck which had been caulked some years previously, and that the upper deck had been in part laid some time after the ship was built, and at a different level from the original deck, there being a vertical bulkhead at the point of junction; the extremities of the vessel having originally been occupied by deck houses, and that there were no scuppers in the main deck. Bark was stowed between decks without any dunnage, a certain amount of loose chopped bark being used to fill up between the bags. The lower hold was dunnaged in the bottom and wings, but the dunnage was not brought up to the main deck, so that the upper tiers of bags rested against the lodging knees in the lower hold. The level of the lower deck was only between one and two feet from the water when the ship was laden and lying on an even keel.

The ship left Adelaide on the 7th May, met with heavy weather in the early part of the voyage, arrived at Cork on 3rd Oct., left that place on 11th Oct., and arrived at Hull on 23rd Oct. The cargo, on discharge, was found much damaged by sea water.

On the arrival of the ship at Cork, Messrs. Murray, who were the holders of the bills of lading, sold the cargo to Messrs. Holmes. Messrs. Holmes, on ascertaining the condition of the cargo, refused to take the delivery of it. The contract of sale was thereupon cancelled, and a new contract entered into on 14th Nov., by which Messrs. Holmes agreed to take it at 6*l.* per ton for sound, and 3*l.* per ton for damaged bark.

The writ was issued by Messrs. Murray on 20th Nov. 1878.

The case was heard on 31st Jan. and 1st, 3rd, and 5th Feb. A great deal of evidence was produced, both as to the construction of the ship and the stowage of the cargo, and it was proved that Messrs. Murray were agents and consignees of Messrs. Wilkie, and that Messrs. Wilkie had drawn on them against this cargo.

After the close of the evidence, it was desired by the court that the Trinity Masters should inspect the construction of the ship, and accordingly the argument was deferred. The Trinity Masters made a report to the court as follows :

Trinity House, 8th Feb. 1879.  
We have carefully compared the evidence in the case of the American barque *Marathon*, and we have come to the conclusion that the lower hold appears to have been fairly dunnaged ; but altogether wanting in the 'tween decks, in which there should have been scuppers. She is a badly fastened ship, leaking much in her topsides, waterway seams, deck, and generally, which, when she strained in bad weather, admitted large quantities of water, which, falling on the upper part of the lodging knees, poured over them into the hold beyond the inner surface of the dunnage, damaging the cargo.

In bad weather the pumps appear to have been properly attended to ; but nothing could remedy the want proper and adequate fastening.

Much water must also have found its way between decks from the bulkhead in the break, when she pitched heavily, and, as the master stated, shipped large quantities of water forward. As a proof how much she strained, the oakum about the stem, bows, and also under the counter, had worked out as stated by the seaman of the *Marathon*, who thrust his knife right into one of the seams.

This could not have happened had she been properly fastened.

Feb. 11.—*Butt, Q.C.* and *E. C. Clarkson* for the plaintiffs.—The ship was improperly constructed to carry this particular cargo stowed in the way it was stowed :

*Kopitoff v. Wilson*, 1 Q. B. Div. 377 ; 34 L. T. Rep. N. S. 677 ;

*Steele v. State Line Steamship Company*, 3 App. Cas. 72 ; 36 L. T. Rep. N. S. 333.

The exception of "negligent navigation" in the bill of lading does not include "bad stowage." The effect of inserting the exception may be to shift the onus of proof as to how the damage arose :

*The Helena, Br. & Lush*, 429 ; L. Rep. 1 P. C. 231 ; 14 L. T. Rep. N. S. 873 ;

*Cscek v. General Steam Navigation Company*, L. Rep. 3 C. P. 14 ; 17 L. T. Rep. N. S. 246.

We have satisfied that onus of proof independently of the report of the Trinity Masters, and have shown that the ship was herself defective when she was warranted seaworthy, and also that the cargo was improperly stowed. What the amount of damage is which we have sustained by reason of these defects and negligence is for the registrar and merchants.

*Webster, Q.C.*, and *Dr. W. G. F. Phillimore*.—The only issue in the case is, whether the damage was sustained in consequence of the ship not being properly dunnaged, or by the construction of the ship, so far as the plaintiffs can avail themselves of any peculiarity in it. As to the report of the Trinity Masters, the plaintiffs cannot help their case by that. It was not the case they have attempted to prove, that the fastenings of the ship were weak, they had themselves examined the ship and made no complaint of the fastenings. The report of the Trinity Masters should have been confined to the matters pleaded and in issue, and the court will only decide the case on the evidence which has been given, and the report of the Trinity Masters, so far as it affects that evidence. But apart altogether from this question, the plaintiffs here have no right of action. Murray is merely an intermediate indorsee of the bills of lading, and, having parted with the cargo by sale to Holmes on the 14th Nov., had divested himself of any such property in the bills of lading or goods as might give him a right to sue under the Bills of Lading Act or Admiralty Court Act, before the action was commenced on the 20th Nov. The other plaintiff, Holmes, bought the cargo as a damaged

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cargo, and therefore, having knowledge and notice of the damage, is not in any way damaged by the fact of the cargo being damaged. Wilkie, the shipper, is the only person who can really recover from the shipowner. Before the passing of the Admiralty Court Act 1861 (24 Vict. c. 10) Wilkie was the only person who could have sued at all. Murray's right is only under the statute, and therefore only as owner or agent of the owner of the cargo:

*The St. Cloud*, Br. & L. 4; 8 L. T. Rep. N. S. 54.

A bare assignee cannot sue; but here the plaintiffs are neither assignees, consignees, nor owners within the meaning of the Act. Wilkie, the shipper, cannot be joined as a plaintiff without his consent (Sup. Court of Jud. Act 1875, Order XVI., rule 13). The property had passed to Holmes before the action was brought, by the transfer to him of the documents of title:

*The North of England Pure Oil Cakes Company v. The Archangel Maritime Insurance Company*, L. Rep. 10 Q. B. 249; 32 L. T. Rep. N. S. 561.

Holmes cannot sue as trustee for Murray; the case does not come under the exception to the general rule in *Powles v. Innes* (11 M. & W. 10).

*Butt*, Q.C. and *H. C. Clarkson* in reply.—A right of action having once vested in Murray, it cannot be divested except by a release under seal or something in accord and satisfaction. Murray had a cause of action under the Bills of Lading Act and Admiralty Court Act vested in him on the 4th Nov., and the fact that he sold the cargo for what he could get for it before the 20th Nov. does not divest him of it. Indeed, if the goods were perishable, it would be his bounden duty to sell, so as not to increase the damage to the cargo. One accepting a bill of exchange against goods has sufficient property in the goods to allow him to sue under the Bill of Lading Act (18 & 19 Vict. c. 111), and the Admiralty Court Act (24 Vict. c. 10):

*The Figlia Maggiori*, L. Rep. 2 A. & E. 1086; 18 L. T. Rep. N. S. 532.

The property in the goods had not passed from Murray at the time the action was brought. It is clear that, if the contract had been for the sale of a "cargo" simply, the property in a particular cargo would not have passed, and the fact that the sale was of the "cargo *ex Marathon*," is not of itself sufficient to pass the property in this particular cargo. "Where anything remains to be done to the goods for the purpose of ascertaining the price, as by . . . testing the goods, where the price is to depend on the . . . quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted:" (Blackburn on Sales, pp. 151, 152; Benjamin on Sales, pp. 235, 236.) The plaintiff Murray has two distinct causes of action; one for the breach of contract to deliver in good order and condition, and the other for negligence in the stowage by which he has suffered damage.

Sir R. PHILLIMORE.—I consider the objections to this action being brought by the present plaintiffs invalid, on both the grounds which have been argued.

After further consultation with the Trinity

Masters, his Lordship delivered the following judgment on the merits of the case:—

Sir R. PHILLIMORE.—This case has occupied the attention of the court for some days, and I have had an ample opportunity of consulting from time to time the Elder Brethren and ascertaining their opinions upon the subjects discussed before them, and also their reasons for the conclusion at which they have arrived. Now, in all cases of this kind, the question is whether the damage to the cargo was caused by one of the excepted perils in the charter-party and bills of lading, or by the want of proper appliances on board the carrying ship. The law which is applicable to this subject is perspicuously stated by the Lord Chancellor in the case of *Steel v. The State Line Steamship Company* (3 App. Cas. 72; 37 L. T. Rep. N. S. 333), and I think I cannot do better than read it: "It is an engagement to carry and to deliver at a certain port in this kingdom the wheat so shipped. What is the meaning of the contract created by those words, supposing they stood alone? I think there cannot be any reasonable doubt entertained that this is a contract which not merely engages the shipowner to deliver the goods in the condition mentioned, but that it also contains in it a representation, and an engagement—a contract—by the shipowner that the ship on which the wheat is placed is at the time of its departure reasonably fit for accomplishing the service which the shipowner engages to perform. Reasonably fit to accomplish that service the ship cannot be unless it is seaworthy. By 'seaworthy,' my Lords, I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic. My Lords, if there were no authority upon the question, it appears to me that it would be scarcely possible to arrive at any other conclusion than that this is the meaning of the contract." The decks of the vessel in this case appear to have been of a peculiar formation, and in this respect the vessel seems to have undergone an alteration from her original structure. The cargo consisted of ground bark and chopped bark; a portion of the latter was used as dunnage. As to this I shall say a word presently. Part of this cargo was of a porous kind, and, when saturated with water, caused the ship to float so much deeper. The sweat and the steam would have been the natural consequences of the heating of the cargo, and I must take it to have been put on board in good order. It arrived in an extremely bad condition. The voyage, beginning on May 7 at Adelaide, ended on Oct. 3, at Cork, occupying, therefore, 149 days. The weather was extremely tempestuous, almost a succession of gales, until she came under the influence of the trade winds. The upper works leaked continuously, admitting large quantities of water. In the 'tween decks there was no dunnage. In the lower hold the dunnage was in quantity sufficient, but being composed of chopped bark, was bad for the purpose, acting as a sponge, conveying the water to the cargo. The Elder Brethren are decidedly of opinion that there should have been scuppers in the 'tween decks, and that the want of them was one of the causes of the damage to the cargo in the lower hold. I must here express my entire agreement with that, and also with the observation of the learned

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counsel who spoke last, that it was not competent to the carriers of this cargo to use any portion of it as dunnage. The Trinity Masters further drew my attention to what they consider a great defect in the ship, the want of proper fastenings in the deck—that is, as I understand, a sufficient number of bolts to hold the planking to the timbers. The vessel, leaking much in her topsides, admitted large quantities of water, which, falling on the upper part of the lodging knees, poured over them into the hold beyond the inner surface of the dunnage, and greatly damaged the cargo. In bad weather the pumps appear to have been properly attended to, but the Trinity Masters point out to me that this could not have remedied the want of proper and adequate fastenings. They further observe that much water must have also found its way between decks from the bulkhead in the break when she pitched heavily, and, as the master stated, shipped large quantities of water forward. They allege, as a proof how much she strained, that the oakum about the stem and bows, and also under the counter, had worked out, as stated by the seaman of the *Marathon*, who thrust his knife into one of the seams. On the whole, I am of opinion that it is proved that the damage was occasioned by the want of proper appliances on board the carrying vessel, especially the want of proper scuppers, and the imperfect and improper dunnage, as well as the inadequate fastenings. I must, therefore, refer to the registrar, assisted by merchants, to inquire into and report as to the amount of damage caused by the matters I have referred to, and I give judgment for the plaintiffs.

Solicitors for the plaintiffs, *Hollams, Son, and Coward*.

Solicitors for the defendants, *Pritchard and Sons*, agents for *A. M. Jackson*.

Tuesday, March 4.

(Before Sir R. PHILLIMORE.)

THE ENDORA. (a)

*Practice—Costs—Damages—Arrest.*

Where the holder of a bottomry bond arrests the vessel and freight on which the bond is secured before the bond is due, and the bond is paid at or before maturity, the shipowner is entitled to the costs occasioned by the proceeding, but not, in the absence of malice or gross negligence on the part of the bondholder, to damages.

THIS was a motion in an action of bottomry. The bottomry bond on ship and freight was payable seven days after the arrival of the ship in the port of London. The plaintiffs instituted the action, and arrested the ship on Feb. 25, the ship having arrived on Feb. 22.

March 1.—*Clarkson* moved the court to release the vessel without bail, and to condemn the plaintiffs in costs and damages.

*Myburgh*, for the plaintiffs, consented to the release of the vessel on the amount of the bond and interest being paid, and the rest of the motion was ordered to stand over.

*Clarkson*, for the defendants, now moved the court for costs and damages, for the unlawful arrest of the ship. There was no excuse for the

arrest; the bond was not due, and till it became due there was no cause of action. In fact, there never was a cause of action, as the money was tendered before it had arisen; the arrest was not merely premature, but altogether illegal.

*Myburgh* for the plaintiffs.—Under the circumstances we were justified in taking the steps we did. Before the arrival of the ship we had written to ask if the bond would be paid, and received no reply. Our bond was on ship and freight only; if therefore the vessel was not arrested the cargo would be discharged and the freight received by the ship, and our security diminished by that amount. The bond was for a large sum, and the ship by itself might not have realised enough to pay it:

*The Jane*, 1 Dodson 461, 464;

*The San José Primeiro*, Prit. Dig. 513.

There was no malice or gross negligence in the arrest such as to entitle the defendant to damages:

*The Strathnaver*, 1 App. Cases 58; 34 L. T. Rep. N. S. 148.

*The Evangelismos*, Swa. 376; 12 Moo. P. C. 352.

Sir ROBERT PHILLIMORE.—I do not think the circumstances are such as to entitle the defendants to damages, but they are clearly entitled to the costs of the suit.

Solicitors for the plaintiffs, *Hollams, Son, and Coward*.

Solicitors for the defendants, *Lowless and Co*.

#### COMMON PLEAS DIVISION.

Dec. 13, 1878, and March 14, 1879.

(Before LOPES, J.)

MARITIME MARINE INSURANCE COMPANY (LIMITED)  
v. FIRE RE-INSURANCE CORPORATION (LIMITED.) (a)

*Marine insurance—Fire insurance—Usage—Declaration of risks.*

The plaintiffs, a marine insurance company, entered into an agreement with the defendants, a fire re-insurance company, that the defendants should upon certain agreed terms re-insure the plaintiffs against loss by fire only by all coal-laden ships which should be insured by the plaintiffs under their policies between certain ports, so long as the agreement remained in force; and successive policies to cover the risks insured against by ships as might be declared were accordingly subscribed and issued by the defendants to the plaintiffs. It was admitted that in the case of open policies, on ships to be declared, there was a usage of merchants and underwriters that such policy attached to the goods as soon as and in the order in which they were shipped, in which order the assured was bound to declare them; and, in case of mistake, that the assured should be bound to rectify the declaration, which was sometimes done after loss.

Held, that the admitted usage with regard to marine insurances applied, although the re-insurance with the defendants was a re-insurance against fire only; it being a contract of fire insurance in respect of a marine risk.

FURTHER CONSIDERATION.

The action was tried at the Liverpool Summer Assizes 1874, and the jury being discharged without a verdict, all questions in the action were left to the decision of the learned judge.

(a) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

(a) Reported by J. A. FOOT, Esq., Barrister-at-Law.



The plaintiffs were a marine insurance company, who had agreed to re-insure themselves with the defendants against all loss or damage by fire only, in respect of such coal-laden ships as should be insured by the plaintiffs under their policies while the agreement was in force; and the action was brought to recover in respect of such an alleged loss. The facts are fully set out in the judgment.

*C. Russell, Q.C. and Myburgh* for the plaintiffs.—It is admitted that the usage stated in *Stephens v. Australasian Insurance Company* (27 L. T. Rep. N. S. 585; L. Rep. 8 C. P. 18) exists as to marine insurance generally. The risk which the plaintiffs undertake is a marine risk, it being simply an insurance of ships at and between certain specified ports. Part of this risk—i.e., so much as relates to fire—they have re-insured with the defendants. The risk undertaken by the defendants is consequently also a marine risk, it being an insurance against fire in the case of ships at sea, and the admitted usage therefore applies to the present case. It follows that the policy attached to the ships insured by the plaintiffs as soon as the risk of the plaintiffs began; and their laches in not declaring the *Hampden* does not disentitle them to recover, since the declaration can be amended or supplied after the loss. It is admitted that there was no bad faith.

*Herschell, Q.C. and Wheeler* for the defendants.—The insurance with the defendants was a fire insurance; and the usage does not apply to such cases. The policy did not attach until the declaration in each case was made; and that was not done here until after the loss. It is not contended that the plaintiffs acted in bad faith, but their negligence in not declaring must disentitle them to recover. To hold otherwise would be to open the door to fraud:

1 *Parsons on Insurance*, 519, 520.

*March 14.*—*LORES, J.* delivered the following judgment:—This case came before me for trial last Liverpool Summer Assizes. The jury were discharged by consent without a verdict, and all questions were left to my decision. The plaintiffs are a marine insurance company, carrying on business at Liverpool, and defendants are a fire re-insurance corporation. In Nov. 1876 it was agreed between the plaintiffs and defendants that the defendants should, upon certain agreed terms, re-insure the plaintiffs against loss by fire, to the extent of not more than 1000*l.* by any one vessel, upon all coal-laden ships which should be insured by the plaintiffs under their policies, at and from certain agreed ports to certain other agreed ports. In accordance with such agreement the defendants subscribed and issued to the plaintiffs a policy dated 28th Feb. 1877, whereby the defendants, in consideration of 250*l.*, undertook to guarantee or re-insure the plaintiffs against loss or damage by fire and the consequences thereof, to the extent of 50,000*l.*, by the ships or vessels, as might be declared, at and from certain ports therein mentioned to destination, the said policy to be subject to the same clauses and conditions (as far as they relate to the fire risk only) as the original policy or policies, and would pay as might be paid thereon. In the said policy it was provided that the arrangement was to be in force for one year, from the 1st Oct. 1876, and was to include only such vessels as were coal-laden. It

was also provided that the said policy was to be supplemented by further policies on like terms, should the amount thereof not prove sufficient for the year's transactions. Declarations were made on the 19th Feb. and on the 29th June, but such declarations were far in excess of the said policy. On the 9th July defendants subscribed and issued a second policy for 50,000*l.*, similar in its terms in every respect to the former policy. On the 7th June the plaintiffs insured a coal-laden ship called the *Hampden* on a voyage between the prescribed ports. The *Hampden* was lost on the 18th Sept., and the loss was posted at Lloyd's on the 24th Oct. Further declarations were made on the 10th Aug., and were in excess of the second policy. The *Hampden* was not declared either on the 29th June nor on the 10th Aug. On the 24th Oct. the plaintiffs applied to the defendants for a covering slip, which was sent to them by the defendants; and on the 25th Oct. a third policy was subscribed and issued by defendants in the same terms in all respects as the two former policies. On the 2nd Nov. the plaintiffs declared the *Hampden*, and claimed for a loss. At this time, and when the third policy was effected, the plaintiffs knew of the loss of the *Hampden*. It was admitted at the trial, and on the argument, that the plaintiffs had taken a risk of a coal cargo in respect of the *Hampden*, and that there was a loss which would be covered by the policy of re-insurance, if the plaintiffs were not debarred from attributing it to one of the said policies by reason of delay in declaring the risk. It was also undisputed that, taking the risks in chronological order, the *Hampden* did not come under either of the first two policies, which were by previous risks exhausted when the plaintiffs took the risk on the *Hampden*, but must rank under the third policy (if under any), which was effected on the 25th Oct. It was also undisputed that the plaintiffs' manager had been most negligent in not declaring the *Hampden*, but the defendants admitted that there was no want of good faith on his part nor on the part of the plaintiff company. It was also admitted that a usage in fact existed such as that in the case of *Stephens v. Australasian Insurance Company* (27 L. T. Rep. N. S. 585; L. Rep. 8 C. P. 18), to the effect that in the case of open policies, on ships to be declared, there is a usage of merchants and underwriters that this policy attaches to the goods as soon as, and in the order in which, they are shipped, in which order the assured is bound to declare them; and in case of mistake as to the order of shipment, the assured is bound to rectify the declaration, which is sometimes done after loss. The defendants, however, contended that they not being a marine insurance company, the usage did not attach. As this case depends mainly upon whether this custom applies or not, it is necessary to decide that question. I think it does. The argument is, that the usage does not attach, because the plaintiffs are insurers against marine risks, and the defendants are re-insurers against fire. It is conceded, however, that it is within the powers of the defendant company to re-insure against loss by fire in case of ships at sea. The plaintiffs here insure against perils by sea generally, and in order to ease their liability they re-insure their risks in respect of coal-laden vessels, for a limited amount in each case, and in respect of fire only, and between specified ports,

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with the defendants. The contract with the defendants is a contract of fire insurance, no doubt; but it is a contract of fire insurance in respect of a marine risk. The defendants, when they entered into that contract, were doing the trade or business of marine insurance. The plaintiffs, in the course of their business, undertook certain marine risks; the defendants, for their own benefit, take upon themselves to indemnify the plaintiffs against one of those marine risks, being a risk against fire. It was a marine risk in the hands of the plaintiffs, and did not become less so when undertaken by the defendants. When the defendants contracted with the plaintiffs, they contracted with them according to the usage of the particular trade or business to which the contract related. It related to the trade or business of marine insurance. I think, therefore, the usage in *Stephens v. The Australasian Insurance Company* applies. This being my view, it is not necessary for me to determine how the case would stand if this usage did not attach. I will only say that it appears to me that, if the usage did not attach, this contract could not be regarded as an ordinary open policy on ship or ships to be hereafter declared. Having regard to the terms of the contract between the parties, I should be inclined to think that there is no necessity, except as a matter of convenience (as showing when one policy was exhausted and another had become necessary), that there should be any declaration, but that the policy attached when the risk was incurred. It was urged by Mr. Wheeler on the part of the defendants that the negligence of the plaintiffs' manager was such that it afforded facilities for fraud, and consequently disentitled the plaintiffs from recovering, and a passage from Parsons on Insurance was relied on. I am not prepared to hold that there was such negligence, nor can I find any authority for Mr. Wheeler's contention. I am of opinion that the plaintiffs, having acted in good faith, are not debarred from recovering by the delay in making a declaration on the *Hampden*.

*Judgment for the plaintiffs for 1000*l.* with costs.*

Solicitors for the plaintiffs, *Field, Roscoe, and Co.*, for *Bateson and Co.*, Liverpool.

Solicitors for the defendants, *Learoyd, Learoyd, and Pearce*.

Nov. 26, Dec. 7, 1878, and Jan. 11, 1879.

(Before DENMAN, J.)

EMMA SILVER MINING COMPANY (LIMITED) v. LEWIS AND SON. (a)

*Company—Promotership—Liability of promoters as trustees for company.*

*The plaintiffs, being a company formed to purchase and work an American mine, sued the defendants for damages for conspiring with the vendor to sell them the mine for an excessive price, and for the return of profits made by the defendants as promoters of, and received by them as trustees for, the plaintiff company. The defendants were a firm of metal-brokers, who had been employed to sell the ore in England upon commission, and it appeared from the correspondence between the defendants and the vendor that the vendor had been anxious to obtain their assistance in the sale of the mine to*

*an English company, and that it had been arranged that he should remunerate them for such assistance if given. The defendants, in fact, introduced the vendor to an intending purchaser, but this purchase went off, and the mine was afterwards sold to other buyers, by whom the plaintiff company was formed. The prospectus of the company, when issued, referred to the defendants as willing and able to answer inquiries as to the amount of ore already sold from the mine, and generally as to the mine itself, which had been visited by one of the defendants' firm. The defendants alleged that they had given no express authority for this use of their name, but they did, in fact, answer inquiries made by intending shareholders.*

*The vendor, having received part payment in paid-up shares of the company, transferred certain of these shares, to the amount of 5000*l.*, to the defendants, from which the defendants ultimately realised 5968*l.* The defendants alleged that this payment was made to them under an arrangement with the vendor by which they were to be remunerated for any assistance they might give in selling the mine, and to be compensated for the loss they would sustain in respect of their commission on sales of ore, a less rate of commission being usually paid by English mineowners than by owners in America.*

*The jury disagreed on the questions of conspiracy and fraudulent representation, but found that the defendants were promoters, and further found a general verdict for the plaintiffs for the proceeds of the 5000*l.* shares.*

*Held, first, that the question of promotership was one of fact, and not of law; and that there was evidence to leave to the jury in support of the contention that the defendants were promoters.*

*Held, secondly, that there was evidence to leave to the jury in support of the plaintiffs' claim to recover the proceeds of the paid-up shares assigned to the defendants, as "profits received by the defendants to the use of and as trustees for the plaintiffs," the plaintiff company never having received any consideration for the shares in question.*

FURTHER CONSIDERATION.

The plaintiffs sued, according to the indorsement of the writ, "for damages for conspiracy between the defendants and Trenor William Park and others in the sale of the Emma Mine, and for profits received by the defendants to the use of and as trustees for the defendants."

The nature of the pleadings, and the evidence given at the trial, fully appear from the judgment of Denman, J. The action was tried at Westminster on the 24th, 25th, 26th, and 27th June 1878.

The jury disagreed on all the principal questions, including those of conspiracy and fraudulent representation, but found that the defendants were promoters of the company, and added that, if the question of promotership was rightly left to them, they intended to find for the plaintiffs for the amount of 8188*l.*, being the proceeds of the paid-up shares received by the defendants, together with dividends and interest.

On these findings the plaintiffs asked for judgment. The defendants also claimed judgment, on the ground that there was no evidence on which the questions of promotership and general liability

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

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should have been left to the jury. The case was thereupon adjourned for further consideration.

Nov. 26, 27, Dec. 7 and 20.—*Gorst, Q.C., O. Bowen, and Foulkes*, for the plaintiffs, asked for judgment.—The plaintiffs are entitled to judgment on the general finding of the jury, and on the ground that they were promoters. In *Bagnall v. Carlton* (37 L. T. Rep. N. S. 431; L. Rep. 6 Ch. Div. 371) the promoters of a company were held liable to refund money received by them out of the purchase money. A promoter is, in fact, a trustee or fiduciary of the company which he promotes:

*New Sombbrero Phosphate Company (Limited) v. Erlanger*, 36 L. T. Rep. N. S. 222; L. Rep. 5 Ch. Div. 73, affirmed in the House of Lords.

It is clear that the 5000*l.* shares were received by the defendants as such trustees. In answer to the seventeenth interrogatory, they state that Park, the vendor, promised them 5000*l.* in Sept. 1871, and said he would make it 10,000*l.* if he sold the mine at his own price; that the said promise was made in fulfilment of a verbal promise made by Park to the defendant A. Lewis, in America, that, if they, the defendants, would assist him in the sale of the mine in England, he would guarantee them from loss by the sale, either by providing that they should continue to receive the consignments of the ore at the then rate of commission, or by giving them an equivalent; and that they afterwards agreed to take the payment in shares instead of in cash. In other words, the 5000*l.* was to be a payment out of the purchase-money, eventually taken in paid-up shares, for which the company received no consideration, given to the defendants for promoting and assisting the sale of the mine.

Sir H. James, Q.C., Herschell, Q.C., and Henn Collins for the defendants.—The jury having refused to find the main question for the plaintiffs, and there being no evidence which should have been left to them on the question of promotership, the defendants, and not the plaintiffs, are entitled to judgment. The primary cause of action was the alleged conspiracy, as to which the jury gave no verdict; and the promotership ground was a mere subsidiary claim. If judgment were entered on it, the defendants would be prejudiced in going down to try the main question again. The two claims cannot be satisfactorily separated, as in *Parker v. McKenna* (31 L. T. Rep. N. S. 739; L. Rep. 10 Ch. 96). Nor are the plaintiffs entitled to it, inasmuch as the question of the liability of the defendants as promoters should never have gone to the jury. There are two facts fatal to the plaintiffs' contention on this head. First, the defendants did not in fact promote; their only act in connection with the proposed sale was an introduction which proved abortive, i.e., an attempt to promote another company which never came into existence, and not the company now suing. Secondly, the 250 shares received by the defendants were not the property of the company. They were the absolute property of the vendor, Park, who had given value for them, and could assign them to whom he pleased. They also cited

*Gover's case*, 33 L. T. Rep. N. S. 619; L. Rep. 1 Ch. Div. 182;

*Albion Steel and Wire Company v. Martin*, 33 L. T. Rep. N. S. 660; L. Rep. 1 Ch. Div. 582;

*Lindley on Partnership*, p. 585;

*Peck v. Gurney*, L. Rep. 6 H. of L. 377;

*For v. Mackreth*, 1 Wh. & Tud. L. C. 115.

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*Gorst, Q.C.* in reply.—The plaintiff company is that which the defendants intended to promote. It is true that the particular act of promotership referred to was not successful, but it was not the less an attempt to promote the company which was afterwards formed. Promotership is necessarily something done before the company promoted comes into existence.

Jan. 11.—DENMAN, J. delivered judgment.—This was an action brought by the plaintiffs, a limited company, against the defendants, James Lewis and Arthur Lewis, his son, metal brokers at Liverpool. The statement of claim was very long, and contained several allegations which were mere statements of evidence. It cannot, however, be said that the defendants had not notice of the two causes of action upon which the plaintiffs relied; for the indorsement on the writ stated that "the plaintiffs' claim is for damages for conspiracy between the defendants and Trenor William Park and others in the sale of the Emma Mine, and profits received by the defendants to the use of and as trustees for the plaintiffs." The action was tried before me on the 24th, 25th, 26th, and 27th of June last. It appeared from the evidence that the Emma Silver Mine in America, in the year 1871, had come into the hands of Trenor William Park and others, and that they wished to sell it. The defendants had, for some time previous to July 1871, been selling about one-half of the produce of the mine, as metal brokers, for the usual commission on sales for American companies, viz., 2½ per cent. The other half of the produce was sold by other metal brokers named Bath. A long correspondence was put in at the trial between the two defendants and between each of the defendants and Park and one Baxter, who was jointly interested with Park in America, to which I shall have to refer presently. Many expressions in these letters were relied upon by the plaintiffs as proving the conspiracy alleged, and as showing that the defendants were knowingly assisting Park in palming off a comparatively worthless mine upon the public as a mine of great value. The jury having declined to give any verdict upon the questions left by me bearing upon this part of the case, I cannot assume one way or the other whether this was a correct contention on the part of the plaintiffs, or whether the explanations given by the defendants to show that these letters were consistent with perfect *bona fides* were satisfactory. In defining the meaning of the word "conspiracy," I told the jury that it would not be made out by a mere honest agreement, but that it involved an agreement to do something dishonest, as, for instance, the knowingly making of false representations. Notwithstanding the powerful arguments of Sir Henry James and his juniors, I am of opinion that there was evidence which it was impossible to withdraw from the jury upon this part of the claim; but, inasmuch as the jury were discharged upon all questions relating to it which were submitted to them, I feel that it would be idle, and indeed unfair, to comment further upon that part of the case, or to refer to those letters now, except so far as they relate to that part of the claim upon which the jury did give in any finding. Coupling the letters and the oral testimony, and using both for this purpose, and for this purpose only, I think that it was established at the trial as follows, upon uncontroverted testimony: That Arthur

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Lewis, as early as the 17th July 1871, being at that time in America, began a correspondence with his father in England, in which he informed his father, writing from Salt Lake City, that he contemplated giving assistance to mine owners in selling their mines to companies, for a consideration of some kind, whether in money payments, or by obtaining the sale of the ore, or allotments of shares, or otherwise. The first letter from Arthur to James Lewis read at the trial contains the following amongst other passages bearing upon this part of the case. On the 17th July 1871 he writes as follows: "Mr. Park asked me if I would ask Captain N. (a mining captain) to accompany the party to the Emma mine to-morrow, as I had told him Captain's N.'s opinion might be of some value if the mine were sold in London. I shall not give any written opinion without a definite arrangement of some sort being made by which advantage may accrue to me. Litigation is still going on about the mine, and, until this is at an end, they cannot hope to sell the mine in London. It is just possible the court here might order that the proceeds of the ore should be paid into the hands of a receiver, to be afterwards handed over to the winning side. If this were the case, my being here might prove a great advantage, as they could arrange for it with me, and I could secure what we might otherwise have lost. I know the head of the opposition party. Walkers asked me if nothing could be done with us towards the sale in England of some of the mines in the neighbourhood. On thinking the matter over, I made the following proposition to Mr. Robert Walker: I was willing to inspect, report upon, and get reports from Nancarrow and Jassinn upon any mine that I was perfectly satisfied was *bonâ fide* and could honestly recommend. If they could bond it or purchase it themselves at the miners' price, I would endeavour to get it taken up in England at about the same price, no exorbitant commissions being paid to intermediate parties, taking my pay in a stipulation that we should be appointed the managers of the company (like Taylors). As a mine, to stand at par here, should certainly pay 25 or 30 per cent. interest, and as with us 10 per cent. dividends would place it at par, the shares, if Walkers would take or arrange for payment of the whole mine in paid-up shares, would soon become of twice or three times the value they would be at if held here; and so it would prove a very good purchase for Walkers. If only a comparatively few shares were required to be taken up in England, sufficient for capital to work the mine, it would be easy to float the company, and the shares would soon reach a premium if the dividends were good. I would arrange that Walkers should pay us a percentage on the premium at which they ultimately sold their shares, thus paying us by results. I pointed out that, if they would commence with a really good mine in which they had thorough confidence themselves, and it should turn out well, and the shares got up to a high premium, we should then have little difficulty in placing this on the market in the same manner. Thus a regular trade could be made of it, the exorbitant profits to intermediate parties would be saved to the English company, while Walkers could purchase mines at the low rate which the high value of money here justifies, and sell them at the greatly increased price which cheap money with

us equally justifies. He told me to look round, and, if I saw any mine which took my fancy, he would then see what could be done." After visiting the mine on the 19th July, Arthur Lewis wrote again to his father, on the 20th, a letter in which he says: "Do not hand those mining men who come over to Taylors, but make some arrangement with someone to accompany them to London and work it with some good share brokers there." Taylors were a firm who were in the habit of acting as agents in the business of introducing owners of mines to intending purchasers. On the 22nd July Arthur Lewis again wrote to his father in England: "With me out here, I do not see why we should not place some of these mines, like Taylors', retain the management of them, with a commission on all the proceeds, and ultimately perhaps make a regular business of it. Therefore do your best to help me. Mr. Park wants me to give him a report on the Emma mine, and to come over to England in a few month's time to help him to place it on the English market. I doubt if I shall give it him at present. The mine is unsaleable at present, owing to the litigation." On the 24th July he writes to his father a letter which contains the following passage: "Should the mine improve sufficiently to justify making a report on it sufficiently good to effect a sale, S. (Silliman) and N. (Nancarrow) are each to make a report, Park is to take the mine over to England, and, if a sale is made, S. and N. are each to receive 5000*l.* in paid-up shares. This is pretty good for them, but not my way of doing business. Do not mention it on any account." This seems to me to be ample evidence of knowledge on Arthur Lewis's part that Park contemplated a sale to a company to be got up for the purpose of purchasing the mine; but what follows is still stronger to the same effect: "I told Park it was disadvantageous to me for the mine to be sold to an English company; for at present we are receiving a New York commission, whereas, if a London company had it, we should only get a London commission; therefore, if he wished me to assist him in the sale, he must guarantee me from loss on the sale. This he has agreed to do, either by inserting a clause in the articles of sale that we are to receive the consignments of the ore on the present terms, or an equivalent for it in paid shares. This I conceive should not be less than 10,000*l.* or 15,000*l.* He wanted me to go over to London with him to help him to put it through. I said I should be more useful to him here by corroborating anything which the purchasers might wish to know with regard to the mine, while you will take him up to London and introduce him to the Taylors and other great people." From these and other passages in the same and other letters, I think it clear that Arthur Lewis contemplated that he and his father were to give active assistance to Park in selling the mine to an English company to be formed, and that they were to receive remuneration for their services, either by way of having secured to them the sale of the ore for the English company on advantageous terms, or by receiving some payment, either in shares or otherwise, or both. On the 31st Aug. Arthur Lewis writes to James as follows. "Park writes me he leaves for Liverpool on the 2nd. Assist him all you can, and look after the loaves and fishes. He says he can afford to be liberal to us. You had better go up to London

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with all these people, to prevent them falling into the hands of Bath or others." To this letter there was a P.S. as follows: "Park says 'I shall first call on your father in Liverpool and take his advice as to the course to be pursued, and shall ask his aid; and we also want your help in Salt Lake. I shall try to arrange so that your house shall have the ore shipped to Liverpool, and will be willing to compensate you and your house liberally, in case we make the sale. We go to London with a perfect title (U.S. patent), &c. I am willing to make a definite arrangement with you or your father, or leave it until we are through; and I have no doubt you will be satisfied. We can afford to be liberal.'" Park having in the meantime started for England, Arthur Lewis writes on the 5th Sept. to his father a letter containing the following: "The Emma it would be better perhaps to hand over to Taylors, stipulating with Park before you introduce him to them what remuneration you are to have if they take it up. 5000*l.* would not be too much to ask in this, as I can be very useful to them out here. Also stipulate for the sale of the ore and the agency for us out here, if possible." I now turn to the letters from James Lewis to Arthur Lewis, as far as they bear upon the questions upon which the jury found. The first of these is dated Liverpool, 12th Sept., and alludes to Park as follows: "Park arrives to-morrow, and I wanted to be here when he comes. I have prepared for him a statement of all the Emma ore since the commencement, in compliance with instructions from New York, and I will inclose you a copy of it. They asked particularly for all these details. Of course, they have them all in the account sales, but not tabulated." On the 14th again he writes from Liverpool: "Mr. Park and Mr. Stewart" (who was acting with Park in endeavouring to sell the mine) "were with me all yesterday; and I go up to London on Monday about the Emma mine. I am to be remunerated handsomely for my services." On the 18th Sept. he writes from London: "I am here for a few days trying to assist Mr. Park with the Emma. . . . I have had a long interview with John Taylor to-day, and don't think he will have anything to do with the Emma, as he has been told continually the last month by every Yankee who comes to his office—and they have been there by shoals—that it is a deposit, and that the mine has been overstrained. Mind you don't say anything about this in Salt Lake or to anyone. Mr. Park wants me to stop all the week, but this I cannot do; besides, he has got letters to all the people here; and goes to them direct, and only wants me to certify, as it were, to the quantity of the ore; and I don't expect to get anything out of it at all, though he talks cash liberally; but I have not got it in writing. He is going to see Albert Grant, who brought out the Mineral Hill, and his confederates got the chief pull out of it. The Taylors did not get more than a few thousands. However, Taylor told me that Grant would not take it up, as the Stock Exchange want him to clear up and have some return for the other mining adventures floated." This letter seems to show that James Lewis at that time had been assisting Park to induce persons likely to be instrumental in forming a company to take up the purchase of the mine; but that he was not at that time sanguine of obtaining such terms from Park as to make him care about giving any further

assistance himself. But, on the 23rd, it appears that Park had made something more like a definite promise, and that the defendant, James Lewis, was under the impression that the mine was already sold. He then writes from Liverpool as follows: "Emma mine. All this keep to yourself, and do not repeat it. Mr. Park has sold the Emma mine through Coates and Hankey, London, for 800,000*l.*, &c. He promised me 5000*l.* in any case; and, if he gets his own price, he said he would make the amount 10,000*l.*" It appears that this sale through Coates and Hankey fell through; and on the 7th Oct. James Lewis again wrote to his son from Liverpool a letter, in which he said: "Park remains (that is, in England) to close the Emma. He says all is going on well, and he will telegraph me when he wants me in London. I expect they can all get on without me." Before Park's arrival in England, James Lewis had written to Taylor, on the 6th Sept., a letter, in which he said: "I have had a letter this morning from New York, mentioning that one of the owners of the Emma mine is on his way here, and will arrive next Wednesday to place this mine also on the English market. It is a big affair, and an enormous amount will be required. I am well posted up, and know all about the Emma." The rest of this letter related to another mine called the Flagstaff, in relation to which James Lewis wrote that he had informed the owners of that mine that they must not expect the sum mentioned by them, viz., 250,000*l.*, but take less, and take part payment in shares. He then proceeded as follows, referring to the Flagstaff mine: "As regards your (Taylor's) remuneration, I said that you could not look at it under 20,000*l.* to 25,000*l.*, or, if they wished to pay by commission, 10 or 12½ per cent. on the amount realised; and there is no doubt they (the vendors) will pay us liberally to get it taken up by your firm. You must provide for me out of this amount, and liberally. Therefore, if I receive 3000*l.* or 5000*l.*, add it to your amount." On the 8th Nov. 1871 the plaintiff company was registered. The memorandum of association stated the first of the objects for which the company was established to be "the carrying out of an agreement, dated the 4th Nov. 1871, between Trenor William Park of the one part and George Henry Dean of the other part." The capital of the company was 1,000,000*l.*, in 50,000 shares of 20*l.* each. The agreement of the 4th Nov. was one whereby Dean, as trustee for the intended company, agreed on behalf of the company to purchase the mine, &c., for 1,000,000*l.*, of which 500,000*l.* were to be paid in cash and the residue in shares of the company. This agreement was mentioned in the articles of association of the company as being adopted by the company so far as its provisions were intended to be binding on the company thereby contemplated. On the 9th Nov. the prospectus of the company was issued. Both the defendants swore that they first saw it in the advertisement columns of a newspaper, and that they gave no express authority for the use of their names in it. The prospectus stated that Messrs. Lewis and Son (the defendants) had sold ore from the mine between Oct. 1870 and May 1871 to the amount of 73,000*l.* odd, and averaging, with ore sold by Bath and Son, about 38*l.* per ton in price; and that, from the 1st May 1871 to the 1st Sept. 1871, the amount sold by them had been 1888 tons for 64,600*l.* odd. It

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also stated that Messrs. Lewis and Son and Messrs. Bath and Son "would be ready to answer any inquiries relating to the ore, and the former firm also as regards the mine, one of their firm having been at the mine for some time." On the 11th Nov. James Lewis wrote Arthur a letter containing the following passages alluding to another mine: "Flagstaff. I have never been able to find out the names of the purchasers; but it appears from a letter received two days since that the mine is as good as sold; but he (the writer of the letter) wants me in London on Monday about it. He thinks he can divide some plunder with me, if there is any to be had; but he will not say who the parties are." The letter also contained the following passage: "Emma. I send you a paper with the prospectus, and the shares are quoted at 3 premium. This of course is a Stock Exchange dodge, as the prospectus is not yet out, except in the newspapers. I am writing to Mr. Park to let me have half the amount he promised me in paid-up shares; but he does not often take any notice of the letters I write to him." Between the 11th and the 23rd Nov. several letters passed between James Lewis and persons who had received the prospectus, referring to the paragraph stating that one of the firm of Lewis and Sons had been at the mine for some time, and that they would be ready to answer inquiries as to the mine, and inquiring whether Lewis and Son believed all that was stated in the prospectus. The answers to these letters varied in language to some extent, but they were all to the effect that the figures given in the prospectus as to the quality of the ore sold by the firm and the amount realised were perfectly correct, but that they could guarantee nothing further, and that the persons inquiring must act upon their own judgment as to whether they applied for shares. They also inclosed a copy of the prospectus and a copy of a report by Professor Silliman as to the mine, and stated that "the future of the mine entirely depended on the full realisation of this report." In several of these letters the defendant, James Lewis, advises his correspondents, being trustees or clergymen, not to invest in mining shares; and in one of them he says, "We can guarantee nothing, nor undertake any responsibility, as it is no interest to us whether you become a shareholder or not." In some of the previous letters he had informed the inquirers that they were too late to apply. The effect of the allusion to Professor Silliman's report appears clearly in a letter to one of the applicants, of the 2nd Dec. 1871, in which James Lewis, writing in the name of Lewis and Son, says: "But, as to the future of the mine, it is impossible for us to give an opinion, as all entirely depends on the full realisation of Professor Silliman's report, as to whether it is a true fissure vein or simply a deposit. He speaks very decidedly on this point; and he is considered a great authority in the States. All depends upon this one point, and, no doubt, from what you say, you have heard to the contrary. Our Mr. Arthur Lewis has visited the mine, and resided at Salt Lake for some months past, and he is now on his way home. In a letter to hand this morning, he mentions that there are 3000 tons of ore at the railway depot to come here." The principal use of these letters made at the trial was, to endeavour to show that the defendant, James Lewis, was setting up Professor Silliman as a trustworthy

witness as to the value of the mine; whereas it was contended, that other letters to which I have only referred for other purposes, in passages not set out, proved that he and Arthur Lewis knew that Professor Silliman was a person of doubtful integrity. I do not refer to this letter here as bearing upon any such question, because the jury declined to express any opinion upon the question of suppression of material facts, fraudulently or otherwise, as bearing upon the claim for conspiracy; but it was also contended that they bore materially upon the question of promoter-ship, and I think the passages above quoted were admissible also, and to some extent important, upon that issue. On the 23rd Nov. James Lewis wrote to Arthur a letter, from which the following is an extract: "Emma. I have not heard the result of the applications for shares, nor how many have been applied for. Before I went last to London I wrote to ask Park if he would arrange to let me have half the amount he promised me in shares; and when I saw him in London he said he would arrange it all to my satisfaction; and I have heard nothing since. Park has made a great mistake in letting Grant have anything to do with it, as he is not thought anything of; and, when it was known that he was connected with it, people drew back. You will receive from London a paper with an article about the Emma; and I also send you a *Times* with an article upon silver mines in general. The day is past for selling them at such fabulous prices. I have been inundated with applications from all quarters. I am not so very certain that I shall get the ore consignments from the new company. Look after it in New York all you can. Stewart, I believe, goes out on Saturday." On the same day, the 23rd Nov., a minute was entered in the company's books stating that it was arranged "that the present consignees, Bath and Sons and Lewis and Sons, be continued for the present, reducing the commission to 1 per cent. James Lewis, in his oral testimony, swore that, beyond introducing Park to Taylor and to a Mr. Blake, he did nothing which assisted him in any way in selling the mine, and that both of these introductions came to nothing; that he had nothing to do with drawing up the prospectus; that he first heard of the prospectus of the mine in the newspaper; that the remuneration to be received by his firm for their assistance was in consideration of the loss they would be put to by only receiving 1 per cent. commission instead of 2½ per cent. commission on the sale of ore; that he never authorised the use of his firm's name in the prospectus, though he never repudiated it to the company or its promoters; and that they bought 150*l.* worth of shares in the company in May 1872 at a premium, by which eventually they lost 700*l.* He said, on cross-examination, that he knew that, if the mine was to be sold at all, it must be to a company to be formed. He admitted that, in the case of the Flagstaff mine, by the passage referred to above in the letter of the 6th Sept. 1871, he meant that his firm were to have 3000*l.* or 5000*l.* for assisting to get up a company to take that mine, and that the words "to place the Emma" in that letter meant to sell the Emma to a company to be formed. He said that Park and the other owners of the mine were under no obligation to secure the commission to his firm; and, on being asked whether it was not because he promised Park to do his best in assisting him to get up a company to purchase



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the mine that he was to receive compensation, he said, "It was for that and the loss of the commission combined. I was to introduce them to people to get up a company." Being cross-examined as to a letter written by his son (after consultation with him) to the *Hour* newspaper in Feb. 1876, in answer to a statement which had then recently appeared, alleging that they had received 5000*l.* in paid-up shares of the company from Park, in which letter was this passage, "These shares were given us by Mr. Park in lieu of an amount due to us on the consignment of ore, and we had nothing whatever to do with the sale of the mine to the present English company," both the defendants admitted that this was an inaccurate statement, and said that it ought to have been "for loss of commission on sale of ore," and that nothing at the time was due to them for sale of ore. Arthur Lewis, in his evidence, stated that, upon his first introduction to Park in America, he was informed by Park that he wished to sell the mine, and was told by him that many companies were being brought out in London for the purchase of mines in America. He said that Park as early as July had asked him whether he would assist him in the sale of the mine, and he stated that he could hardly expect him to assist him when it was directly opposed to his interests, because it would involve the loss of the New York commission, and that Park then said, "I don't want you to lose by it, and, if you can render me assistance, I will undertake you shall not lose by it, either when I come to sell it by making a term that your firm shall continue to receive commission at the present rate, or an equivalent," and that there was no arrangement made in America as to what the equivalent should be; that he got the *Times* with the prospectus in it just as he was leaving New York, and when he got to England the company had started, and he first discussed the terms of the commission at the meeting of the 12th Dec., and gave such true information as he possessed to the directors on that occasion. Being asked on cross-examination what the real consideration was for Park's promise, he said: "The loss of commission; also I offered, if I could be of any service in corroborating documents, or anything in my business, to assist him in that respect. I was never asked to render any such assistance. There was no binding agreement between us and Park. We had no legal right whatever as against Park. We trusted to his word entirely. No sum was definitely arranged until the 6th March, when we received the shares. I may have reminded him of the promise in December. I knew nothing of the agreement between Park and Grant until I received the shares, then Park gave me a *resumé* of the terms on which they were to be held, and I held them on the terms of the paper of the 19th March 1872." The following letter (omitting an immaterial passage, which was not dated, but was agreed to have been written about the time at which the 250 shares were transferred by Park to the defendants, viz., about the 6th and 9th March 1872, was put in: "My dear Father,—I have just seen Park. He wants to know on what terms we will take the stock, viz., whether we will put it in with the 500,000*l.* (i.e., the half purchase money to be taken in paid-up shares), and let it be sold along with it *pro rata* when Park and Albert Grant think best, or whether we will take it and control the sale ourselves, subject to the following con-

ditions: To be held for twelve months, unless previously sold under following agreement: Grant has no right to sell below par, and no right to sell above par without Mr. Park's consent; but, if Mr. Park refuses to consent, he must take the stock at the price offered. Park has also right to sell, placing Grant under similar conditions. When sold, Grant to receive 1*l.* per share, and half the amount of the premium realised. Of course, in the above arrangement, we would occupy Park's place. Whether we sell them or not, we should still have to pay Grant, as above. I almost think we should do better to have the control of the sale ourselves, though Park will undoubtedly sell to great advantage, knowing exactly what is doing at the mine, and the right time to sell. Grant is obliged to support the market at his own expense. We also can get informed by M'Intosh and Johnson what is doing. Telegraph me in the morning early your views on the subject, both here and to Andrew's office. No amount was named. When I decide which way we will take the shares, Park will make them over to me. Let me know your views early by telegraph. If I get them here by eleven o'clock I will call at his house, and try and get the stock to-morrow." On the 9th March the following agreement was entered into between Lewis and Son and Park: "Whereas T. W. Park has transferred to James Lewis and Son 250 shares in the Emma or Silver Mining Company (Limited), which transfer of said shares is made under the agreement that the certificate of said shares should be held by Albert Grant for the space of one year from the first day of February 1872, unless previously sold with the consent of said Grant, and when sold said Grant to receive 1*l.* on each share, and in addition one half what may be received for said shares above par; said Grant shall have the right to sell said shares in his discretion, first giving said James Lewis and Son the privilege of taking such shares at the price said Grant may propose for the same. Now, it is agreed between said James Lewis and Son and said Albert Grant on the terms above stated." In accordance with this agreement, the shares were placed in Grant's hands and sold on the 11th May 1872, for 75,600*l.*, of which sum Grant received 1531*l.* 5*s.*, and the defendants 5968*l.* 15*s.*, for which sum, and dividend upon the 250 shares and interest, the plaintiffs claimed to recover as money received by the defendants as trustees for the company, and under such circumstances as to be liable to refund. In addition to the oral evidence and letters above referred to the plaintiff relied upon the following answer by the defendants on interrogatories, as showing that they were promoters of the company, and that the shares which they were to receive were to be a portion of the purchase-money without any consideration as between the defendants and the company, or as between Park and the company. In answer to the seventeenth interrogatory, they said: "The said T. W. Park, in or about Sept. 1871, promised us 5000*l.*, and, if he sold the mine at his own price, he would make it 10,000*l.* The said promise was made in fulfilment of a verbal promise made by said T. W. Park to the defendant Arthur Lewis, when in Salt Lake City, in July 1871, that, if we would assist him in the sale of the mine in England, he would guarantee us from loss by the sale, either by causing to be inserted in the agreement for sale a stipulation



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that we should continue to receive the consignments of the ore at the then rate of commission (2½ per cent.), or receive an equivalent in paid-up shares. The said T. W. Park, in Sept. 1871, informed the defendant James Lewis that he could not succeed in securing to us a continuance of the consignment of the ore on the old terms, and in lieu thereof promised to make us the above payment. Instead of taking it in money, we took 250 paid-up shares in satisfaction of Mr. Park's promise. There never was any written agreement; it was verbally arranged, but when we cannot state, that the said T. W. Park should transfer to us the above number of shares. The said T. W. Park never paid us, or either of us, any sum whatever in cash, nor did he give us any consideration whatever in respect of the said sale." The secretary of the company, Mr. Tooke, was called for the plaintiffs, who said that he had called at the defendants' office at Liverpool to ask Mr. Arthur Lewis his opinion of the mine, and that he had informed him that he had seen it, and that the company had a very valuable property; whereupon he requested Arthur Lewis to call on the board, which he did, as before mentioned, on the 12th Dec. The purchase money was paid, 400,000*l.* on the 4th Dec. 1871, 63,000*l.* on the 20th Dec. 1871, 13,000*l.* on the 30th Jan. 1872, 70,000*l.* in February, and 13,000*l.* in March; and 500,000*l.* value in shares was allotted to the vendors on the 5th Dec. 1871, including the shares aforesaid, sold by Grant for the defendants in May 1872. The 250 shares were transferred from Park to Arthur Lewis on the 14th March 1872. After hearing the evidence on both sides, as well as at the end of the plaintiffs' case, Sir Henry James, for the defendants, claimed judgment on the ground that there was no evidence for the plaintiffs on either ground of claim. I thought there was evidence for the jury on both of the plaintiffs' contentions, and left several questions to the jury. I invited the counsel on both sides to suggest any further questions; but none were suggested, Sir Henry James declining to suggest any on the ground that he did not feel justified in giving any colour to what he contended was a wholly unfounded action, without any particle of justification either in law or fact. The questions were mostly directed to the claim founded upon a conspiracy (which I defined to mean a conspiracy, by fraudulent misrepresentations or suppressions, to assist Park and others in the sale of the mine at a price beyond its value). But questions 5, 6, 7, and 8 were intended to bear upon the second branch of the claim. And I also told the jury that I should ask them the question generally whether they intended to find for the plaintiffs or for the defendants. The questions handed to the jury in writing were as follows: 1. Did the defendants conspire together with Park and others to assist or enable him or them to sell the mine at a price in excess of its real value? 2. Were the plaintiffs induced to enter into the contract for the purchase of the mine by reason of such a conspiracy as above? 3. Did the defendants, in pursuance of such conspiracy, state any facts false to their knowledge, in order to induce the plaintiffs to purchase the mine? 4. Did they fraudulently suppress any facts which would have been material to be disclosed, with the intention of inducing the plaintiffs to purchase the mine at a price in excess of its real value? 5. The same, omitting the word

"fraudulently." 6. Were they promoters of the company? 7. Do you find for the plaintiffs as in paragraph 8 in the statement of claim, or for the defendants, as in paragraph 7 of the statement of defence? 8. The same, as to paragraph 9 of the statement of claim, and 8 of defence. 9. Assuming the plaintiffs to be entitled to recover for a conspiracy, what damages? 10. Assuming the defendants were promoters, and as such liable to refund, what damages? The jury, after a long absence, stated that they were hopelessly disagreed as to the first five questions, and as to the seventh and eighth; but, as to the sixth, they found that the defendants were promoters of the company. And, in answer to the question whether they were agreed to give a verdict for the plaintiffs or for the defendants, at first they said they were not agreed, but afterwards added that, if the question was rightly put as a question for them, whether the defendants were promoters or not, they intended to find for the plaintiffs for the amount of 8188*l.*—viz., the 5968*l.* 15*s.* for which the shares sold, 1823*l.* 15*s.* 8*d.* interest, 303*l.* dividends, 92*l.* 14*s.* 8*d.* interests on dividends. Both sides having requested me to adjourn the case for further consideration, I did so, and heard very learned and elaborate arguments on the 26th and 27th Nov. and on the 7th and 20th Dec. last. Both sides claimed judgment—the plaintiffs upon the findings of the jury so far as related to the claim for a refunding of the proceeds of the shares; the defendants on the whole claim, on the ground that there was no evidence which ought to have been left to the jury in support of either portion of the claim. I have already said that I am clearly of opinion that there was evidence which I could not properly have withdrawn from the jury applicable to the claim for conspiracy. It consisted partly of letters, partly of conversations, upon which widely different interpretations were placed. If the plaintiffs' view of the effect of this evidence as a whole and in its most debateable parts had been adopted by the jury, I should have thought there was ample evidence of an agreement between the defendants and Park to aid one another in palming off a comparatively worthless mine by statements known to be false, and to which all would be parties, for the purpose of making an illegitimate profit out of the persons who might be induced by such means to form a company for its purchase. Indeed, upon the plaintiffs' construction of the evidence, I think the defendants would be brought within the definition of conspiracy laid down by the Lord Chief Justice as applicable even to criminal cases, in *Eg. v. Warburton* (23 L. T. Rep. N. S. 473; L. Rep. 1 C. C. R. 217), cited by Mr. Brown in his able argument. On the other hand, if the defendants' explanation of this evidence were accepted, the defendants had done nothing fraudulent or wrong, at all events, in such a manner as to be liable to the plaintiffs in an action for conspiracy; but the jury, having been discharged upon all questions put to them in relation to this part of the claim, I have abstained from recapitulating any of the evidence which was applicable to it only, and I shall say no more about it, because I think it fairer not to do so. The true construction of the letters referred to, and of the conduct of the parties, was entirely for the jury, and it would be impossible to discuss it in a judgment without running serious risk of prejudicing the fair trial of that part of the claim

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should it again come before a jury. When the case came before me first upon further consideration I stated that I felt very great difficulty upon the point whether I ought to hear an argument at all in a case where the jury have been discharged as to so important a question as that first raised in this case. I felt bound, however, at the urgent request of both parties, to hear the views of both sides fully discussed, in order that I might, if possible, prevent a four days' inquiry from being wholly useless and abortive. And I have come to the conclusion that I ought, if possible, to give judgment upon that part of the case to which the finding of the jury relates, although the plaintiffs declined to give any undertaking to abandon the other part of their claim, and although the defendants have still reserved to them all their right of appeal, as well as that of moving the divisional court for a new trial on the ground of misdirection, or that the verdict was against the weight of evidence. I am of opinion that I have power to do this by Order XL, r. 10, which gave power to the court, upon a motion for judgment, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, to give judgment accordingly. This order (which was made in 1875) must, I think, be now read as applicable to sect. 17 of the Act of 1876 (39 & 40 Vict. c. 59), which provides that all proceedings in an action down to and including final judgment shall, so far as practicable, be heard by the judge before whom the trial took place. It was admitted by the plaintiffs' counsel that I had a discretion whether to act upon this power or not. Upon the whole, I think it may be better for the parties that I should do so, and I do so accordingly. The question, then, which I have to decide is whether the plaintiffs are entitled to judgment upon the finding of the jury that the defendants were promoters of the company, and upon the general finding for the plaintiffs, assuming that particular question to have been one for the jury. The grounds upon which the defendants' counsel contended that I ought, notwithstanding this finding, to give judgment for the defendants, were several. First, it was said that the defendants came within no definition of promoters to be found in any of the cases decided on the subject; that there was no act done by them in any way conducive to the creation of the company, nor any duty existing on their part to inform the company of their arrangements with Park; and it was contended that I ought not to have left the question to the jury, whether they were promoters or not on two grounds—first, that the question is essentially a question of law, not of fact; secondly, that there was no evidence in support of the proposition that they were promoters to be left to the jury in this case. It was also argued that they could not be promoters of this company, because there was no evidence that they had had anything to do with its establishment, even though they might have contemplated throughout that their assistance of Park was to end in his selling the mine to some company promoted by him. The plaintiffs, on the other hand, contended that the question whether the defendants were promoters or not was properly a question for the jury; that there was ample evidence to be left to the jury on the question; and that the jury having found that question in the affirmative, and also found a verdict for

the plaintiffs, the plaintiffs are entitled to retain that verdict, and ought to have judgment for the sum assessed by the jury upon that part of the case, without being compelled to forego any other rights they may possess. They contended that there was ample evidence, not only of the fact of promotorship, but of such facts as to warrant the jury in finding the verdict generally for them, on the grounds that they were promoters, as being persons who had agreed to share a portion of the purchase money paid by the company with a co-promoter, the vendor, either in money or in paid-up shares of the company, not in consideration of any services rendered to the company, but merely by way of reward to them for their assistance to him, the vendor, in getting rid of the property to the company. The only question for me now to decide is whether there was any evidence for the jury upon which they could find for the plaintiffs; in other words, whether I ought, notwithstanding the findings, to have directed a verdict for the defendants. I am not at liberty now to consider whether the verdict was against the weight of the evidence, nor whether my direction to the jury in point of law was erroneous or insufficient, but I apprehend I can only now consider whether the evidence was so entirely in favour of the defendants that I ought not to have left the question to the jury at all, but at the end of the evidence to have given judgment for the defendants. This being the duty I have to discharge, the first question which has to be decided is, whether it is the duty of the judge or the jury upon a complicated series of facts to decide whether certain persons are or are not promoters of a company. It appears to me that, though there may be cases in which the facts are so clear as to admit of no doubt, this must almost always raise a question for the jury; and that in this case (without at all wishing to prejudge the question whether I gave a sufficient direction to the jury in this respect) it was a proper question to leave to the jury. I was referred to a case which was very recently before the Master of the Rolls (*Emma Mining Company v. Grant*, not yet reported), in which this very question was directed to be tried in an issue as a question of fact. In *Twycross v. Grant* (36 L. T. Rep. N.S. 469; L. Rep. 2 C. P. Div. 469) Cockburn, C.J., in p. 541 of his judgment, and Bramwell, L.J., in p. 503, both treat the question as one of fact; and in a case tried before Lush, J., at Guildhall, the same opinion was expressed. In the present case I am clearly of opinion that it was a question for the jury if it was a necessary question at all, and that I have no power to disregard their finding on the ground that I ought to have withdrawn it from them. I do not think it necessary, having very fully set out the evidence bearing upon the point, to examine it in detail for the purposes of pointing out all the facts upon which I think a jury might be asked whether the defendants were promoters of the company or not; but I think, to put it as shortly as possible, that there was evidence of the following facts sufficient to go to a jury, and that, if the jury were satisfied of all these facts, they might find that the defendants were promoters: (1) That the defendants knew that the whole object of Park and the other owners was to sell the mine for the best price they could obtain; (2) that it could only be sold to a company to be formed; (3) that there was an agreement before-

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hand that, whatever company should be formed, Park was to include in his purchase money a sum sufficient to cover a sum of money to be handed to the Lewises for their assistance to him in getting the property sold; (4) That the Lewises did give Park actual assistance, and looked to the formation of the company by Park for their remuneration in shares out of the purchase money. But it was argued forcibly, for the defendants, that even if the defendants were promoters, it does not at all follow that they were liable; for that many cases may be put in which a man might properly be found to be a promoter of a company, and yet not be in such a position as to make him liable to refund moneys which he might have received from the vendors of the property which the company was formed to acquire. On the other hand, the plaintiffs' counsel admitted that the mere finding that the defendants were or were not promoters would not be conclusive as to their being in such a position as to be liable to refund the amount of the shares received by them; on the contrary, they contended that, independently of their being promoters, the defendants might be liable as trustees to the company for their shares received by them under the circumstances of this case; and therefore I ought to give judgment upon the finding of the jury for the plaintiffs, independently of the particular finding as to promotorship. Subject to the question of whether the verdict ought to be set aside and a new trial had on the ground of misdirection, which I apprehend is not a matter now to be considered, and subject to the difficulty arising from the fact that other questions left to the jury were not disposed of, I am of opinion that there was evidence upon which the jury might find for the plaintiffs, upon the second head of claim as stated in the indorsement on the writ as a claim for "profits received by the defendants to the use of, and as trustees for, the plaintiffs." With regard to the two questions put to the jury upon paragraphs 8 and 9 of the claim, and 7 and 8 of the defence, it appears to me, on full consideration, that they are immaterial; for, assuming the version of the defendants to be correct, they do not touch the question now under consideration, which arises under paragraph 17 of the statement of claim, and paragraph 13 of the defence. Paragraph 17 of the claim is as follows: "The defendants became and were promoters of the plaintiff company, but did not communicate to the plaintiff company, and such company did not know, that they had obtained from the said T. W. Park the said promise of 250 fully paid-up shares, nor that the agreements mentioned in paragraphs 7, 8, 9, 10, and 12 had been entered into, nor the facts mentioned in paragraphs 5, 6, 10, 11, 13, 15, and 16, as known to the defendants. Such agreements and facts were material to the plaintiffs to know, and as such promoters the defendants were bound to disclose them fully, yet they did not disclose them, but concealed and misrepresented them as aforesaid. If such agreements and facts had been disclosed, the plaintiffs would not have entered into the agreement to purchase hereinafter mentioned." Paragraph 13 of the defence is as follows: "As to paragraph 17 of the claim, the defendants deny that they were promoters of the plaintiff company. They had nothing whatever to do with the promotion thereof, and first knew of the said company's existence from seeing a copy

of the said company's prospectus in a newspaper. They deny that they had obtained a promise from the said T. W. Park of 250 or any shares, and they deny that they were under any obligation, or owed any duty whatever, to the said company, and they deny that they concealed or misrepresented any facts within their knowledge. They do not admit that the said alleged agreements or facts were material to the plaintiffs to know, nor that, had they been disclosed, the plaintiffs would not have entered into the agreement to purchase." The reason why I am of opinion that the findings referred to are immaterial is, that the issues raised by paragraphs 7 and 8 of the defence appear to me to be only issues as to the exact amount of agreement at which Park and the defendants had arrived at a given time, and not to amount to a denial of the material allegations of paragraph 17, viz., that the defendants had obtained a promise (though it might not have been definite as to amount) that they should be remunerated for their assistance in paid-up shares of the company, or in moneys to be included in and to come out of the purchase money to be charged by him, in consideration of assisting him; and that they were promoters of the company in such a sense as that they ought not to have obtained such a promise or the benefits of it without disclosure to the company. I think that it does not lie in the mouth of the defendants to say that there was no promise, merely because down to a certain period there was an uncertainty as to its performance, or as to the amount of the shares or money to which Park would recognise his liability. The evidence showed that, immediately upon the formation of the company, one of the defendants wrote to the other, "I am writing to Mr. Park to let me have half the amount he promised me in paid-up shares;" and they both in their evidence admitted that the correspondence showed that it was contemplated that this was a probable mode of payment. I think that upon the whole of the evidence there was enough to warrant the jury in finding, and that they must be taken to have found, that there was an agreement that the defendants should have payment or part payment of the sum they were to receive out of the purchase money in paid-up shares, which Park was to receive from the company in part payment of the purchase money; and that they did receive the 250 shares in accordance with that agreement. This being so, I think it matters not that, as between them and Park, the consideration should have been in part their loss of the 2½ per cent. as compared with the 1 per cent. commission. That was merely one of their motives for assisting Park to sell, and to get up a company by helping him in disposing of the property. It was not a matter for which the company intended to create shares, or to pay in the shape of purchase money or otherwise. It was a mere mode of obtaining money of the company for services rendered to Park for his own benefit and that of the defendants, without any consideration as far as the company was concerned. It cannot be suggested that the latter part of paragraph 17 of the claim, which alleges that, if such agreement had been disclosed, the plaintiffs would not have entered into the agreement to purchase, would be proved or not proved according as the promise of Park was or was not reduced to a certainty as regards

the exact number of shares to be taken by the defendants, or the exact amount of the money to be paid. The substance of the question was whether there had been a promise by Park to remunerate the defendants for services to him, the vendor, out of moneys to be charged by him to the company in the purchase money for the mine, which was unknown to the company, but throughout known to be intended by the defendants, and which ended in their obtaining from Park by virtue of his promise the 250 shares in question. I think there was evidence to go to the jury that this was the real state of the case, and that the jury intended to give their verdict upon that ground. This being so, it only remains to consider whether the facts proved, supposing them to amount to what I have above suggested, do constitute a good cause of action. I am of opinion that they do. A great many cases were referred to in the argument; but it is unnecessary to refer particularly to more than one. It appears to me that the case of *Bagnall v. Carlton* (37 L. T. Rep. N. S. 481; L. Rep. 6 Ch. Div. 371)—which ought to be called *Bagnall and Co. v. Carlton*—deals with a state of facts identical in all essentials with those in the present case, and lays down principles entirely applicable to and sufficient to decide that part of this claim upon which I feel called upon to give judgment. It is there distinctly laid down that it is not necessary that the particular company should have been constituted or contemplated at the time when the arrangement for remuneration complained of is made. This point was expressly argued by the counsel for one of the persons held liable in the case; and Cotton, L.J., who was the only one of the Lords Justices who gave reasons for his judgment—the other treating the matter as too clear for argument—gives reasons entirely applicable to this case for thinking that this made no difference. The case of *Bagnall v. Carlton* also clearly establishes that persons who know that the sum they are to receive is to come out of the secret profit which persons standing in the position of trustees for the company are going to put into their own pockets, are themselves in a fiduciary relation to the company, and answerable as trustees to refund any profits so made by themselves at the expense of the company. The case of the *Richardsons*, dealt with by Cotton, L.J. in his judgment, seems to me to be on all fours with that of the defendants in the present case, there being evidence in this case as in that from which the jury might reasonably think that the defendants knew that Park was to pay them out of moneys of the company, ostensibly but not really purchase money, or out of shares to be created for the mere purpose of covering a reward to them for their secret services to Park. If the question were to turn upon whether the defendants were promoters of the company or not, as distinct from the question whether they occupied such a position as to be liable to the company as trustees in respect of the shares, I think there is evidence that they were promoters in quite as high a degree as were the Messrs. Duignan in the case of *Bagnall v. Carlton*, who were held to be promoters by Bacon, V.C.; and in the Court of Appeal, though it was held that they were not liable to refund the 1500*l.* received by them, on the ground that the money did not come out of the funds of the company, but was a debt personally due from the vendor, and payable out of his own

moneys. In the present case I think there was ample evidence upon which the jury might find that it was throughout intended and understood (though in what particular proportions, and in what exact manner, was not at the time of the formation of the company defined) that the payment to the defendants by the vendor for their assistance to him in promoting a company, and furthering the sale of his mine, should come from the funds of the company by being included in the purchase money of the chief promoter Park, and paid to the Lewises out of that purchase money, whether in cash or shares, or partly in each. On the whole, therefore, I am of opinion that there was evidence upon which the jury might reasonably find, if necessary, that the defendants were promoters, and, at all events, that they were liable to refund the profits received by them in the shape of shares of the company, for which the company had received no consideration. No question was raised before me as to the amount of the verdict. It was not urged, as in *Bagnall v. Carlton*, that the defendants ought to be allowed to retain any sum because of the value of their services; nor was any evidence given to warrant me in telling the jury that they were bound to take any such into consideration. The defendants simply stood upon the points of law raised. So far as this part of the case was concerned, the facts sufficient to warrant the finding of the jury were really not in dispute. I therefore give judgment for the plaintiffs for the sum awarded by the jury in respect of that part of the claim which consists of a claim "for profits received by the defendants for the use of and as trustees for the plaintiff," leaving either party to take such further steps as they may be advised.

*Judgment accordingly. Liberty reserved to the plaintiffs to apply to the court on the subject of costs.*

Solicitors for the plaintiffs, *Snell and Greenip*.  
Solicitors for the defendants, *Burton, Yeates, and Hart*, for *Tyrer, Kenion, and Tyrer*.

## Supreme Court of Judicature.

### COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Thursday, Feb. 27.

(Before JESSEL, M.R. and JAMES and BRAMWELL, L.JJ.)

*Ex parte* HILMANN; *Re* PUMFREY. (a)

*Bankruptcy—Trader—Post-nuptial settlement—Leaseholds—Purchaser for value—Bankruptcy Act, 1869, s. 91.*

In the 91st section of the Bankruptcy Act 1869, which provides that any settlement of property made by a trader not being (inter alia) a settlement "made in favour of a purchaser or incumbrancer in good faith and for valuable consideration," shall, if the settlor becomes bankrupt within two years after the date of such settlement, be void as against the trustee in the bankruptcy, the word "purchaser" means "buyer," and the trustee of a post-nuptial settlement can-

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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not be a purchaser within the meaning of the section.

A trader within two years before the commencement of his bankruptcy executed a post-nuptial settlement, whereby he assigned to trustees, in favour of his wife and children, certain leasehold houses subject to the rent and covenants contained in the lease:

Held (affirming the decision of Bacon, C.J.), that the settlement was void as against the trustee in bankruptcy.

*Price v. Jenkins* (36 L. T. Rep. N. S. 237; L. Rep. 5 Ch. Div. 619) distinguished.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy reversing a decision of the judge of the Birmingham County Court.

The facts of the case were as follows:—

On the 3rd Jan. 1878 J. H. Pumfrey, who carried on business as a jeweller at Birmingham, was adjudicated a bankrupt, the act of bankruptcy on which the adjudication was founded being the filing by him of a liquidation petition on the 23rd Feb. 1877.

On the 1st July 1875, within two years before the commencement of the bankruptcy, Pumfrey had executed a post-nuptial settlement, by which he assigned to trustees for the benefit of his wife and children two leasehold houses in Birmingham which he had purchased in 1873, and some personal chattels. The leaseholds were assigned to the trustees, subject to the payment of the ground rent of 10l. per annum, which was reserved by the lease, and to the performance of the lessee's covenants contained in the lease.

The trustee in the bankruptcy applied to the Birmingham County Court for a declaration that the settlement was void as against him under the 91st section of the Bankruptcy Act 1869.

It was admitted that the bankrupt was solvent when he executed the settlement, and that he had purchased the houses, not out of moneys withdrawn from his business, but with the proceeds of a legacy.

The County Court judge held that the settlement was valid as to the leasehold houses, but declared it void as to the other property comprised in it.

The trustee appealed from this decision, and the decision of the County Court judge was reversed on appeal, the following judgment being delivered by

BACON, C.J.—No doubt there are a great many cases arising upon settlements, in which the court has endeavoured to ascertain what is and what is not an unfair transaction, by deciding the question as to what is a merely voluntary assignment. I have no inclination to interfere with any of those decisions, and, least of all, with the decision in the case of *Price v. Jenkins* (*ubi sup.*) which has been referred to by Mr. Roxburgh. But what has that case to do with the Bankruptcy Act 1869, in which there is a special provision made by the Legislature, that a settlement made by a trader within two years of the bankruptcy, unless it is made to a purchaser or incumbrancer for valuable consideration, shall be void as against the trustee? The words of the 91st section of the Act are as follows: "Any settlement of property made by a trader, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for

valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor become bankrupt within two years after the date of such settlement, be void as against the trustee of the bankruptcy appointed under this Act." I do not think that the present case comes within any one of those provisions; and there can be no doubt that the assignment in question is invalid as against the creditors of the bankrupt, and that the trustee ought not only to be declared entitled to the moveables, but also to the leaseholds. The appeal will be allowed, and there will be a declaration in favour of the trustee, with costs here and below.

From this decision the trustees of the settlement appealed.

Roxburgh, Q.C. and Tarleton for the appellants.—We are purchasers for valuable consideration within the meaning of the 91st section of the Bankruptcy Act 1869, the liability to which we are subject to pay the rent and perform the covenants of the lease preventing the assignment from being a voluntary one. That is the effect of the decision of the Court of Appeal in *Price v. Jenkins* (36 L. T. Rep. N. S. 237; L. Rep. 5 Ch. Div. 619). [JESSEL, M.R.—That was a decision upon the 27 Eliz. c. 4.] *Ex parte Doble* (38 L. T. Rep. N. S. 183) is a decision on the Bankruptcy Act 1869, and is equally in our favour. It was there held by the Chief Judge that a settlement of leasehold property, to which liability is attached, is of necessity a settlement for valuable consideration, and cannot be avoided under the 91st section of the Bankruptcy Act 1869, even though no other consideration be given. [JESSEL, M.R.—Let us look at the words of the section. The words are "a purchaser or incumbrancer in good faith and for valuable consideration." The word "purchaser" must mean "buyer," and not purchaser in the legal meaning of the term; that is clear from the alternative word "incumbrancer," which would not be used if "purchaser" meant one who acquires title by purchase, as distinguished from descent.] The trustees here are as much purchasers as the son was in *Price v. Jenkins*. [JESSEL, M.R.—The word "purchaser" is not used in the 27 Eliz. c. 4.]

De Gez, Q.C. and Finlay Knight, for the respondents, were not called upon.

JESSEL, M.R.—It appears to me that the judgment of the Chief Judge in this case is clearly right. What we have to decide is this: What is the meaning of the 91st section of the Bankruptcy Act 1869? Now, in the first place, the Bankruptcy Act is a code of law relating to bankruptcy and dealing with matters which specially concern commercial men. It is part of a commercial code, and we must expect to find words in it used in the sense in which commercial men use them. And I think that in the 91st section of the Act we do find words used in that sense. That this is so, moreover, is clear from the words themselves independently of any other consideration. [His Lordship read the section and continued:] It is said that this settlement comes within the exception as being "made in favour of a purchaser or incumbrancer in good faith and for valuable consideration," the argument being that, because the leasehold houses are subject to the payment of rent and the performance of covenants, the trustees of the settlement are purchasers of them in good

faith and for valuable consideration. This argument, I think, is not well founded. The word "purchaser" in this section clearly means "buyer," and not a man who takes by purchase, as distinguished from taking by descent. That this is so is made obvious, as I pointed out during the argument, by the use of the other word "incumbrancer;" for every incumbrancer is a purchaser in the purely legal sense of the word, and the two words are contrasted with each other. It is impossible to say that a trustee of property for a wife and children is in any sense of the word a "buyer" of the settled property. The case does not therefore fall within the exception, but within the rule of the 91st section, and the appeal must be dismissed, with costs.

JAMES, L.J.—I am entirely of the same opinion. *Price v. Jenkins*, as the Master of the Rolls pointed out during the argument, was entirely a decision on the statute 27 Eliz. c. 4, and the object of our decision in that case was to prevent a fraud.

BRAMWELL, L.J.—I am of the same opinion.

*De Gez*, Q.C.—In the case of *Ex parte Doble* (*ubi sup.*) the bankrupt was not a trader, and therefore the 91st section of the Act did not apply there. That fact is not stated in the report of the case, but the copy of the proceedings in counsel's brief in that case shows that the bankrupt was not a trader.

*Appeal dismissed, with costs.*

Solicitors for the appellants, *Hacon and Turner*.  
Solicitors for the respondent, *Robinson, Preston, and Co.*

Thursday, Feb. 27.

(Before, JESSEL, M.R., and JAMES and BRAMWELL, L.JJ.)

*Ex parte HALL; Re WHITTING. (a)*

*Equitable assignment—Interest in land—Parol agreement for loan on security of future rent—Written authority to tenant to pay rent to lender—Bankruptcy of landlord—Statute of Frauds, s. 4.*

*A man who subsequently became bankrupt obtained a loan of 200l. from his bankers upon a verbal agreement that it should be repaid out of the Michaelmas rent of a farm belonging to him, and he gave the bankers a letter addressed to the tenant of the farm, authorising and requesting him when his Michaelmas rent became due to pay the bankers 200l. He was adjudicated bankrupt before the rent became due:*

*Held, that the trustee in the bankruptcy was entitled to the rent, the letter to the tenant being a mere revocable authority, and the parol agreement to charge the loan upon the rent being inadmissible in evidence by virtue of the 4th section of the Statute of Frauds.*

*Decision of Bacon, C.J. affirmed on different grounds.*

This was an appeal from a decision of the Chief Judge in Bankruptcy.

The hearing in the court below is reported *sub nom. Ex parte Rowell; Re Whitting*, in 39 L. T. Rep. N. S. 259, where the facts of the case and the judgment of the Chief Judge are set forth.

The facts were briefly as follows:—

William Whitting was adjudicated a bankrupt

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

on an act of bankruptcy committed on the 11th Aug. 1877.

On the 16th July he had given to his bankers, Messrs Hall and Co., a letter addressed to Messrs. Horrell, who were tenants of a farm belonging to him, authorising and requesting them to pay 200l. to the bankers "when your Michaelmas rent becomes due to me."

Messrs. Horrell received the letter, but made no payment to the bankers.

The trustee in the bankruptcy applied to the court for a declaration that the letter of the 16th July was void as against him.

There was parol evidence that the letter was written in pursuance of a verbal agreement between Whitting and his bankers that they should advance him 200l., and that he should charge the Michaelmas rent with the repayment of the loan, and that the 200l. was actually advanced to him by the bankers.

The Chief Judge held, reversing the decision of the judge of the County Court at Peterborough, that the letter was void as against the trustee on the ground that when the rent accrued due, it was due, not to the bankrupt, but to the trustee in the bankruptcy.

From this decision the bankers appealed.

*Winslow*, Q.C. and *Reginald Brown* for the appellants.—In *Ex parte Shellard, Re Adams* (29 L. T. Rep. N. S. 621; L. Rep. 17 Eq. 109), a document like the letter in this case was held to be void as against the trustee in the bankruptcy, on the ground that it was inadmissible in evidence as being an unstamped bill of exchange. But that decision has been impeached in many cases and is no longer an authority. In *Diplock v. Hammond* (5 De G. M. & G. 320) such a letter was held to be a good assignment. *Brice v. Bannister* (38 L. T. Rep. N. S. 739; L. Rep. 3 Q. B. Div. 569) is an authority in our favour, for there a letter of this kind was held to be a good equitable assignment. [JESSEL, M.R.—Then it is an assignment of an interest in land, and by virtue of the 4th section of the Statute of Frauds parol evidence of the agreement to make the assignment is inadmissible; and without such evidence the letter contains a mere revocable authority to pay the rent.] The advance of the money by the bankers is a sufficient part performance to take the case out of the statute: (*Nunn v. Fabian*, 13 L. T. Rep. N. S. 343; L. Rep. 1 Ch. 35.) The point on the Statute of Frauds was not raised in the court below. They also cited

*Fisher v. Calvert*, 27 W. R. 301;

*Buck v. Robson*, 39 L. T. Rep. N. S. 325; L. Rep. 3 Q. B. Div. 686.

*Cookson*, Q.C. and *H. Percival*, for the respondent, were not called upon.

JESSEL, M.R.—I am of opinion that the decision of the Chief Judge in this case ought not to be disturbed. The real agreement between the parties was verbal, and the verbal arrangement was a contract charging an interest in lands, the rent which it was agreed to charge being an interest in lands. Therefore it comes under the 4th section of the Statute of Frauds, which provides that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or notice thereof shall be in writing,



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and signed by the party to be charged therewith," &c. We cannot take any notice of that verbal agreement. The only document we can look at is a letter dated the 16th July, 1877, and written by the bankrupt to Messrs. Horrell in these words: "When your Michaelmas rent becomes due to me, I hereby authorise and request you to pay to Messrs. Hall, Lloyd, Bevan, and West, of Brighton, 200*l.*, for which I will accept their receipt as so much of your rent discharged." Now, there is nothing more than that. The letter is, on the face of it, a mere request to the tenants to pay a sum to the bankers on account of rent. It is simply an authority to pay which was revocable the next moment, and the bankruptcy operated as a revocation. It has been argued that the authority to pay was an equitable assignment for valuable consideration, and was therefore irrevocable; but the answer is, you can't prove that, the agreement between the bankers and the bankrupt not being in writing, and therefore evidence of it being inadmissible. I should add that I see no reason for differing from the decision in *Brice v. Bannister*.

JAMES, L.J.—I am entirely of the same opinion. The letter written by the bankrupt to his tenants is in the common form of an authority to pay rent to bankers, and is just like the authority which most men give for the payment of railway dividends and such things to their bankers. And it is clearly revocable at any moment. The agreement between the bankrupt and his bankers was clearly one affecting an interest in land, and ought to have been reduced into writing, and that not having been done, evidence of it is inadmissible.

BRAMWELL, L.J.—I am of the same opinion.

*Appeal accordingly dismissed with costs.*

Solicitors for the appellants, *Linklater, Hackwood, Addison, and Brown.*

Solicitor for the respondent, *S. S. Hatchett Jones*, agent for *Rutland and Graves*, Peterborough.

#### SITTINGS AT WESTMINSTER.

Nov. 18, 19, and Dec. 10, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

FOWLER v. KNOOP. (a)

*Shipping—Charter-party—Bill of lading—Consignee of goods—Implied contract to take delivery within a reasonable time—Bills of Lading Act 1855 (18 & 19 Vict. c. 111), s. 1.*

G. and Co. chartered plaintiff's ship to load a cargo at Iquique, and proceed to a port for orders to discharge in a safe port in the United Kingdom. The charter-party stipulated that the vessel should deliver the whole of her cargo as fast as the custom of the port of discharge would allow. G. and Co. (the charterers) shipped the cargo at Iquique, and consigned it to defendant, to secure an advance and for sale. The bill of lading stated that the cargo was to be delivered to defendant or his assigns, "he or they paying freight for the said goods as per charter-party." Whilst the ship was on her voyage defendant sold the cargo, and after intermediate sales, upon the ship's arrival at the port of discharge, the cargo was delivered to the ultimate purchasers upon orders signed by the defendant, who re-

tained without indorsing it to any of the purchasers the bill of lading in his own hands. In an action for damages for detention of the ship at the port of discharge, the jury negatived the existence of any custom in that port as to unloading.

Held (affirming the judgment of Field, J.), that the contract, both in the charter-party and the bill of lading, was that the cargo should be discharged within a reasonable time; that defendant was a consignee of the goods within the meaning of the Bill of Lading Act 1855, sect. 1, and therefore that plaintiff was entitled to maintain this action.

APPEAL from a judgment of Field, J., after a trial with a special jury at Guildhall, during the Trinity Sittings 1877.

The action was to recover damages against the defendant, as consignee named in the bill of lading of a cargo of nitrate of soda, shipped on board the ship *Claudine*, for the detention of the vessel at the port of discharge.

The plaintiff was the owner of the vessel *Claudine*. By charter-party entered into at Valparaiso on the 11th Sept. 1875, J. Gildmeister and Co. chartered the *Claudine* to load a cargo of nitrate of soda at the port of Iquique, and proceed to a port for orders to discharge in a safe port in the United Kingdom. The charter-party contained the following stipulations:

Bills of lading to be signed by the master, weight and quality unknown, all on board to be delivered, and that the vessel should, in such discharge port as ordered, deliver the whole of her cargo as fast as the custom of the port will allow.

The cargo was shipped on the 19th Nov. and consigned to defendant, who was then carrying on business in London under the firm of William Berkefield and Co. The bill of lading was as follows:

Shipped in good order and condition by J. Gildmeister and Co., on board the British barque *Claudine*, whereof E. Jamieson is master, now lying at the port of Iquique, and bound for Queenstown or Falmouth for orders—5290 bags nitrate of soda, weighing, &c., and are to be delivered in the like good order and condition at the port of her final destination (the act of God, fire, and all other dangers and accidents of the seas, rivers, and navigation excepted), unto Messrs. Wm. Berkefield and Co., London, or to their assigns, he or they paying freight for the said goods, as per charter-party and average accustomed. In witness, &c. Dated at Iquique Nov. 19, 1875.

Messrs. Gildmeister and Co. drew a bill of exchange for 5000*l.* upon the defendant on account of the cargo, and forwarded to him the bill of lading and a copy of the charter-party. The defendant accepted and paid the bill of exchange, and agreed to sell the cargo to the London Banking Association at a price per ton delivered *ex* ship. The London Banking Association contracted to sell it to Bath and Sons upon the same terms, and the latter firm also upon the same terms agreed to sell it to Jas. Gibbs and Co. The defendant kept the bill of lading in his own hands, and did not indorse it to any of the purchasers of the cargo. The vessel was ordered to Plymouth to discharge, and she was there and ready to discharge her cargo on April 8, 1876. The cargo was delivered to Jas. Gibbs and Co. upon orders signed by the defendant, and the discharge (which the plaintiff contended was not performed within a reasonable time) was completed on April 27.

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.



At the trial, the defendant's counsel, at the close of the plaintiff's case, submitted that there was no liability on the part of the defendant to the plaintiff to take delivery of the cargo within a reasonable or any other time. Field, J. reserved this point for further consideration, and left certain questions to the jury upon which they found: First, that there was no such custom of the port of Plymouth as to take delivery of cargoes of nitrate of soda at the rate of forty tons per day as alleged by the defendant; secondly, that the delivery of the cargo was not taken within a reasonable time, and that seventy tons per day was reasonable.

It was agreed that, if the defendant was liable, the plaintiff was entitled to recover for seven days' detention at 7l. 10s. per day.

The question of liability was argued before FIELD, J. on Dec. 1, and on May 6, 1878, the learned judge delivered the following judgment:—The question in this case is, whether the defendant is liable for not taking delivery at Plymouth, within a reasonable time, of a cargo of nitrate of soda, which was shipped on board the *Claudine*, at Iquique, by J. Gildmeister and Co., under a charter-party, whereby it was stipulated that the vessel should deliver the whole of her cargo as fast as the custom of the port would allow, and in respect of which a bill of lading, stating that the cargo was shipped by J. Gildmeister and Co., who were the same persons as the charterers, and was to be delivered unto the defendant or his assigns, he or they paying freight for the said goods as per charter-party, was signed by the master. The defendant advanced to Gildmeister and Co. 5000l. on account of the cargo, which was consigned to him to secure the advance and for sale, and it was admitted on the argument that he was a consignee named in the bill of lading to whom the property in the cargo passed. Whilst the cargo was afloat the defendant sold it, and after several intermediate sales the ultimate purchasers were James Gibbs and Co. The defendant did not, however, indorse or part with the bill of lading, and the cargo was delivered to Messrs. James Gibbs and Co. by his orders. He therefore remained subject to any liability which attached to him as the consignee named in the bill of lading, and it becomes unnecessary to consider the point adverted to by the Lord Chief Baron in *Lewis v. Nilke* (L. Rep. 4 Exch. 58; 38 L. J. 62, Ex.), whether the doctrine of *Smurthwaite v. Wilkins*, *post*, that the right of the consignor to sue under the Bills of Lading Act passes to the indorsee with the indorsement, applies to the liability of the consignee, so as to divest his liability in the event a transfer by him. Upon the argument it was contended on the part of the plaintiff that it is an implied term of the contract, contained in the bill of lading, that the consignee shall take delivery of the goods within a reasonable time; and that by virtue of the Bills of Lading Act 1855 the defendant, to whom the property in the goods passed by reason of the consignment, became liable to do so. On the part of the defendant it was contended, first, that the bill of lading did not contain any contract to take delivery within a reasonable time, or at any time; and secondly, that, as there was an express contract in the charter-party with reference to the discharge of the cargo, no other contract on the part of the shippers,

who were the charterers, could be implied in the bill of lading, as between the shippers and the shipowner; and that therefore no liability passed from the shippers to the consignee, under the Bills of Lading Act; or, in other words, that the only liability to take delivery was under the charter-party, to which the defendant was not a party. Upon the first question, which I answer without reference to the charter-party, I am of opinion that there is a contract in the bill of lading by the consignee to take delivery. It is true that in one sense there is no express contract to that effect in words, the only express stipulation being that the cargo is to be delivered to the defendant or his assigns, he or they paying freight as per charter-party—the only term of the charter-party which is incorporated in the bill. But delivery by one person to another is not an act which can be performed by one of them only. In order to effect a delivery, one party must give, and the other must take delivery; it is a composite act requiring a readiness and willingness in both parties to the delivery. It is as much the act of the person who takes as of the one who gives delivery—of the merchant as of the shipowner. See the judgment delivered by Blackburn, J. in *Ford v. Cotesworth* (19 L. T. Rep. N. S. 634; L. Rep. 4 Q. B. at p. 132; 38 L. J. 216, Q. B., at p. 55). I think that the obligation of the shipowner to deliver, which is expressed in the bill of lading, imports an obligation to take delivery, and that a contract to take delivery is to be implied in the bill of lading. It is clear that the consignee on tendering freight is entitled to delivery; it would be, I think, unreasonable to hold that the shipowner has not a relative right to have the cargo taken and to sue the consignee for not taking it. To hold otherwise would compel the owner to resort to the charterer, who may be, and often as in this case is, a stranger living in a distant part of the world, and to deprive him of what, in comparison, is the simple and natural resort of the person who has taken delivery of his cargo. Then within what time is delivery to be taken? I think that in this, as in all other contracts where anything is to be done, and there is no express stipulation as to the time within which it is to be done, a reasonable time is to be implied, which, in the present case, is found by the jury against the defendant. I also think that the liability to take delivery became vested in the defendant by virtue of the 1st section of the Bills of Lading Act 1855, whereby it is enacted that: "Every consignee of goods named in a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself." It was argued by Mr. Butt that, as there was an express contract in the charter-party as to the delivery of the cargo, and as the charterers were the shippers of the cargo mentioned in the bill of lading, there was no contract between the shipper and the shipowner contained in the bill of lading as to taking delivery, and no new contract was to be implied. This appears to me to misread the statute. The statute does not say that the contract between the shipper and the shipowner is to be transferred, but that the liability of the consignee in respect of the goods

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is to be the same as if the contract contained in the bill of lading had been made with the consignee himself. What is the object of taking a bill of lading when there is a charter-party? The object of a bill of lading is to enable the holder to sell, or otherwise deal with the cargo, and to transfer the right to the cargo upon the terms contained in the bill of lading, free from all rights and liabilities under the charter-party, except so far as any term in it is incorporated in the bill of lading. It is to be observed that, whilst on the one hand it is clear that as between the parties to the charter-party and the bill of lading, so long as they are the parties whose rights and liabilities have to be determined, the terms of the charter-party dominate; on the other it is equally clear that when the bill of lading is in the hands of an indorsee, only those terms of the charter-party which are expressly incorporated bind the latter; and if there be a different rate of freight provided for, nothing can be clearer than that the indorsee is liable to the bill of lading, and not to the charter freight. In the present case, freight is the only term of the charter-party which is expressly incorporated in the bill of lading; and I have to say what is the term of the contract contained in the bill of lading which is to govern the rate and time of discharge. If the effect of the reference in the bill of lading to the charter-party had incorporated the terms in the charter-party in reference to the mode of discharging, the consequences would be the same; for the jury have found that there was no special custom to take the contract out of the ordinary one of reasonable time, and that the delivery was not taken within that time; but if, as I hold, the contract upon which the defendant is liable is that contained in the bill of lading, then the same result follows. My judgment is, that the contract contained in the bill of lading was to take delivery of the cargo in a reasonable time, according to the custom of the port of discharge; and that the defendant is subject to this liability, not because it was the contract entered into between the plaintiff and the shipper, but because it is the contract contained in the bill of lading. I therefore give judgment for the plaintiff for 52*l.* 10*s.* and costs, and I think that he should also have the costs of the introduction of the different purchasers as third parties.

The defendant appealed from this judgment.

*Butt*, Q.C. and *J. C. Matthew*, for defendant, cited and referred to

*Smurthwaite v. Wilkins*, 5 L. T. Rep. N. S. (39 O. S.) 842; 11 C. B. N. S. 842;

*Ford v. Cotsworth*, 19 L. T. Rep. N. S. 634; L. Rep. 5 Q. B. 132; and 38 L. J. 55, Q. B.;

*MacLachlan on Shipping*, p. 373.

*Cohen*, Q.C. and *Wood Hill*, for plaintiff, referred to

*Domett v. Beckwith*, 5 B. & Ad. 521;

*Hill v. Idle*, 4 Camp. 327;

*Fraser v. The Telegraph Company*, 27 L. T. Rep. N. S. 373; L. Rep. 7 Q. B. 566.

The arguments fully appear from the judgments of Field, J. and the Court of Appeal.

*Curr. adv. vult.*

Dec. 10.—The following judgment of the Court was delivered by

BRAMWELL L.J.—In this case the defendant contended that, as there was a charter-party besides the bill of lading, and as the terms of the charter-

party provided that the unloading should be according to the custom of the port, the bill of lading and the contract contained in or evidenced by it is not the governing contract, but that it must be read in connection with the charter-party. It was said that the contract between the defendant as consignee of the goods, if he was so, and the shipowner, must be collected from the two documents and the other circumstances of the case. This the plaintiff denied. We think it is not necessary for us to give an opinion as to this, because the plaintiff contended that, even if the charter-party and the bill of lading were to be read together, the same contract would be collected from them as shown by the bill of lading alone, without the charter-party. Field J., in the court below, took this view, and said that, in his opinion, the charter-party did not alter the contract, which was to be collected from the bill of lading alone. We agree with the view of Field J. If there had been no charter-party, the contract would be in the bill of lading, and the law would imply a contract to unload within a reasonable time, or, which is the same thing, with due diligence. The charter-party makes no difference whatever; it provides that the unloading shall be according to the custom of the port. There was no custom of the port, unless it was to unload within a reasonable time. So that, assuming that the defendant's objection is well founded, and that you must look at the two documents together, the obligation is to unload within a reasonable time. We agree with Field J., that that obligation is the same as under the charter-party, and therefore that the plaintiff is entitled to our judgment. There is another point which we also decide in plaintiff's favour. It was said that the defendant was not the consignee of the goods, and a holder of them for value within the meaning of the Bills of Lading Act, because, before the bill of lading was made, he had secured to him an interest in the property within the Act. I doubt whether that is true in fact, because the bill of lading was made at a time when he was the beneficial owner of the goods. But, if the argument was well founded on fact, I am of opinion that the case is within the statute. The defendant retained the bill of lading in the sense of being the owner of it. He did not indorse it over to any of the purchasers, but retained it in his own hands with all the rights and obligations appertaining to the holder of a bill of lading, and he gave delivery orders to the vendee for the goods. Under these circumstances, I am of opinion that the defendant is liable, for the reason, that there must be some one to satisfy the description in Bills of Lading Act; either the original consignee or his assignee of the bill of lading. In the present case, James Gibbs and Co. were not the one or the other, and it seems to follow that the defendant was.

*Appeal dismissed.*

Solicitors for plaintiff, *Stibbard, Gibson, and Co.*  
Solicitors for defendant, *W. A. Crump and Son.*

CT. OF APP.] THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY CO. v. WATSON. [CT. OF APP.]

Dec. 20, 1878, and Feb. 1, 1879.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY v. WATSON. (a)

*Railway company—Bye-law—Penalty—Passenger*  
—8 & 9 Vict. c. 20, ss. 103, 108, 109.

By 8 & 9 Vict. c. 20, s. 103, if any person travel in any carriage of a railway company "without having previously paid his fare, and with intent to avoid payment thereof," he shall for every such offence forfeit to the company a sum not exceeding 40s.

Sects. 108 and 109 enable the company from time to time to make regulations for regulating the travelling upon the railway, and for better enforcing such regulations to make bye-laws, "provided that such bye-laws be not repugnant to . . . the provisions of this Act. And any person offending against any such bye-law shall forfeit for every such offence any sum not exceeding 5l., to be imposed by the company in such bye-laws as a penalty for any such offences."

Plaintiffs, a railway company, made a bye-law under the above sections, that "any passenger travelling without a ticket shall be required to pay the fare from the station whence the train originally started to the end of his journey."

Defendant, without any intent to defraud, travelled on plaintiffs' railway from Norwood Junction to Lower Norwood without a ticket, and in a train which had originally started from New Croydon. On his arrival defendant tendered the fare for the distance he had actually travelled, but this was refused by plaintiffs' servants, who demanded the whole fare from New Croydon. Defendant having subsequently paid plaintiffs the fare from Norwood Junction to Lower Norwood, they sued him to recover the difference between the sum so paid and the amount of the whole fare from New Croydon to Lower Norwood.

Held (affirming, but on different grounds, the decision of the Common Pleas Division), that plaintiffs were not entitled to maintain their action, because the excess fare was claimed, not as a penalty (which would be recoverable only before two justices under sects. 145 and 150 of 8 & 9 Vict. c. 20), but as a debt, and the Act gave plaintiffs no power to create such a debt.

Per Brett, L.J. (in concurrence with the view taken by the court below): The bye-law was repugnant to the provisions of the Act, because the Act only authorised the exacting of an additional sum from a passenger whose conduct had been fraudulent.

APPEAL from a decision of the Common Pleas Division.

The action was brought by the plaintiff company in the County Court of Surrey holden at Southwark, to recover from the defendant the balance of a railway fare from New Croydon to Lower Norwood, two stations on the railway of the company.

The County Court judge gave judgment for the defendant, and on appeal, on a case stated, to the Common Pleas Division, the court (Lord Coleridge, C.J. and Lopes, J.) upheld his decision.

The plaintiffs appealed.

The case in the court below is fully reported,

and the special case set out, 39 L. T. Rep. N. S. 199.

For the purposes of this report the facts sufficiently appear in the head-note.

*Jeune (Mosley with him) for plaintiffs.*

*MacMorran for defendant.*

The arguments and authorities cited were the same as in the court below.

*Our. adv. vult.*

Feb. 1.—BRAMWELL, L.J. delivered the following judgment of the Court.—If the sum claimed in this case is a penalty, it is not recoverable in the County Court, nor elsewhere than before two justices, as provided by 8 & 9 Vict. c. 20, s. 145, (a) for it is the case of a liability created by statute, with a special provision for its enforcement, and with provisions inconsistent with there being a concurrent jurisdiction in the ordinary courts (see sect. 151, and *Cates v. Knight*, 3 T. Rep. 422; and see also Lord Coleridge's judgment in the court below). Accordingly it was argued for the appellant that it was a fare and not a penalty, and therefore recoverable, not before justices as a penalty, but as a debt in the County Court. I am of opinion that it is not a debt, and that the appellants have no power to create such a debt. The statute by sect. 109 gives power to enforce bye-laws only by a penalty against the offender. I have no doubt that a railway company may demand and insist on payment before taking a passenger, and that, if they give him credit for his fare, they may insist on any sum they think fit, and if he agrees to it, that it would be a valid debt recoverable as such. But if he does not agree to it, he may indeed be a trespasser in getting into the carriage, and liable to damages as such, or they may waive the tort and recover a fare on the *quantum meruit* scale; but they cannot fix or insist on a fare at their pleasure. In this case it is only one penny; but, if they can fix it at their pleasure, they might make it five shillings or 5l. They have not sued for a trespass or tort, but for a fare. They have not shown, and, of course, could not show, that the defendant ought to pay more than the ordinary fare. Consequently the appeal fails, and the judgment should be affirmed. My brother Brett wishes to add to this that, in his opinion, the claim is based on that which is repugnant to the statute, inasmuch as the statute only authorises the exacting of an additional sum in the case of fraudulent conduct. Lord Justice Cotton and myself desire it to be understood that we express no opinion one way or the other on that matter.

*Judgment affirmed.*

Solicitors for the plaintiffs, *Norton, Ross, Norton, and Brewer.*

Solicitor for the defendant, *H. S. Smith.*

(a) By sect. 145: "Every penalty or forfeiture imposed by this or the special Act, or by any bye-law made in pursuance thereof, the recovery of which is not otherwise provided for, may be recovered by summary proceeding before two justices."

Sect. 150 provides for the manner in which such forfeiture or penalty may be awarded by the justices; and sect. 151 provides that the penalty or forfeiture must be sued for within six months after the commission of the offence.

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.

CHAN. DIV.]

Re SCARTH—Re SLATER'S TRUSTS.

[CHAN. DIV.]

## HIGH COURT OF JUSTICE.

## CHANCERY DIVISION.

Friday, Feb. 7.

(Before MALINS, V.C.)

Re SCARTH. (a)

*Will—Separate gifts of surface and mines—Produce of mines set aside.*

*A testatrix, having a general power of appointment over land, appointed the surface one way and the mines under it another. At her death there was a sum of money, which had arisen from rents of the mines set aside in accordance with the Settled Estates Acts.*

*Held, that the money so set aside passed under the will to the appointees of the surface.*

UNDER the will of Richard Scarth, certain land of his was held as to half of it on these trusts—for Jane Scarth for life, remainder for her children if she should have any, in default of children as she should by will appoint. She married W. Dixon. By an order of July 14, 1871, made by Malins, V.C., in the above matter, powers to grant leases of the minerals within, under, or upon the whole of the land, half of which was held on trust as aforesaid, in conformity with the Settled Estates Acts then in force, were made to vest in the trustees of Richard Scarth's will; and it was ordered that the money to be set aside out of the rents or payments to be reserved on such leases, as directed by the Acts, should be paid to the trustees, and until it could be applied to any of the purposes mentioned in the Acts, be invested, and the interest paid to the person who would have been entitled to the rents if the money had been invested in the purchase of lands. Under this order, a lease was made of the minerals in 1871 for forty-two years. In accordance with 19 & 20 Vict. c. 120, s. 2, three-fourths of the rent received under the lease were set aside and invested, and half of the interest was paid to Jane Dixon during her life. She by her will, dated 14th July 1871, appointed all the real estates of Richard Scarth over which she had or might afterwards have power of disposition, "except the mines and minerals within and under the same, and the necessary powers for winning, working, and carrying away such minerals," to W. S. Dixon; "and as to the said mines and minerals within and under the said hereditaments," she appointed them to W. S. Dixon and certain other parties in the shares therein mentioned. She died never having had issue. The appointees of the minerals, other than W. S. Dixon, now petitioned that half of the sum, of which the three-fourths of the rent set aside consisted, might be paid to them and W. S. Dixon in the shares mentioned in the appointment of mines in Jane Dixon's will. W. S. Dixon claimed the entire half of the rent set aside, as having passed to him under the appointment of real estates in the same will.

*Bury for the petitioners.*—The will, being of the same date as the order which enabled the mines to be severed, and made as soon as the testatrix was aware of that severance, speaks from the date; it shows an intention to separate the surface from the mines, and to give the fund which

arose from the mines in the same way as the mines themselves.

*Northmore Lawrence* for W. S. Dixon.—An intention to speak from the date as to property must appear from the will itself: (7 Will. 4 & 1 Vict. c. 26, s. 24). The money set aside continued real estate subject to the will of Richard Scarth.

*Bury* in reply.

MALINS, V.C.—So long as the testatrix lived, there was a possibility of children, and therefore the case came within 19 & 20 Vict. c. 120, and accumulation went on, in accordance with sect. 2; but if she should have no children, then, under the power given by Richard Scarth's will, she could, as it was a mineral estate, give the surface one way and the minerals another. Accordingly, she has severed them. She gave the surface on trusts under which it goes to her nephew, W. S. Dixon; that is, she gives the land to him, except the mines and minerals. The will must speak at the death; and the question is, what under the will becomes of this money which before the death had arisen from the mines? This money did not represent mines which were under the surface at the death, but mines which, before the death, had been taken from under the surface and accumulated according to the Act. In excepting the mines and minerals under the estate, and giving the necessary powers for winning and working them, she means to except and give only "the mines and minerals which now, on the day of my death, are within and under the surface," with powers for working. The money set aside, not coming within this exception, forms part of the rest of the real estate as it existed before her death, and passes with the devise of the surface.

Solicitors: R. M. and F. Lowe.

Saturday, Feb. 22.

(Before BACON, V.C.)

Re SLATER'S TRUSTS. (a)

*Mortgagor and mortgagees—Reversionary interest—Expectant heirs—Unconscionable bargain—Security only for sums actually advanced—Arrears of interest—3 & 4 Will. 4, c. 27, s. 42—Fund in court—Jurisdiction under petition.*

*Reversioners entitled on the decease of a tenant for life to a sum of 1500l. charged on land, mortgaged their interest to B. for 500l. Though the mortgage was nominally for 500l., and a receipt for the same amount was indorsed, only 250l. was actually advanced; subsequently B. advanced 150l. more on the same security, and the mortgage deed in this case was expressed to be for 300l., and contained recitals that the nature and effect of the deeds and receipts were perfectly understood by the borrowers, and that the difference between the sums actually advanced, and the sums expressed to be secured was considered by them a reasonable remuneration for the delay considering the age of the tenant for life. These deeds were prepared by B.'s solicitor, acting on behalf of all parties, and the borrowers, who were in humble circumstances, had no independent advice. Interest was payable at 5 per cent., but only one instalment, on the first sum of 250l. was ever paid. On the death of the tenant*

(a) Reported by W. M. HARRIS, Esq., Barrister-at-Law.

(a) Reported by W. COWELL DAVIES, Esq., Barrister-at-Law.

for life, the trustees, having paid the fund into court:

*Held, upon the petition by the reversioners, alleging that the transaction was an unconscionable bargain, that the mortgage and further charge could stand as security only for the sums actually advanced with six years' arrears of interest only.*

*Semble, the court has jurisdiction upon petition for payment out of court to hear and decide questions of this nature without directing the issue of a writ.*

PETITION.

By an indenture of settlement of 13th Sept. 1833, certain real estates, in the county of Northampton, were appointed to trustees for 500 years to secure an annuity, and then in case at the decease of the survivor of one John Fowkes and Abigail his wife, there should be any child of the said Abigail Fowkes, by the said John Fowkes, then living, or there should have been any child of her by him who being a son attained the age of twenty-one years, or being a daughter attained that age or married, upon trust to raise by mortgage or sale a sum of 1500*l.*, and interest at 4 per cent., and to stand possessed thereof in trust for all and every such child and children.

John Fowkes died on the 6th Jan. 1858, leaving five children, four of whom lived to attain a vested interest in the above trust fund of 1500*l.*, viz., (1), Mary Ann, who married John Corby in 1842; (2), William Fowkes; (3), John Fowkes; and (4), George Fowkes.

In the year 1858 Mrs. Corby and her brothers applied to one Thomas Barber for a loan on the security of their reversionary interest in this 1500*l.*; and a loan of 250*l.*, with interest at 5 per cent. was advanced to them by Thomas Barber on the security of a mortgage dated the 22nd Dec. 1858, whereby Mr. and Mrs. Corby, John Fowkes, William Fowkes, and George Fowkes assigned to Thomas Barber, his executors, administrators, and assigns, all the aforesaid sum of 1500*l.*, and all their share and respective shares as well original as accruing therein, and all interest to accrue due thereon, by way of mortgage to secure the repayment, with interest, of a sum of 500*l.*

A receipt for 500*l.* was indorsed on this deed. Both deed and receipt were attested by a clerk of Messrs. Scriven and Terry, of Nottingham, Barber's solicitors, who were the only solicitors employed in the transaction; this deed was signed, as Mrs. Corby alleged, in total ignorance that it purported to secure 500*l.* therein expressed to have been actually advanced. A payment of 12*l.* 10*s.* only, for a year's interest on the above, was made on the 22nd Dec. 1859.

In the year 1860 application was made to Thomas Barber for a further loan on the same security, when he agreed to advance them 150*l.*, and by an indenture of the 12th June 1860 the said reversionary interest of Mr. and Mrs. Corby and her brothers was charged in consideration of 150*l.* paid by Barber with the repayment to him of the said sum of 500*l.*, and of a further sum of 300*l.* on or at the decease of the said Abigail Fowkes. This deed contained a recital as follows:

Whereas the consideration of the said sum of 500*l.* (the sum purported to be secured by the first mortgage) was the payment in present money of the sum of 250*l.* being one half only of the amount of the sum thereby secured

it being then considered that the difference between the said payments in cash, and the sum secured by the said recited indenture (the first mortgage) was a fair and reasonable remuneration only for the delay in payment of the same until after the decease of the said Abigail Fowkes.

This deed also contained a clause by which Mrs. Corby, her husband, and her brothers did thereby

Acknowledge, undertake, and agree with and to the said Thomas Barber, his executors, administrators, and assigns, that before the execution of the said several securities respectively, it was fully explained to them, and they did thereby intend and agree that the said Thomas Barber should after the decease of the said Abigail Fowkes, have and receive out of the sum of 1500*l.* the said several sums of 500*l.* and 300*l.* respectively, being double the amount actually paid by him, but with interest in the meantime upon the respective sums actually advanced and paid by him only, and which arrangement they, after due consideration and explanation, did then and do now consider to be fair and reasonable considering the age and state of health of the said Abigail Fowkes, and that the said Thomas Barber had agreed to pay such expenses as aforesaid (the expenses of preparing these securities), and that he, his executors, administrators, and assigns, would be prevented from applying or employing the moneys so advanced and paid in his or their trade or business or otherwise during the life of the said Abigail Fowkes, and further that the same terms and conditions which have been accepted and entered into by the said Thomas Barber, for advancing money on the said security were offered by or on behalf of the said parties hereto of the first part to several other persons who are in the habit of lending money on security, but who declined to make advances thereon.

There was also a covenant by Barber not to call in the money, or any part thereof, during Abigail Fowkes' life, "except only" in case of nonpayment of interest. Execution of this deed was attested by both Scriven and Terry.

Mrs. Corby and her brother were people in a very humble position in life, earning weekly wages, with no accumulated property of any kind; they had had no independent legal advice, and were not in a position to form any proper judgment as to the effect of these indentures of mortgage and further charge. John Fowkes died in 1863. George Fowkes died in April 1866, and letters of administration to his estate were granted to Mrs. Corby in July 1877; John Corby died in March 1874. Letters of administration of the personal estate of John Fowkes had also been taken out.

On the 16th April 1876 Abigail Fowkes died. By a deed dated the 27th Feb. 1861, in consideration of 400*l.* theretofore lent by Scriven to Barber, Barber had assigned his securities to Scriven; and subsequently obtained further advances from other persons on the security of these indentures of mortgage, and further charge.

On the death of Abigail Fowkes, the various incumbrancers all sent notice of their claims to the present trustees of the fund. Mrs. Corby and William Fowkes now denied the validity of Mr. Barber's security for the whole amount claimed, on the ground that it had been improperly obtained, and thereupon the trustees paid the money representing this 1500*l.* and interest into court. No interest on either of the advances had been paid since Dec. 1859.

Mrs. Corby now presented this petition praying for a declaration that the two indentures of 22nd Dec. 1858 and the 12th June 1860 were not binding upon and in no way affected her individual share, never having been acknowledged by her under the Fines and Recoveries Act; that

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the said two indentures ought as against the parties thereto (other than the petitioner) to stand as security only for the money actually advanced by the said Thomas Barber, with interest upon the advances for six years only, and for a division of the residue into four equal shares, one of such shares being paid out at once to the petitioner, the others being carried over to the account of three beneficiaries and their incumbancers.

*Crossley* for the petition.—The first point that may be raised is whether the court has jurisdiction to make the declaration now asked upon petition, or whether it will direct a writ to be issued. I should submit that it can be done upon petition :

*Lewis v. Hillman*, 19 L. T. Rep. 329; 3 H. of L. Cas. 607.

It is entirely a matter in the discretion of the court to hear and decide the matter on petition or not; the question of jurisdiction is now fairly clear. The fact that these deeds, never having been acknowledged by Mrs. Corby, do not affect her individual share, will not, I believe, be disputed. Clearly the transactions between Barber and these "expectant heirs" was an unconscionable bargain that cannot be allowed to stand; the security can only stand for sums actually advanced :

*Craft v. Graham*, 9 L. T. Rep. N. S. 582; 2 De G. & Sm. 155.

The point always is, is the transaction a hard bargain, apart from any question of fraud (*Beynon v. Cook*, 82 L. T. Rep. N. S. 353; L. Rep. 10 Ch. 389), though I say that there is a strong indication of fraud. Further, the mortgagee can only recover six years' arrears of interest on the sums actually advanced :

*Re Stead's Mortgaged Estates*, 35 L. T. Rep. N. S. 465; L. Rep. 2 Ch. Div. 713.

*Henry Fellowes*, for the representative of the deceased brother, John Fowkes; and *G. O. Edwards*, for the trustees and an incumbancer, supported the petition.

The respondent Barber did not appear.

*Shebbeare*, for Scriven, the assignee from Barber.

*Romer and Levett* for subsequent incumbancers, *contra*.—We do not wish to incur further expense, and if the court considers that it has jurisdiction to try such a question on petition we are willing to have it decided now. The petitioners do not allege that if they had understood the proceeding they would never have executed the documents. They do not venture to swear in their evidence that the documents were not read over and explained to them. The charges of fraud, therefore, fall to the ground, and that being so they cannot rely on a subsidiary equity on the ground of "hardship" and their being expectant heirs. The cases of *Beynon v. Cook* and *Craft v. Graham* (*ubi sup.*) relied on by Mr. Crossley do not apply to the circumstances of this case; here the petitioners though in a humble position were earning weekly wages, and were not dependent for their existence on this reversionary interest. They wanted to raise money for their own purposes, and they could only get it upon certain terms; taking into consideration the long time Barber would have to wait for his money, and that he would very likely, as has actually occurred, have to wait for his interest too, the terms of the loan were not usurious—it only amounted to interest at about

eight per cent. We are entitled at least to twenty years' arrears of interest on the sums actually advanced; under the covenant to pay, Barber became a specialty creditor :

*Rolls v. Chester*, 20 Beav. 610;

*Edmunds v. Waugh*, 13 L. T. Rep. N. S. 739; L. Rep. 1 Eq. 618.

They could not have redeemed upon payment of only six years' arrears of interest. In *Beynon v. Cook* interest at 5 per cent. was allowed from the date of the advance; Barber is not suing for this interest.

*Crossley*, in reply, referred to

*Seton on Decrees* (last edit.), 1056;

*Smith v. Hill*, 38 L. T. Rep. N. S. 638; L. Rep. 9 Ch. Div. 143.

BACON, V.C.—No doubt this is a somewhat singular case. The fact that the petitioner's own share is not affected by these securities is admitted, so that I need not express any opinion on that point. In 1858 a deed is prepared by a solicitor acting for all parties, reciting as a fact that 500*l.* had been advanced, when in reality, only 250*l.* had been paid; this deed is then read over to people in a state of abject poverty, in all senses of the phrase "expectant heirs." No explanation of this transaction has been given, though I can suggest one very well for myself. Under the circumstances it was a grievously hard bargain, and further it was fraudulent, because it was fraudulent to recite that 500*l.* had been advanced when only 250*l.* had actually been paid; in a transaction like this beginning with fraud, persons cannot justly complain if every subsequent step is looked at with suspicion. Then comes the second deed reciting that only 250*l.* was actually advanced, because it was considered at the time that the difference between the cash payment and the sum secured was only a fair and reasonable remuneration for the delay, although Barber had a right to foreclose, and could have foreclosed at any time. This subsequent deed did not make matters at all better; and although Barber's name appears throughout the transaction I strongly suspect that Barber had no more to do with it than I had. Without founding any part of my judgment on this suspicion, I think that under the circumstances the utmost that the mortgagee can be entitled to, is to have these mortgages treated as a security only for the sums actually advanced. As to the amount of interest he is entitled to, it is argued, that inasmuch as Barber is not suing for it in this court, the Statute of Limitations does not apply, and he is therefore entitled to more than six years' arrears, but the money has been paid into court by the trustees, and let Barber's interest be what it may, he could only have obtained his money by an application to the court, when he would have been entitled to six years' arrears of interest only. With the sub-mortgagees' interests I have nothing to do; they have no right as against this fund beyond what Barber had; and if there is not enough to pay them, that is their affair. The order must be to divide the fund into four parts, to one of which the petitioner is entitled out and out, the other three will be liable to satisfy Barber's charge to the amount of the sums actually advanced with six years' arrears of interest.

Solicitors: *Smith, Fawdon, and Low; Elwes and Sharp; Brandreth and Co.; Heneman and Nichols; Robinson, Preston, and Stowe.*

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Re ALLEN; DAVIES v. CHATWOOD.

[CHAN. DIV.]

Thursday, Feb. 27.

(Before BACON, V.C.)

Re ALLEN; DAVIES v. CHATWOOD. (a)

*Solicitor—Retainer—Joint or several liability of defendants signing retainer—Form of retainer—Taxation.*

A suit was instituted by a shareholder against seven directors of a company, the company, and its secretary, to recover the amount paid by him on his shares, on the ground of fraud and misrepresentation. One solicitor was retained for the defence, the written retainer being signed by all the defendants. One joint and several answer on behalf of all the defendants was filed, and one set of counsel were instructed. The bill was ultimately dismissed with costs, which were taxed between party and party, and paid by the plaintiff. A bill of costs as between solicitor and client, was delivered to the defendants, and an order to tax as against the company (which was in liquidation) obtained. The solicitor claimed to be entitled to a lien for the whole of his costs upon a balance in his hands, of money recovered on behalf of the company, on the ground that by the terms of the retainer, the company was liable to pay the whole of such costs. The taxing master had decided that the assets of the company in the hands of the solicitor were liable to one-ninth only of these costs, and upon a summons for a review of this finding by the taxing master, Held, that though the defendants undertook to make common cause in defending the action, and to pay the solicitor the whole amount of his costs, they had not thereby undertaken that any one of them should be liable for the whole amount, and that the decision of the taxing master was therefore right.

Re Colquhoun (5 De G. M. & G. 35) and Burridge v. Bellew (32 L. T. Rep. N. S. 807) observed upon.

ADJOURNED SUMMONS.

This was a summons on behalf of George Peter Allen, a solicitor, that the taxing master might be ordered to review his taxation under an order of the 25th April 1878 in respect to the matters set forth in the objections to the said taxation left by the applicant in the office of the said taxing master, and that the taxing master might be ordered to vary his certificate, or that it might be declared that the applicant was entitled to a charge upon the sum of 402l. 19s. 1d. by the taxing master's certificate found to be due from the applicant as representing moneys recovered by the applicant for The East Rocks Hematite Iron Ores Company (Limited), in the suit of *Davies v. Chatwood*, for the sum of 314l. 1s. 6d., the total amount of the taxed costs under the said order.

The suit of *Davies v. Chatwood* had been instituted against the seven directors, The East Rocks Company, and its secretary; and on the plaintiff's motion for an injunction all the nine defendants appeared by one firm of solicitors, Messrs. Partington and Allen, who instructed one set of counsel to oppose the injunction. Subsequently to this motion, in Jan. 1875, the joint and several answer of all the defendants, signed by one counsel, was filed by the same firm of solicitors. Up to this time the solicitors had acted upon the verbal instructions of their clients,

but in Oct. 1875 a written retainer was obtained, which was in the following form:

DAVIS v. CHATWOOD AND OTHERS.

Dear Sirs,

You having up to the present time alone conducted the defence on behalf of all the defendants and in pursuance of their instructions in that behalf, we the undersigned do hereby confirm such instructions and request you to continue such defence, and to take such steps as you may consider necessary in the matter, and approve of your proceeding to the neighbourhood of the mines for the purpose of obtaining on our behalf evidence in corroboration of the reports made in the formation of the defendant company as advised by counsel.

To Messrs. Partington & Allen, (Signed)  
Solicitors, Manchester.

This retainer, or one in precisely the same words, (there were three retainers in all, on account of the number of the defendants and their residing in different parts of the country) was signed by all the defendants.

On the 27th April 1876, the suit of *Davies v. Chatwood* came on for hearing, and the bill was dismissed with costs. The defendants were again represented by one set of counsel only. The party and party costs were taxed and paid by the plaintiff, and Mr. Allen, in accordance with his previous arrangement, carried in a bill for his costs, as between solicitor and client, against the defendants. This bill was headed: "*East Rocks Company, Re Allen, Mr. Samuel Chatwood &c.* (giving the names of all the Defendants) bill of costs, as between solicitor and client up to the 31st Oct. 1876 of the defendants, &c." The taxing master not being satisfied that Mr. Allen had received any retainer by the company which would make it liable to more than a proportion of the whole costs, had held that the assets of the company were liable for one-ninth only. Mr. Allen objected to this taxation on two grounds: first, "because the company is liable upon the retainer given to the firm of Partington and Allen to pay the whole of the said costs;" secondly, "because the said J. P. Allen, as the solicitor for the said company, has a lien for the whole of the said costs remaining in his hands of moneys recovered on behalf of the said company in the suit of *Davies v. Chatwood*, or otherwise, from the Rev. Charles Davies."

This summons was thereupon taken out to vary the taxing master's certificate.

*Kekewich, Q.C.* and *Hornell* for the summons.—Each of the persons employing a solicitor is liable separately for the costs of his defence. The suit of *Davies v. Chatwood* was really the company's suit, and Allen was the company's solicitor, the retainer was a joint retainer, and one set of counsel appeared for all the defendants throughout the proceedings; the whole thing was a joint transaction. The practice of the taxing master is elaborately stated in *Re Colquhoun* (1 Sm. & G.; Appendix, p. 1), and again on appeal 5 De G. M. & G. 35, and there it is stated to be a question of retainer. In *Anderson v. Boynton*, (13 Q. B. 308) there were originally separate retainers, which were afterwards consolidated into one joint retainer, which is just our case here, and there the solicitor was allowed to recover from one defendant the amount of his whole bill. *Burridge v. Bellew* (32 L. T. Rep. N. S. 807) is a similar case almost. In each of these cases, as in ours, there was a joint defence, and one set of counsel, and a joint answer; indeed, *Burridge v. Bellew*

(a) Reported by W. COWELL DAVIES, Esq., Barrister-at-Law.



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goes further than our case. Whatever the words may be in point of form, looking at the substance of them, it is a joint retainer; and the matter should be referred to the taxing master.

Sir H. M. Jackson, Q.C. and *Northmore Lawrence* for the official liquidator of the East Rocks, &c. Company.—The applicant does not allege that the other eight defendants are not all able to pay their ninth shares, but having in his hands money of the company he elects to retain the amount of his whole bill, leaving the company to get back eight-ninths of this sum from the other eight defendants jointly liable with them. The words of this retainer are not such as to make it a joint retainer. The applicant, by taking an order to tax as against the company alone has, according to the ruling in *Re Colquhoun (sup.)*, elected to take separate payment of his costs from each of the defendants. His case is inconsistent; he comes here and asserts that the retainer is a joint one, and yet he takes an order to tax as against the company alone. In *Burridge v. Bellew (sup.)* the question of joint or separate liability on the retainer was not raised before judgment, and Amphlett, B. says, "The mere fact that you employ a joint solicitor, have joint counsel, and joint affidavits, and joint consultations, would not create a joint and several liability."

*Kekewich* in reply.

BACON, V.C.—This is a very proper case to bring before the court in the shape in which it is now presented, because it is unquestionably a matter of principle, and not a matter of detail in taxation. The master's decision, therefore, is subject to revision in this court. The difficulty would be very great but for the clear rule of practice established by the decision in *Colquhoun's case*, and by the long certificate given by Master Follett, which was adopted in the case before the Court of Appeal where the matter was discussed. I take the practice to be now settled and distinct. It is said here, there is a joint retainer; in one sense there is a joint retainer. Here is a suit instituted against the company where the plaintiff desired to be relieved from his contract with the company, and he asked for alternative relief against the directors personally. There are a variety of topics included in the original suit in which the defendants are interested in different degrees. They all agree to this extent—that there shall be one defence presented. How does that touch the principle, whether, when the defence has succeeded and the costs have to be paid, anyone is to be picked out and made to pay for it? Nobody can suggest any such principle. Everyone by signing the retainer—I am not thinking of the particular words of it—agrees to make a common case in defending this suit, and they retain this gentleman to be the solicitor to make a common case. They say, "You know our several cases. You know that we, as directors, are charged with fraud, and are asked to give an indemnity; you must give us protection in those respects." The company was charged with having allotted these shares in a fraudulent or illegal manner, and this knowledge came to the solicitor retained by those several defendants, and the only thing that is joint is this, viz., "we agree with you that you shall be paid for what you do." How does that affect the question whether each individual signing those retainers is liable for his own share

of those expenses? Certainly the case of *Re Colquhoun* gives no colour or authority for that. It establishes, on the contrary, the well-established practice in the master's office, that upon a retainer such as this is shown to have been, although the solicitor is entitled to the whole of his demand, he is not entitled to pick out any one of the defendants, and say I will get it from you alone. He has his remedy against any one of the others. The cases referred to do not touch this principle at all. In one case (*Anderson v. Boynton*, 13 Q. B. 308) it was held that the retainers had been consolidated, and if there had been any previous retainer it would have been said here that the retainers were consolidated. Retainers to do what? To defend singly and collectively. The case in the Court of Exchequer (*Burridge v. Bellew*, 32 L. T. Rep. N. S. 807) stands upon a totally different footing, for that decision went upon the ground principally that no such objection as the defendant there raised could be allowed, because the only thing he had pleaded had been decided against him, and the other he had not raised at the trial. When it is said that the rule is the same in the Court of Chancery as in the Court of Exchequer, as is said by one of the judges, I do not quite know what that means. I do not know what the rule in the Exchequer is, but I do know what the rule of the Court of Chancery is, and that upon a joint employment for different defendants, with different rights and different grounds of defence, although they together say, "You, the solicitor, shall be paid by us all the amount of your costs"; they do not thereby say, "Any one of us will pay the whole, but that the shares we shall have to pay you are settled by the practice of the court"—in this case one-ninth, because there are nine parties from whom the payment is to be derived. Nothing prevents the solicitor having his remedy against the other eight. He makes out his bill to the nine, including the company, which is right enough, and then, desiring payment, he gets an order to tax the bill against the company. That not only decides nothing in his favour, but the reasonable construction of it is—I want to get from the company that one-ninth which they owe me, and so the taxing master has dealt with it. In this case, as in any other, relying upon the settled course of practice in his chambers he makes his certificate. It is said that is wrong. I am at a loss to see any ground upon which it can be said to be wrong. It is a joint retainer to this extent, that "We together undertake to pay you, but not that any one of us will pay you all. We jointly contract with you, and with ourselves, that we will pay you the whole amount of your charges." That is the whole extent of the undertaking. The taxing master's certificate is established, and to the extent of one-ninth, and no more, under this order to tax, is the solicitor entitled to an order, either retainer or payment, whichever may be necessary. The summons must be dismissed with costs.

Solicitors: *Meriman, Pike, and Merriman*, for *Partington and Allen*, Manchester; *Gregory, Rowcliffe, and Rawle*, for *Hodge, Hockins, and Mar-rack*, Truro.

Tuesday, Feb. 4.

(Before HALL, V.C.)

CHAMPNEY v. DAVY. (a)

*Charity—Will—Mortmain—43 Geo. 3, c. 108—Pure and impure personalty—Construction—Invalid gift—Particular residue—General residue.*

*A testatrix bequeathed certain personal estate to her mother for life, and, after her death, as to 2000l., part thereof, to the vicar of M., to be applied by him "in or about restoring, altering, enlarging and improving the church, parsonage house, and school." The residue thereof (the "particular residue") she bequeathed upon trusts in the will mentioned. All the residue of her personal estate (the "general residue") she bequeathed to her mother.*

*Held, that, as to the church, parsonage house, and school the legacy was good, to the extent ascertained by inquiry to be required in restoring, altering, enlarging, and improving such of them as were already in mortmain; but bad as to the rest: that to the extent of 500l., for the purposes mentioned in 43 Geo. 3, c. 108, the legacy might and was to be taken out of impure personalty; and the rest out of the pure personalty to the extent lawful under the Mortmain Acts.*

*Held also, that the abatement of the charity legacy went into the particular, and not into the general residue. The construction of a particular residuary gift is not affected by the presence or absence of a general residuary gift.*

HANNAH ELIZABETH WEST made her will, dated the 13th Feb. 1872, whereby, among other things, she gave and bequeathed out of her personal estate, to the vicar for the time being of the parish of Muston, near Filey, in the county of York, the legacy or sum of 1000l., to be by him applied in such manner for the benefit of the Sunday-school attached to the church there as he in his absolute discretion should think proper. And she directed that the said legacy, with others, should be paid within six months of her decease.

She also gave and bequeathed to her trustees all her money, securities for money, moneys secured on mortgages, railway stocks and shares, moneys to be produced from the sale of any property at Scarborough or Peterborough to which she was entitled, all moneys to which she was or might be entitled under the will of her late grandfather, Thomas Phillips, and also all her moneys invested upon any securities in any way or manner howsoever, upon trusts for conversion and investment, and for payment of debts, legacies, and legacy duties, and to stand possessed of the residue (which is hereinafter referred to as "the particular residue") upon trust to pay the income to her mother, Hannah West, for life, and after her mother's death upon trust as to 2000l., part thereof, to pay the same to the vicar for the time being of Muston aforesaid, to be by him applied and disposed of in such manner as he in his absolute discretion should think proper, in or about restoring, altering, enlarging, and improving the church, parsonage house, and school attached thereto, whose receipt for the said sum of 2000l. should be a sufficient discharge to her executors. And as to the residue thereof, upon the trusts declared of

certain real estate thereafter devised. And the testatrix bequeathed to her mother all the rest, residue, and remainder of her personal estate and effects, which are hereinafter referred to as "the general residue."

Questions arose as to whether any part of the legacies of 2000l. and 100l. respectively failed, and whether any part of the legacy of 2000l. was payable out of the impure personal estate of the testatrix, under the provisions of 43 Geo. 3, c. 108. That Act provides:

That all and every person and persons having in his or their own right any estate or interest in possession, reversion, or contingency of or in any lands or tenements, or of any property of or in any goods or chattels, shall have full power, licence, and authority in his and their will and pleasure, by deed enrolled in such manner and within such time as is directed in England by the statute made in the twenty-seventh year of the reign of King Henry VIII., and in Ireland by the statute made in the tenth year of the reign of King Charles I. for enrolment of bargains and sales, or by his, her, or their last will or testament, being duly executed three calendar months at least before the death of such grantor or testator, including the days of the execution and death, to give and grant to and vest in any person or persons, or body politic or corporate, and their heirs and successors respectively, all such his, her, or their estate, interest, or property in such lands or tenements not exceeding five acres, or goods and chattels, or any part or parts thereof, not exceeding in value 500l. for or towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy and rites of the said United Church are or shall be used or observed, or any mansion house for the residence of any minister of the said United Church officiating or to officiate in any such church or chapel, or of any outbuildings, offices, churchyard, or glebe for the same respectively, and to or for those purposes applied according to the will of the said benefactor in and by such deed enrolled, or by such will or testament executed as aforesaid expressed, the consent and approbation of the ordinary being first obtained, and in default of such direction, limitation, or appointment, in such manner as shall be directed and appointed by the patron and ordinary, with the consent and approbation of the parson, vicar, or other incumbent.

Sect. 2 provides:

That no more than one such gift or devise shall be made by any one person, and that if any such gift or devise as aforesaid shall happen to exceed five acres in lands or tenements, or the value of 500l. in goods and chattels, any such gift or devise shall be good and valid to the extent aforesaid; and it shall be lawful for the Lord Chancellor for the time being, on petition, to make order for reducing every such gift or devise to and within the said limits, and for allotting such specific five acres, and if occasion should require such specific goods and chattels as in his judgment shall be most convenient, and to make such further order touching the premises as to him shall appear just and reasonable.

Hastings, Q.C. and Nalder, for the plaintiffs, stated the facts.

Robinson, Q.C. and Sutton, for the vicar of Muston.—We rely upon *Sinnett v. Herbert* (26 L. T. Rep. N. S. 7; L. Rep. 7 Ch. 232), which decides that where pure and impure personalty is given to trustees to erect or endow a church, they are entitled, under 43 Geo. 3, c. 108, to 500l. out of the impure personalty, in addition to the whole of the pure personalty.

Pearson, Q.C. and Speed for certain legatees, defendants.—According to *Hoare v. Osborne* (14 L. T. Rep. N. S. 9; L. Rep. 1 Eq. 585) it would be impossible to ascertain what proportion of the gift was to be assigned to the illegal and what to the legal object. See also

*Wrigley's Trusts*, 15 L. T. Rep. N. S. 499.

There is nothing in 43 Geo. 3, c. 108, which enables

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

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you to bring money into mortmain for restoring and enlarging. *Pratt v. Harvey* (25 L. T. Rep. N. S. 209; L. Rep. 12 Eq. 544), before Wickens, V.C., decided that a charitable gift for building must refer to an existing site, or expressly exclude the application of the money in the purchase of land. Moreover, that was not the case of the application of impure but of pure personalty; and the gift was held void except to the extent of 500*l.*, under 43 Geo. 3, c. 108. There are two grounds on which this gift might be impugned: either as a gift of pure personalty to bring land into mortmain, or as a gift of impure personalty. To be good you must have the possibility of bringing land into mortmain absolutely excluded. This gift would be void as to the pure personalty. But it is a gift of pure and impure personalty—there is no alternative; therefore it is bad in its totality. See

*Watmough's Trusts*, 22 L. T. Rep. N. S. 88; L. Rep. 8 Eq. 272;

*Incorporated Church Building Society v. Coles*, 1 K. & J. 145; 5 De G. M. & G. 324.

*Sinnett v. Herbert* (*ubi sup.*) was a gift of general residue and not a particular legacy. If one object is void the whole gift fails.

*Dickinson, Q.C.* and *Joyce*, for the representative of Hannah West, in the same interest, referred to the 2nd section of the Act. *Sinnett v. Herbert* has no application. There is no lawful purpose except what was made lawful by 43 Geo. 3, c. 108; and the different purposes are here coupled so inseparably that all must be considered bad.

*Robinson, Q.C.* in reply.—Schools are within the Act of 43 Eliz. The legacy is good if the land is already in mortmain. See

*Theobald on Wills*, p. 196.

HALL, V.C.—The questions which have been discussed on the present occasion with reference to the validity of this disposition of 2000*l.* are now to be disposed of by me. The first thing I shall deal with will be the distinction between the pure and impure personal estate with reference to this disposition. As regards the pure personal estate there is no possible objection to the disposition of that so far as there is pure personal estate to answer the gift; except in so far as that pure personal estate has been directed, if at all, to be laid out for a purpose which is prohibited by the Statute of Mortmain. As to that, the only possible objection I can see to this disposition is, that the fund is to be applied "in or about restoring, altering, enlarging, and improving the church, parsonage house and school attached thereto." The only possible objection which seems to me to arise as to that is, that it may be the parsonage house and school are not in mortmain; in which case, it would be practically giving money to be applied in or towards acquiring or purchasing a school not already in mortmain. As to those two, the parsonage house and school, therefore, if it be desired, I must have an inquiry to ascertain what the position of them is as regards their being in mortmain already. Subject to that, it seems to me to be plain that the disposition is perfectly good. [*Dickinson, Q.C.*—There must be a short affidavit by somebody stating either one way or the other.] I should think there is no doubt about the parsonage house, and very probably not much as to the other. [*Pearson, Q.C.*—I happen to have

some little knowledge of the locality. I believe the parsonage house, is in mortmain, and that the school lands belong to C. Strickland.] To that extent the gift would be bad. I am now dealing with the pure personal estate; and I say, to that extent (and it is an observation which applies both to pure and impure personal estate), that I do not consider that, with reference to there being three subject-matters upon which the money might be laid out, there is any real difficulty arising as to that. No doubt there is an observation, which is to be found in *Sinnett v. Herbert* (*ubi sup.*), by Lord Chancellor Hatherley, and there are observations in other authorities of the same kind, that where there are several objects of the charity, one of which is illegal, the whole must fail, there being no distinction taken as to the amount to be devoted to each. But I do not take that to be law in a case where you can ascertain how much ought to go to each. In fact it was in *Hoare v. Osborne* (*ubi sup.*), and also, as I recollect, in a subsequent case which was before the same learned judge, that Kindersley, V.C., only because he considered that it could not be ascertained from the nature of the subject-matter what property ought to be set apart for each, decided that he would adopt, not the rule of invalidity, but the rule of there being a number of objects, saying so much for one and so much for the other. The same question was under the consideration of Wood, V.C. in the case of *Attorney-General v. Fisk*, which is in the 4th vol. of Equity Cases, p. 521. There was a gift of 1000*l.* Consols to the rector and churchwardens of a parish and their successors upon trust to apply such of the dividends thereof as should from time to time be necessary or required in keeping in repair her family grave, and to pay and divide the residue of the said dividends, at Christmas every year for ever, amongst the aged poor of the parish. It was held, that though the amount of the gift for the repair of the grave was not specified, the court could, if necessary, have estimated the amount "necessary and required" for the purpose, and so have prevented the gift of the residue from being void for uncertainty. Then he observed upon the case which has always been considered as a case looking the other way of *Chapman v. Brown* (6 Ves. 404), and he came to that conclusion. Therefore, as regards the school, you must ascertain how much of the gift, whatever the reduced amount may be, was required to be laid out upon each of the three several objects specified; and the gift, therefore, will prevail to the extent to which it may be ascertained that the money will be required; and it will fail as to the rest. Now then, as to the sum so far as it is to come out of the impure personal estate: it appears that, as regards the coming out of impure personal estate, having regaid to the statute, and taking into consideration the second section to which my attention has been called, I must give effect to the gift to the extent to which the law will allow it to take effect out of the impure personal estate. In other words, that it is a valid gift to the extent of 500*l.* after taking the pure personal estate as far as it will go, it being of course clear that the whole amount of 2000*l.* will not be exceeded by taking the whole of the pure personal estate. I assume that, of course, you will take the pure personal estate as far as it will go. I do not know what the amount is.

The question remained to be discussed whether to the extent of the abatement the legacies went into the first or into the ultimate residue.

*Pearson, Q.C.* and *Speed* for persons entitled to the particular residue.—There is no intention in any event to benefit the residuary legatee. In *Carter v. Taggart* (16 Sim. 423), where a gift, directed to be deducted from a particular residue, failed on account of the death of the legatee, went to the particular, and not to the general residue. The same rule is applied in *De Trafford v. Tempest* (21 Beav. 564). In *Harries' Trusts* (Johnson, 199), Wood, V.C. thus expresses the principle: "If you find in the will a plain indication of an intention to appoint the whole, that may remain strictly in the shape of residue, as residue is appointed by this will, or to appoint the entire fund charged only with the sums specified in the preceding appointments; then the residuary clause will be read as an appointment, not of the mere balance of the fund, after the sums previously appointed have been deducted from it, but of the entire fund subject to the appointments previously made. The whole question is, what is the first residue? It includes everything payable out of these particular funds:

*Theobald on Wills*, pp. 93, 94.

*Dickinson, Q.C.*, and *Joyce* for the representative of Hannah West, entitled to the ultimate residue.—The particular residuary legatee of this specific fund, has no claim to anything but what is expressly given her. See

*Re Jeaffreson's Trusts*, L. Rep. 2 Eq. 276.

The clear distinction is whether the gift, which partly fails, is in the form of a charge or the gift of an aliquot part. Here there is a gift to trustees of a variety of subjects, and a clear residue to be ascertained. It is only in the former case that a particular residue can be benefited by the failure of previous gifts. This case comes within *Easum v. Appleford* (5 My. & Cr. 56), in which a testator bequeathing a sum to a daughter for life, and then as she should by will appoint, directed that on failure of appointment the fund should go into his general residue. The daughter appointed part of the fund by an appointment which failed, and the residue to other persons. What was ineffectually appointed went into the father's and not the daughter's residue. See also

*Oke v. Heath*, 1 Ves. sen. 135 (referred to in *Harries' Trusts*, *ubi sup.*);

*Barnard v. Minshull*, Johnson, 276.

*HALL, V.C.*—In *Falkner v. Butler* (Amb. 514), under a limited power of appointment, the donee appointed a sum to persons not objects of the power, and this sum was held to pass under the appointment of residue; i.e., it fell into that residue. So in *Wollaston v. King* (8 Eq. 165) it was held there being an invalid appointment of part of a trust fund, that fund passed under an appointment, "subject to the appointment thereinbefore contained of all the trust moneys subject to the trusts of the settlement." In *Carter v. Taggart* (16 Sin. 423), the testatrix exercising a power over a specified sum, gave part of it to a person who died before her, and gave all the rest and residue of the sum, after deducting the legacies above mentioned. The part which lapsed was held to fall into the residue. This decision, I think, turned upon the particular will indicating an intention, particularly by a life estate being given in part with a

direction that that part should fall into the residue, that all should pass to the appointee of the residue, subject only to the charge. In *De Trafford v. Tempest* (21 Beav. 564) a lapsed gift of particular furniture was held to fall into a gift of furniture not thereinbefore otherwise disposed of, and not to pass under a general residuary gift. This is a case of two residues. In *Easum v. Appleford* (*vide sup.*), which was a case of an appointment under a power, Lord Cottenham considered that the fund was a definite one, and that the last disposition, though of "residue," was in substance to be read as if the whole amount of such residue had been inserted in the disposition. In *Re Harries' Trusts* (Johns. 199), Wood, V.C. held upon the whole instrument that a lapsed share of a definite sum passed under an appointment of residue of the said moneys after certain specified sums. He considered *Carter v. Taggart* and *Falkner v. Butler* to apply rather than *Easum v. Appleford*. In *Re Jeaffreson's Trusts* (L. Rep. 2 Eq. 276), which was the execution of a power the donee appointed 100*l.*, part of the fund, to a person not an object of the power, and appointed the balance of the fund, after payment of certain other sums well appointed, which balance he described as 260*l.*, and, after payment of the debts (which was an invalid direction), and should any surplus remain, she gave it to an object of the power. Here there were two invalid gifts. The latter was held to fall into the ultimate surplus; the former was held to pass as unapplied. That decision as regards the 100*l.* followed *Easum v. Appleford*, the 100*l.* not becoming part of and passing with the balance, because that was defined as 260*l.* That case, therefore, is not an authority in favour of the general residuary legatee in the present case, viz., the testatrix's mother; and, construing the whole will and having regard to the authorities, I hold that the particular residuary legatees are entitled to so much of the 2000*l.* legacy as is not well disposed of. I do not think there is a sound distinction between cases of lapsed and cases of invalid disposition, whether the disposition be under a power of appointment, special or general, or in exercise of ownership; nor do I think that the construction of a particular residuary gift is affected by the presence or absence of a general residuary gift.

Solicitors: *Golyer - Bristow, Withers, and Russell*; *E. W. and W. B. James*; *J. and F. Needham*; *B. Smith and Wilmer*, for *Ford and Warren*, Leeds.

## QUEEN'S BENCH DIVISION.

Monday, Feb. 24.

(Before MELLOE and FIELD, JJ.)

TURQUAND v. FEARON. (a)

*Amendment—Adding a plaintiff—Consent—Indemnity—Defendant's right to object—Order XVI., rule 2.*

*An order was made at chambers, at the plaintiff's instance, to add a person's name as co-plaintiff, under Order XVI., r. 2, without the consent of the latter, and without any condition of indemnity in his favour.*

*Held, upon appeal, that the new plaintiff had not been added upon such terms as seemed just, and*

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law

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*that it was competent to the defendant to make the objection.*

THIS was an appeal from an order at chambers by Pollock, B., by which, at the instance of the plaintiffs, a Mr. Darling was made a co-plaintiff in his absence, without his consent, and with no condition of indemnity. A master had previously refused to make the order.

It appeared that the plaintiff Turquand, as trustee of Willis, Percival, and Co., and the plaintiffs the Capital and County Bank, jointly sued the defendant upon a guarantee signed by him, and addressed to Darling, by which the defendant undertook to cover certain acceptances which he had requested Darling to meet. There was no evidence to show how either of the banks became possessed of the guarantee, nor how much was due on the acceptances; but it was stated on the plaintiff's behalf that the whole amount of the guarantee was due from the defendant, that Darling had transferred his interest in the guarantee, for full value, to one of the banks, and that the omission of the name of Darling as one of the plaintiffs was by mistake at the commencement of the action.

The order was made at chambers under Order XVI., r. 2:

Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the court or a judge may, if satisfied that it has been so commenced through a *bond fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as may seem just.

By rule 13,

No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent thereto.

*Cohen, Q.C.* and *Lamaison* argued for the defendant.—There is nothing in this rule to empower the addition of a plaintiff who does not consent to sue jointly with the other plaintiffs. It applies only to the case of all possible plaintiffs being ready and willing to sue, and a mistake by the solicitor as to the proper names to put on the writ. Here it is proposed to amend the writ by adding Darling's name, so that the solicitor of the other plaintiffs may appear as solicitor of all the plaintiffs, although Darling distinctly repudiates the action. The proper course under the circumstances is, as in equity, to make him a co-defendant. That Darling himself might have made this objection to be joined unconditionally as a plaintiff is clear from all the authorities; and although it was held in *Chambers v. Donaldson* (9 East, 471), and *Harrison v. Almond* (4 Dowl. 321), that it was not competent for a defendant to do so, those cases are now overruled by *Hubbart v. Phillips* (13 M. & W. 702). If a defendant could not apply he could get no release against the new plaintiff by payment to the solicitor on the record (*Robson v. Eaton*, 1 T. Rep. 62); nor could he get costs against him:

*Reynolds v. Howell*, L. Rep. 8 Q. B. 398.

Gore for the plaintiff.—This is the proper course, according to Chitty's Practice, 12th edition, p. 1385, and it is open at any time to the plaintiff to claim indemnity:

*Lav v. Bott*, 16 M. & W. 300;

*Austen v. Holland*, 3 D. & L. 740.

No authority is necessary from the new plaintiff before the addition of his name:

*Duckett v. Gover*, L. Rep. 6 Ch. Div. 82.

Rule 13 of Order XVI. must be subject to the preceding rule 8, and was not intended to allude to all plaintiffs by the words used.

*Cohen, Q.C.* was not heard in reply.

MELLOR, J.—I am of opinion that the order of Pollock, B. must be set aside. I think this rule was intended to provide for such a case of *bond fide* mistake as to the parties, as where a partner has gone out of a partnership, and after action brought it is considered advisable to join him as plaintiff. I cannot think that without hearing the person whom it is desired to join as plaintiff, and without his consent, the judge should exercise his discretion by adding him. Before he does so the person applying must show some authority, and also that the omission was by *bond fide* mistake. It is eminently desirable in the interests of justice that the party to be added should be before the court.

FIELD, J.—I am of the same opinion. Here two plaintiffs bring an action on a document which is found not to be in the name of either of them, and which can be sued upon only in the name of Darling. Probably there was a *bond fide* mistake in commencing the action. It does not appear upon what terms Darling handed the guarantee to these banks, and no right is shown by the plaintiffs to use Darling's name. Under these circumstances, however, they ask to do so. I must first be convinced that there was a *bond fide* mistake; this I assume there was; also that it is necessary for the determination of the real matter in dispute to join Darling as a plaintiff; this, too, I assume. Therefore I may add Darling as a plaintiff; but then it is to be done on such terms as may seem just. Now, before the Judicature Acts it was provided by the Common Law Procedure Act, which has not been repealed, that a plaintiff should not be added in his absence without the production of his written consent, and the name of any person joined without such consent might be struck out even at the trial of the action. It does not seem just that a person should be added as plaintiff without his consent and without giving him a proper indemnity. This is an objection which I think Darling is entitled to take, otherwise he might be saddled with costs if the other two plaintiffs became insolvent. I also think the defendant may take this objection, and on that point I am satisfied with the cases cited in argument. I think the order of the master dismissing the summons was right.

*Judgment for defendants.*

Solicitors for plaintiffs, *Kimber and Ellis*.

Solicitors for defendants, *Herbert and Kent*.

Monday, March 17.

(Before COCKBURN, C.J. and MELLOR, J.)

DAVIDSON v. GRAY. (a)

Action remitted to County Court—Costs of counter-claim—Alteration of certificate—19 & 20 Vict. c. 108, s. 26.

In an action for freight the plaintiff claimed about 50l., and the defendants counter-claimed about 10l. for damage to the cargo, paying the remaining 40l. into court.

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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The action was remitted to a County Court under 19 & 20 Vict. c. 108, s. 26, and the registrar certified a verdict for the plaintiff for 16s.

Held, that the court would alter the certificate by distributing the findings on the issues, so as to enable the defendant to be allowed the costs of his counter-claim.

Thus was an action to recover 51l. for freight for the conveyance of 910 bags of nuts from Tarragona to London by the plaintiff's vessel *Castlehow*.

The defendants paid 41l. 2s. 11d. into court immediately after the issue of the writ.

By their statement of defence, the defendants admitted the plaintiff's claim of 51l., claimed 9l. 17s. 1d., by way of counter-claim for damage to the said cargo of nuts, for which the freight was claimed by the plaintiff, and said that the 41l. 2s. 11d. paid by them into court, together with the amount of the defendants' counter-claim, was enough to satisfy the plaintiff's claim.

The amount in dispute being thus reduced to 9l. 17s. 1d., the action was sent to the Westminster County Court for trial under 19 & 20 Vict. c. 108, s. 26, by which it is provided, amongst other things, that "after such hearing the registrar shall certify the result to the master's office of such superior court, and judgment in accordance with such certificate may be signed in such superior court."

The registrar had certified the result to be a verdict for the plaintiff for 16s.; upon which the plaintiff got from a master a judgment signed for that sum, together with costs.

Application was made to the master by the defendants to tax the costs according to the issues, of which they contended that they had won all those raised by the counter-claim, and that, the plaintiff's claim being admitted, there was no issue found for the plaintiff at all.

The master declined so to tax the costs upon the certificate as it stood, but stayed the taxation to enable the defendants to apply to the court to amend the certificate by distributing the findings upon the issues.

McLeod accordingly now moved for the defendants.—*Blake v. Appleyard* (L. Rep. 3 Ex. Div. 195) was an action tried at Croydon Assizes, in which the plaintiff recovered on an admitted claim 40l., and the defendant recovered 10l. as damages in tort on his counter-claim. The judge at the trial made no order as to costs, and the master allowed the plaintiff his costs of the cause generally, so far as he succeeded therein, and the defendant his costs of proving so much of his counter-claim as he succeeded on, and his costs of the pleadings so far as they related thereto. This taxation was ordered to be reviewed by the judge at chambers, but was sustained by the court, and it is in order to obtain a taxation on the same principle that this application is now made.

*Bucknill* for the plaintiff.—The County Court judge is under this Act merely a commissioner of the High Court to try the action, and the registrar having made his certificate, the judge is *functus officio*, and can have no further authority in the matter. This is on all-fours with the case of *Potter v. Chambers* (L. Rep. 4 C. P. Div. 69), where the plaintiff claimed a balance of 114l. 8s., and the defendant established a counter-claim to the extent of 109l. 16s., whereupon the judge directed the jury

to find a verdict for the plaintiff for the balance 4l. 12s., and no order was made as to costs. The Court refused to alter the findings of the jury for the purpose of giving the defendant costs upon his counter-claim.

McLeod was not heard in reply.

COCKBURN, C.J.—I think this was a material issue decided in the defendants' favour, and on that ground we ought, if possible, to afford the defendants an opportunity of getting their costs upon it. It is very true that the general conclusion is 16s. in the plaintiff's favour, but the defendants established all the rest of their counter-claim. *Blake v. Appleyard* seems to be a distinct authority on the point, and we abide by it. I cannot quite understand the report of *Potter v. Chambers*; but, as far as I do, it does not apply to this.

MELLOR, J.—I am of the same opinion.

Judgment for defendants.

Solicitors for plaintiffs, *Ingledeu, Ince, and Greening*.

Solicitor for defendants, *Wm. Beck*.

Tuesday, Jan. 14.

(Before COCKBURN, C.J., and POLLOCK, B.)

FINNEY v. HINDE. (a)

*Practice—Judgment debt—Charging order—Death of judgment debtor prior to order nisi—1 & 2 Vict. c. 110, ss. 14, 15.—Rules of Court 1875, Order L.*

No order charging stock under 1 & 2 Vict. c. 110, will be made absolute where the judgment debtor has died before the order nisi has been obtained. An order nisi, charging certain stock standing in the name of a judgment debtor, had been made absolute at chambers, although it was in evidence that at the time the order nisi had been obtained the judgment debtor was dead. Defendant's executrix now appealed against the order.

Held, that the order must be rescinded, as a charging order, under 1 & 2 Vict. c. 110, was merely in lieu of the old remedy of arrest by *measne process*, and was only co-extensive with such remedy, and therefore could not be put in force where the judgment debtor had died before the order nisi had been obtained.

THIS was a motion to rescind an order made by Field, J., at chambers on the 14th Dec. 1877, making absolute an order nisi to charge certain shares standing in the name of J. C. Hinde, with the payment of the sum of 73l. 2s. 10d., for which plaintiff had recovered judgment against the said J. C. Hinde.

It appeared from the affidavits that after the plaintiff had obtained judgment, but before the original order nisi had been made, J. C. Hinde had died; but Mrs. Hinde, his executrix, appeared before the judge to show cause against the order, whereupon the order was made absolute.

By 1 & 2 Vict. c. 110, s. 14, it is enacted:

That if any person against whom any judgment shall have been entered up in any of Her Majesty's Superior Courts at Westminster, shall have any Government stock . . . or shares of any public company in England, standing in his name, in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the Superior Courts on the application of any judgment creditor to order that such stock, or such part

(a) Reported by A. H. POTTER, Esq., Barrister-at-Law.

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thereof as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor.

By sect. 15:

That every order of a judge charging any Government stock . . . or shares under this act shall be made in the first instance *ex parte*, and without any notice to the judgment debtor, and shall be an order to show cause only. . . . Further, that unless the judgment debtor shall, within a time to be mentioned in such order, show to a judge of one of the Superior Courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute; provided that any such judge shall upon the application of the judgment debtor, or any person interested, have full power to discharge, or vary such order.

*Anstie* for Mrs. Hinde.—If Hinde, the debtor, had been alive this power could not have been exercised without giving him an opportunity to show cause against the order. I do not appear on his behalf; he is unrepresented here to-day; it is impossible that anyone should appear on his behalf, as he is dead. No notice has been given to the judgment debtor that a rule *nisi* has been obtained. The requirements of the statute have not been complied with.

*Hart* for plaintiff.—This is a form of execution in an action, and an action does not abate by the death of one of the parties: Order L., r. 1. Moreover, the person entitled to the estate appeared to show cause as the representative of the judgment debtor. Bankruptcy is a species of civil death; and in *Stuart v. Cockerell* (20 L. T. Rep. 513; L. Rep. 8 Eq. 607), where a mortgagee after the bankruptcy obtained a stop order on certain dividends, it was held that he was entitled to priority over the assignee in bankruptcy. In *Haly v. Barry* (18 L. T. Rep. 491; L. Rep. 3 Ch. App. 452) the order was made after the death of the judgment debtor, though the point raised by the other side does not appear to have been dealt with in that case.

COCKBURN, C.J.—I am of opinion this order must be rescinded. The Act 1 & 2 Vict. c. 110, was passed for abolishing arrest on mesne process in civil actions, as that process was unnecessarily extensive and severe, and in lieu of that process a new remedy was given to execution creditors; but I cannot suppose that the Legislature by sect. 14 intended to give a remedy which was more than co-extensive with the old remedy they were abolishing. Before this statute was passed the effect of the judgment could only be obtained by a remedy *in personam*, that is by duress; if the debtor died then the creditor was without a remedy; the statute abolishes this remedy *in personam*, and substitutes for it a remedy *in rem*; but that is only co-extensive with the old one, and therefore cannot be of any effect where the debtor is dead. Order L. is not applicable to this case at all; that merely applies to prevent an action from abating by the change of parties. I am of opinion, therefore, that the property of the judgment debtor cannot be got at by the particular and extraordinary powers given by this Act, and that the order must be discharged.

POLLOCK, B.—I entirely agree. Upon looking into the Act we find that the particular proceedings in question are dealt with by sects. 14 and 15; and it

is clear that any order made under sect. 15 must be in the first instance *ex parte* and to show cause only, and that such order will be made absolute unless the judgment debtor appears to show cause to the contrary; but it is quite clear a dead man could never appear, therefore in every case where a debtor died subsequent to judgment the order would be made absolute, which might very probably work an injustice, and which would be clearly contrary to the words of the Act. This is no mere proceeding in an action, but is a new, direct, and substantive proceeding against the property of a judgment debtor.

*Order discharged without costs.*

Solicitor for plaintiff, J. E. Dunn.

Solicitors for Mrs. Hinde, White and Sons, for Britain, Press, and Inskip.

Thursday, Feb. 20.

(Before COCKBURN, C.J., and MELLOR, J.)

STAHLSCHMIDT v. WALFORD. (a)

*Practice—Discontinuance—Findings by arbitrator in special case—Discretion—Rules of Court 1875, Order XXIII., r. 1.*

*After an arbitrator has found the facts in favour of the defendant on all material points which are in issue between the parties to an action, the court will not, in the exercise of its discretion, allow the plaintiff to discontinue the action, under Order XXIII. of the Rules of Court 1875.*

*Plaintiff, as lord of the manor of B., claimed a heriot of the best beast, in respect of certain tenements, parcel of the said manor. The rights of the plaintiff were based upon an alleged custom of the manor, and by consent of all parties it was ordered that the facts should be stated in a special case, for the opinion of the court, by an arbitrator. After a long and expensive inquiry the arbitrator found in favour of the defendant, whereupon the plaintiff obtained an order at chambers, allowing him, upon payment of costs, to discontinue the action. Against this order defendant appealed.*

*Held, that by the findings of the arbitrator, defendant was in the same position as he would have been in if there had been a general finding by a jury in his favour, and that in the exercise of a sound discretion the court will not interfere to deprive the defendant of a judgment to which his right had become vested as soon as the issues were determined in his favour.*

THIS was an appeal from an order of Field, J., made at chambers.

The action was commenced in 1871. The declaration stated (*inter alia*) that Samuel Scott (the defendant's testator) died seised of eighteen tenements in and parcel of the manor of Bromley, and held by custom or service, entitling the lord of the manor to a heriot of the tenant's best beast, on the death of a tenant, in respect of each tenement held by him, and as lord of the manor plaintiff claimed accordingly.

On the 1st May 1875, by consent of all parties, Archibald, J. ordered that the facts in the action should be stated by the parties, or failing agreement between them, by an arbitrator in the form of a special case for the opinion of the Queen's Bench.

(a) Reported by A. H. POYSEN, Esq., Barrister-at-Law.



There were twenty-eight meetings before the arbitrator, and the evidence was of a very voluminous and technical character, involving researches back as far as Domesday Book, and many ancient books had to be translated.

The arbitrator found that there was no custom as alleged; that, save as to part of one of the tenements, none of such tenements were held of the manor of Bromley by any custom or service whatsoever. With regard to the before-mentioned part of a tenement, it was found that if a certain entry was admissible in evidence, then that such tenement was held of the manor by heriot service, but otherwise not so.

After these findings of the arbitrator, plaintiff applied for leave to discontinue the action, and the following order was made by Field, J.:—"That action be discontinued, no other action to be brought in respect of the same causes of action, or against the defendant, or any person claiming under or through him in respect of heriot custom within the manor of Bromley, or heriot service in respect of any of the tenements mentioned in the plaintiff's particulars in this action. Plaintiff to pay all costs."

Against this order the present appeal was brought.

*Wills, Q.C.* (*Moorsom* with him) for the defendant.—The plaintiff's case depends upon the findings of the arbitrator, and they are against him. They were obtained at a great expenditure of time and labour, and now plaintiff is attempting to deprive us of the fruits of all that labour and expense. An order of discontinuance is merely a personal order; we want a judgment, because that would bind privies in estate. Upon the next death of a tenant, the lord of the manor might seize beasts, and it would be necessary to bring a fresh action, whereas judgment would operate as a complete estoppel. Before the Judicature Act, discontinuance was allowed before trial; after a special verdict it was sometimes allowed as a great favour, but after a general verdict it was never allowed: (2 Chit. Arch. 1483, 1484.) Now the practice is regulated by Order XXIII., r. 1, of the Rules of Court 1875. The finding of the arbitrator here is to so great an extent in our favour that it is equivalent to a general verdict. He cited

*Price v. Parker*, 1 Salk. 178.

*R. E. Webster, Q.C.*, and *Curtis Bennett* for plaintiff.—The order gives defendant all he is entitled to have under any circumstances. At certain stages the plaintiff might discontinue upon payment of costs, but where there has been any finding, he could not bring an action against the same party. According to the order neither the plaintiff nor his heirs or assigns could be again attacked on this point. This is a matter of discretion, and both the learned judge at chambers and the master have exercised their discretion in favour of the plaintiffs. They referred to

*Sweeting v. Halse*, 9 B. & C. 365; and

*Young v. Hitchens*, 6 Q. B. 606; 3 L. T. Rep. O. S. 219).

*Cockburn, C.J.*—I am of opinion that the order of my brother Field was wrong, and ought to be rescinded. I think the defendant has a perfect right to say, "I am not to be prejudiced, because this judgment may be hereafter used in other cases. If others can avail themselves of it, well and

good; it may be doubtful whether they can or cannot, but that is no reason why I should be deprived of the judgment to which I am entitled." The questions in dispute in this action were submitted to an arbitrator, and they turned out to be questions as to the customs that applied to these tenements; they were to be determined by the arbitrator, and he has determined them in favour of the defendant, with one very trifling exception, and upon that finding the defendant applies for judgment. That is exactly equivalent to the case going to trial at Nisi Prius, and a verdict being found by the jury for the defendant. If that had been the case it is conceded it would have been idle to ask the judge or a court to interfere between the finding and the technical judgment. Instead of the findings of a jury here we have the findings of a referee; it appears to me, then, only common justice that the party entitled should have the fruit of those findings. It is vain to say he gets the same thing by the conditions imposed in the order for discontinuance. The object of the defendant is not to obtain perpetual immunity from certain claims, but to secure his property, and those taking after him, not himself. To interpose between the decision of the referee and the judgment to which the defendant is entitled, I think in the exercise of a sound discretion cannot be allowed. It is a matter of discretion clearly, but I think the right to judgment vested in the defendant as soon as the issues were ascertained; it is too late then for the party against whom judgment is bound to be given, to abandon the action merely on condition that he should not bring another action against the parties. If the plaintiff finds his own evidence is too weak, and he wishes to bring another action, I can understand why he should want, and why he should get an order to discontinue; but when once the issues have been decided the question assumes a different aspect, and I am satisfied that an order such as the present should be rescinded.

*Mellor, J.*—I am of the same opinion. It appears to me to be perfectly clear that Order XXIII., r. 1, was intended to put some limitation on the powers of withdrawal of a case by the parties, and the rule would seem to be rather a restriction than an enlargement of the former powers possessed in that respect. I think the discretion exercised by my brother Field may come within the letter, but not within the spirit of the rule. If this order is a favour to the plaintiff it must detract to a certain extent from the position of the defendant. The most important issues have been decided in the defendant's favour, and therefore I cannot indorse this order.

*Order rescinded, with costs.*

Solicitors for plaintiff, *Stonham and Legge*, for *Latter and Willett*, Bromley.

Solicitors for the defendant, *Taylor and Hales*.

## COMMON PLEAS DIVISION.

Nov. 5, 6, 7, and 30, 1878.

(Before GROVE and DENMAN, JJ.)

HOWE v. MALKIN. (a)

*Evidence—Action of trespass—Declarations against interest of tenant as to boundary of estate—Hearsay.*

*The declarations of a tenant for life in possession as to the boundary of his estate are not evidence against the remainderman.*

THIS was an action of trespass involving a question of boundary. The facts appearing from the pleadings, so far as it is necessary to state them, were as follows:—

The plaintiff was possessed in Dec. 1877 of an estate called the "Teaford Property," and the defendant was and is the occupier of a contiguous property called the "Teaford Mill." Prior to the year 1877 the defendant committed certain trespasses by building some arches and walls, as was alleged, upon the Teaford property. As to some of these buildings, the defendant alleged that they were built by the authority and sanction of John Malkin, the defendant's predecessor in title. The defendant further alleged that he was at that time tenant to John Malkin, and that afterwards the latter conveyed the land in question to him. The defendant also pleaded that the land was his freehold, leave and licence, and other pleas.

The action was tried at the Staffordshire Spring Assizes 1878, before Baggalay, L.J. and a jury. The defendant proved that during the erection of the buildings in question the plaintiff's father, who was tenant for life, came down almost every day. The defendant's counsel then asked, "Did the tenant for life ever object to any of the building which was then going on?" This was objected to by counsel on the other side on the ground that nothing the tenant for life had said or done could be evidence in an action where the right of the remainderman was in question. The Lord Justice allowed the objection. It was further proposed to prove that the position of a wall erected at the time of the building was altered by the defendant at the request of the then tenant, the plaintiff's father; and the defendant was asked whether the plaintiff's father had said anything to him with reference to the alteration of the position of the wall. It was contended that this was admissible as a declaration accompanying an act, and also as an admission of boundary by the tenant for life. It was, however, rejected. A verdict having been found for the plaintiff, a rule for a new trial was afterwards obtained on the ground that this evidence was improperly rejected.

H. Matthews, Q.C. and A. L. Smith showed cause.—It is settled law that the tenant for life, who is a stranger to the remainderman, cannot by any possibility derogate by anything he says or does from the title of the remainderman. [DENMAN, J. referred to the dictum of Patteson, J. in *Tickle v. Brown*, 4 A. & E. 369, 378.] There was no act, such as clipping a hedge or ploughing a field, accompanying the declaration here; at most, there was only a pointing out of the boundary. The cases that will be relied upon by the other side are *Roe d. Bruns v. Rawlings* (7 East 279),

which is distinguishable on the ground that that was a declaration by a deceased person against his own interest; *Doe d. Human v. Pettett* (5 B. & Ald. 223); and *Doe d. Roffey v. Harbrow* (3 Ad. & Ell. 67 n.). In each of the two last cases the boundary of the declarant's estate was material to the issue; here the estate of the tenant for life is immaterial to the issue. They cited

*Papendick v. Bridgewater*, 5 E. & B. 166; 25 L. T. Rep. 144;

Taylor on Evidence (6th ed.), vol. 1, p. 618, sect. 620.

*Staveley Hill, Q.C. and Bosanquet*, in support of the rule, cited

*Stanley v. White*, 14 East, 332;

*Parrott v. Watts*, 37 L. T. Rep. N. S. 755.

*Cur. adv. vult.*

Nov. 30.—GROVE, J.—At the trial of this action before Baggalay, L.J., Mr. Bosanquet proposed to ask the defendant whether the plaintiff's father, who was the predecessor of the plaintiff in the possession of Teaford property as tenant for life, had ever objected to any of the building that the defendant was then carrying on on the property which is now the plaintiff's, and also whether the plaintiff's father had said anything to the defendant with reference to the alteration of the position of a certain wall. This evidence was rejected, and I am of opinion that it was inadmissible. The tenant for life, no doubt, stood by and acquiesced in what was going on. The question is, whether that was a matter to affect the remainderman, and I think it was not. If it were to be allowed to affect the remainderman, his interests might suffer from something permitted through the good nature of the tenant for life, or possibly from something done to further the interests of the latter. It was contended that this evidence was admissible, on the ground that it consisted of statements accompanying acts. Mr. Bosanquet desired to ask whether the plaintiff's father had said anything with regard to the position of the wall; he wished to show that the wall was placed where it was by desire of the plaintiff's father, but this was held inadmissible. It appears to me that the evidence was properly rejected; no act was shown to have been done by the plaintiff's father at the time of making the alleged statement, so that the declaration was by one person, and the accompanying act by another. That does not appear to me to come within the rule. The rule is that, though you cannot give in evidence a declaration *per se*, yet when there is an act accompanied by a statement which is so mixed up with it as to become part of the *res gestæ*, evidence of such statement may be given. The statements here do not come fairly within that rule. Even if they did, I think they are not really material evidence in the case; and the defendant has now not only to satisfy us that the evidence was improperly rejected, but also that, had it been admitted, the jury might probably have come to a different conclusion. The rule for a new trial must therefore be discharged.

DENMAN, J.—I am entirely of the same opinion. The case of *Papendick v. Bridgewater* (*ubi sup.*) disposes of Mr. Bosanquet's strongest argument. That case decided that a declaration by a tenant was not sufficient to bind the reversioner. It is true that it was not a case of boundary, but I think it is in point in principle. It is urged that *Tickle v. Brown* (*ubi sup.*) was an authority

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

for the defendant on the strength of a dictum which fell from Patteson, J. But in the present case the declarations sought to be given in evidence were not declarations accompanying an act, no evidence being tendered of any act whatever having been done by the declarant. I therefore agree that this rule ought to be discharged.

*Rule discharged.*

Solicitor for the plaintiff, *Greenfield*, for *Young*.  
Solicitors for the defendant, *Austen, De Gex*, and *Harding*, for *Blagg and Son*.

Nov. 19 and 20, 1878.

(Before Lord COLERIDGE, C.J., GROVE and LINDLEY, JJ.)

LEONARD v. ALLOWAYS. (a)

APPEAL FROM REVISING BARRISTER.

Parliament—County vote—Late notice of claim—Power of overseers to waive irregularity—6 Vict. c. 18, ss. 4, 5, 37, 40.

By 6 Vict. c. 18, s. 4, every person claiming to vote shall on or before the 20th July give notice of claim to the overseers. By sect. 5, "the overseers shall, on or before the last day of July in every year, make out a list of all persons who, before the 20th day of July then next preceding, shall have claimed as aforesaid." A claim was delivered to the overseers on the 25th July; the overseers inserted the name of the person claiming in a list of voters which they published on the 29th of the same month.

Held, that the overseers had power to waive the irregularity, and that the list prepared by them was conclusive as to the claim having been duly made.

*Davies v. Hopkins* (3 C. B. N. S. 376; 30 L. T. 152) followed.

APPEAL from the decision of the revising barrister for the county of Gloucester.

At the revision of the list of voters for the parish of Stapleton, the appellant objected to the name of the respondent being inserted in the list.

The following facts were established by the evidence: That the claim of the respondent to be inserted in the said list of voters for the parish of Stapleton was not delivered or sent to the overseers of the said parish until after the 20th July last, but was delivered to the said overseers on the 25th July last. That the said overseers published the said claim on the 29th July last. That the respondent attended at the said court and duly proved his qualification.

Ten other persons delivered claims to be inserted in the said list under similar circumstances, and such claims were published by the said overseers on the said 29th July, and they also attended at the said court and duly proved their qualifications.

The revising barrister decided that the names of the respondent and of the said ten other persons should be inserted in the said list.

If the court should be of opinion that the decision was wrong, the register of voters for the western division of the county of Gloucester is to be amended by erasing therefrom the names of the respondent and of the said ten other persons.

C. Bowen for the appellant.—By 6 Vict. c. 18, sect. 4, every person desiring to make a claim to vote "shall, on or before the said 20th of July,

deliver or send to the said overseers a notice signed by him of his claim, according to the form of notice," &c. And by sect. 5, "the overseers of the poor of every parish and township respectively shall on or before the last day of July in every year make out, according to the form numbered (3) in the said schedule (A.), an alphabetical list of all persons who on or before the 20th of July then next preceding shall have claimed as aforesaid, and in every such list," &c. By sect. 40, "where the name of any person inserted in any list of voters shall have been objected to by the overseers, or by any other persons, and such other person," &c., the "revising barrister shall then require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list, and in case the same," &c. [Lord COLERIDGE, C.J.—*Davies v. Hopkins* (3 C. B. N. S. 376; 30 L. T. Rep. 152) in principle governs this case.] It is submitted that that case was wrongly decided.

*Anstie*, for the respondent, was not called upon.

Lord COLERIDGE, C.J.—I am of opinion that the judgment of the revising barrister was right, and should be affirmed. What may be the power of the court to reverse its own decision I decline to say, because the decision on which I base my judgment is, in my opinion, a right decision. In the present case the objection raised against the claimant is that he did not claim within the day specified in the sects. 4 and 5, and the counsel for the appellant has argued that the claimant must be one who makes a claim within the provisions of the Act, for that if the claimant does not follow the provisions of the Act, he is not a claimant within the meaning of the Act, and consequently has no right to be on the list. No doubt, on the words of sect. 5 there is plenty of ground on which to found such an argument, and, if that section stood alone, there would be considerable force in the argument; but there are other sections, especially sects. 37 and 40, which throw light on that section by showing, first, what the revising barrister has to do when the claimant is not on the list and is objected to; and, secondly, what he has to do when the claimant is on the list and is objected to. Sect. 37 deals with the case of a claimant who is omitted from the list. There the revising barrister is ordered to call on the claimant to show that he is *rectus in curia*, and that before he is entitled to be placed on the list he has fulfilled all the conditions of the various Acts of Parliament; the revising barrister has, in the words of the section, to see "that such person gave due notice of such his claim to the said overseers," words which are omitted in sect. 40. But when we come to look at sect. 40 and see what is ordered to be done when persons are on the list and are objected to, then all that we find the revising barrister is entitled to require is proof that the claimant was entitled on the 31st July then next preceding in respect of his qualification described in such list to have his name inserted in the list. Changing the collocation of the words, that is the sense of the section. This appears to me to be a strong argument to show that the duty of making the claim and the power of the overseers are correlative, and that the overseers are only concerned with the directions

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

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of sect. 5. Such being my opinion with regard to these sections, I find that in *Davies v. Hopkins* (*ubi sup.*), a case in which all these sections were before the court, the same conclusions were come to, and I have therefore merely to say that I think *Davies v. Hopkins* was perfectly well decided, and, on the authority of that case and the construction there placed on the Act, I am of opinion that the decision of the revising barrister was right, and should be affirmed.

GROVE, J.—I am also of opinion that the judgment of the revising barrister must be affirmed, and I base my judgment on *Davies v. Hopkins* (*ubi sup.*). That case is admitted to be identical in principle with the present. I was struck with the argument of the appellant's counsel founded on sect. 5 of the Act; and I am not prepared to say that I should have decided against his contention without hearing counsel on the other side if it were not for the decision in *Davies v. Hopkins*. The strength of the argument is lessened by sects. 37 and 40, which seem to point to the 31st of July as the date to which the revising barrister has to look when considering the qualification of the claimant, and on which the public are informed of the names of the persons on the list and the claimants. But the argument has not satisfied me, on any view of these sections, that *Davies v. Hopkins* (*ubi sup.*) was wrongly decided, and I gather from *Hadfield's* case (L. Rep. 8 C. P. 306), that we must be satisfied the previous decision was clearly and manifestly wrong before we reverse it. I am of opinion, therefore, that the decision of the revising barrister was right.

LINDLEY, J.—I am of the same opinion. The claim ought to have been sent in before the 20th July, instead of which it was sent in on the 25th July. This was wrong, and the claimant not having claimed in time had no right to be on the list; so far the case is clear. The question then arises, had the overseers power to receive the claim though not sent in time? *Davies v. Hopkins* (*ubi sup.*) decides that they had, and on a careful review of the sections of the Act, and especially sect. 37, I agree with the conclusions there arrived at, and I am of opinion that, though the claimant had no right to be on the list, yet that his sending in the claim late was an irregularity which the overseers had power to waive.

*Decision affirmed with costs.*

Solicitors for the appellant, *Ellis, Munday, and Co.*, agents for *Vizard and Co.*, Dursley.

Solicitors for the respondent, *Jerdein*, agent for *Carter*, Newnham.

Tuesday, Nov. 20, 1878.

(Before Lord COLERIDGE, C.J. and GROVE and LINDLEY, JJ.)

SMITH v. WOOLSTON.

APPEAL FROM REVISING BARRISTER.

*Parliament—County vote—Description of qualifying property—Power of amendment—6 & 7 Vict. c. 18, s. 40—28 & 29 Vict. c. 36, s. 6.*

*A revising barrister has power to amend the description of a voter's qualifying property by striking out such portions of it as he has parted with, and, if what remains is of sufficient qualifying value to confer the franchise, the voter is entitled to remain on the list.*

(a) Reported by A. H. BRITTON, Esq., Barrister-at-Law.

APPEAL from the decision of the revising barrister for the Northern Division of the county of Northampton.

The case stated was as follows:—

At the revision of the list of voters for the parish of Wellingborough, the respondent duly objected to the name of the appellant being retained on the list. The objection was grounded on the third column of the register, and the objection related to the nature of the interest of the appellant in the qualifying property. The name of the appellant was on the list of voters for the parish of Wellingborough.

Christian Name, &c.	Place of Abode.	Nature of Qualification.	Street, &c., where the Property is situate.
Smith, Henry	33, Norfolk-st., Strand, London.	Freehold land.	Plots 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 177, 178, 179, 175, 475, 476, Victoria Estate.

It was admitted the appellant had parted with all the plots mentioned as above in the fourth column, except plot 476, and that plot 476, which he retained, was freehold land, and of sufficient qualifying value to confer the franchise. The revising barrister was of opinion that the freehold land mentioned in the third column was not the freehold land now possessed by the appellant, and that he had no power to amend the fourth column, as requested by the appellant, by striking out the plots which he had parted with as aforesaid. The revising barrister, therefore, held that the appellant was not entitled to be retained as stated upon the list of voters, and expunged his name from the list of voters. If such decision was correct, such list as revised was to remain without alteration; if such decision was incorrect, the name of the appellant, with his address and particulars of his qualification, was to be added to the revised list of voters for the parish of Wellingborough, in the northern division of the county of Northampton.

*Gibbons* for the appellant.—The notice of objection was to the third column, where the nature of the qualification is described as freehold, which is admitted to be correct. But, before the revising barrister, an objection was taken to the fourth column, which was not objected to in the notice, that the appellant had parted with fourteen plots out of the fifteen therein mentioned, although the remaining plot was sufficient to qualify him. The revising barrister was wrong to expunge the name from the list on that ground. He had power to amend the description by striking out the surplus plots:

*Bendle v. Watson*, L. Rep. 7 C. P. 163; 25 L. T. Rep. N. S. 806;

Registration Act, 6 Vict. c. 18, sect. 40. (a)

[He was stopped by the Court.]

(a) 6 & 7 Vict. c. 18, sect. 40, is, as far as is material, as follows: "That the revising barrister shall correct any mistake which shall be proved to him to have been made in any list, and shall expunge the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote, and also the name of every person who shall be proved to him to be dead; and wherever the christian name, or the place of abode, or the nature of the qualification, or the local or other description of the property of any person who shall be included in any such list, and the name of the occupy-

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*Horace Smith* for the respondent.—First, where the objection is to the third column, both it and the fourth column must be looked at to ascertain the voter's right to be on the register (*Hichins v. Brown*, 2 C. B. 25); and in *Howitt v. Stephens* (5 C. B. N. S. 30, 39; 32 L. T. Rep. 162), which was a case of an objection to the third column, Byles, J. says, "I read the third and fourth columns together." Secondly, 6 & 7 Vict. c. 18, sect. 4, enacts that the overseers shall every year publish a notice requiring all persons entitled to vote in respect of any property within the parish who shall not be upon the register, and also all who "being upon such register shall not retain the same qualification . . . as described in such register, and who are desirous to have their names inserted in the register about to be made," to give to the overseers notice in writing of their claim. The appellant had parted with the greater portion of his land, and did not "retain the same qualification as described" in the register, and should therefore have made a new claim:

*Burton v. Gery*, 5 C. E. 7.

[Lord COLERIDGE, C.J.—Had the appellant parted with only one plot, could the amendment not have been made?] No; he ought to make a fresh claim, that attention may be called to the diminution of his property, and, if it be insufficient, objection may be made. Otherwise one whose actual qualification was doubtful might, by causing it to seem sufficient on the register, prevent valid objection being taken. *Williams, J.*, in *Burton v. Gery* (*ubi sup.*), says: "The qualification on the list which has stood the test of public inquiry and investigation having ceased on the voters ceasing to occupy the land, upon principle as well as upon the plain natural meaning of the words of the Act, the new occupation required a new claim."

Lord COLERIDGE, C.J.—In this case I am not quite certain whether the objection which appears on the case as having been taken before the revising barrister was the objection which has been argued before us. The revising barrister says that the objection "was grounded on the third column of the register, and related to the nature of the interest of the said Henry Smith in the qualifying property." But the third column is "freehold land," and the objection to the nature of the interest would seem to have been, therefore, that the land was not freehold, but copyhold, or some estate other than freehold. If so, that objection entirely fails, the barrister himself saying that the nature of the interest is rightly

ing tenant thereof, shall be wholly omitted in any case where the same is by this Act directed to be specified therein, or of any person whose name is included in any such list, or his place of abode, or the nature or description of his qualifications, shall, in the judgment of the revising barrister, be insufficiently described for the purpose of being identified, such barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted or insufficiently described be supplied to the satisfaction of such barrister before he shall have completed the revision of such list, in which case he shall then and there insert the same in such list. Provided always that, whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters or claim, as the case may be, nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same, and where," &c.

described as freehold. I am strongly of opinion that it is not the duty of a revising barrister, if one objection is pointed out by notice, to allow another objection to be taken before him; because the voter may come prepared to meet the one objection, and then be surprised by another for which he is not prepared. But it appears that the real objection was not to the tenancy, but to the description of the qualification in the fourth column; the description there specifies fifteen plots on the Victoria estate, and in fact fourteen of them had been sold. One remained in the voter's possession, and that one was sufficient to confer the right to vote. The revising barrister was asked to amend the fourth column by striking out the numbers of the plots sold. He considered that he had no power, but, if his decision was wrong, he thinks that the list should be so amended. We are, therefore, to determine whether the revising barrister had power to make the amendment asked for, and I am of opinion that he had. This is not a case where tricks have been played on the register, as *Mr. Horace Smith*, in his very able argument, suggested might sometimes happen. If there were any reason to suppose that the voter had put a qualification of nine-tenths on the register, when he possessed only one-tenth, and then an objection having been taken, he asked that the correction should be made, and those circumstances were brought to the barrister's notice, I should think it very doubtful whether he ought to exercise the power of amendment. But this case is admitted to be perfectly *bonâ fide*. I think it is difficult to draw a precise line as to the cases in which the power of amendment should be exercised; but I am of opinion that it should have been in this case. When, in the course of the argument, I put the case of one only of these plots having been sold, *Mr. Horace Smith*, in order to be logical, was forced to say that the revising barrister could equally not have struck out the one. It is, as I have said, extremely difficult to draw the line within which the power of amendment ought to be exercised, but I think that where no fraud exists, and where the person objected to retains property sufficient to entitle him to a vote, that then anything inserted in the fourth column beyond what he actually possesses may be struck out as surplusage. I am of opinion that the amendment asked for was within the power of the revising barrister, and should have been made. This decision must therefore be reversed.

GROVE, J.—I am of the same opinion. The case finds that "the objection was grounded on the third column of the register, and the objection related to the nature of the interest of the appellant in the qualifying property." My attention has just been called to 28 & 29 Vict. c. 36, s. 6, which provides that no notice of objection given under the provisions of the 7th section of 6 & 7 Vict. c. 18, "shall be valid unless the ground or grounds of objection be specifically stated therein; and this provision shall be deemed to be sufficiently satisfied by naming the column or columns of the list on which the objector grounds his objection; provided always, that if the objection be grounded on the third column, then it shall be necessary to state in the notice whether the objection relates to the nature of the voter's interest in the qualifying property, or to the value of the qualifying property, or to

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both; and each of such last-mentioned grounds of objection shall be deemed a separate ground of objection, as well as any objection grounded on any one of the other columns." There seems, therefore, to have been no valid notice of objection in this case. Then as to whether the case falls within sect. 40 of 6 & 7, Vict. c. 18. In *Bendle v. Watson* (*ubi sup.*), Willes, J. says: "It is impossible to say this is a description of another qualification; it is an insufficient description of the claimant's qualification, not a description of another qualification; it is the old description, which at one time was true. Then, as respects the exception, 'except for more clearly and accurately defining the same,' the same test applies; it would be a true description to a person who had left the street several years back, and a false one to a person who only knew the new state of things. Then, as to the words 'change the description of the qualification,' there, I think, 'qualification' must mean the nature of the qualification.—*e. g.*, freehold—while the object of a number is to individualise, and perhaps, in that sense, describe. I think that throughout, the word 'his' governs the meaning, and as the qualification is the same, and the description one which might in one sense be true, inasmuch as it might indicate the house to some people, and there was no falsification or intention to deceive, the revising barrister ought to have amended." Assuming here that there was no falsification or intention to deceive, and that the qualification remained the same, namely, freehold, the one plot retained by the appellant was sufficient to qualify him. Had the revising barrister power to strike out the plots which were erroneously appended to the description of the appellant's qualification? I think that he had. To put the case suggested by the Lord Chief Justice, suppose the voter had disposed of an insignificant part of his land, could not the barrister have amended? If so, the amount of land disposed of cannot alter his power of amendment, although it might affect the exercise of his discretion.

LINDLEY, J.—I am of the same opinion. The statute 28 & 29 Vict. c. 36, determines the first point. Then there remains the point as to whether power is given to the revising barrister by sect. 40 to make the amendment asked for. Looking at that section, I think that the revising barrister would have no power to make an amendment affecting the identity of the property. Here the claimant described the nature of his qualification rightly, viz., as freehold land; he misdescribed, or rather over-described, the amount of land, but there is no change in its identity. That being so, I think the revising barrister had power to amend, and was not restricted by the words of sect. 40, "that he shall not be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same." The mistake amounts, in my judgment, to a mere misdescription. The land is described as Victoria Estate, which in fact it is, and if it has been altered by addition or subtraction, yet the land remains the same, and it appears to me the amendment might in either case be made.

*Decision reversed without costs.*

Solicitors for the appellant, *Sharman and Jackson.*

Solicitors for the respondent, *Lewis and Indermaur*, agents for *Toller, Kettering.*

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

Tuesday, March 11.

(Before Sir R. PHILLIMORE.)

THE CECILIE. (a.)

*Bottomry—Maritime risk—Payment due on arrival of ship.*

*An instrument by which a captain binds his ship to pay a sum of money for goods supplied within "six days after my arrival," means after the ship's arrival, and is an instrument of bottomry.*

THIS was an action of bottomry brought against the Danish vessel *Cecilie* to recover sums of 134*l.* 5*s.* 8*d.* and 131*l.* 11*s.* 10*d.*, to pay for yellow metal and provisions supplied at Hamburg, the payment whereof was secured by two instruments in the following form:

I the undersigned, captain of the Danish vessel named the *Cecilie*, hereby acknowledge for myself and my heirs, the duplicate being valid as a single acknowledgment, that I am indebted to Mr. Rith Rodewalt for yellow metal delivered to (provisions and equipment of) the said vessel for the prosecution of her voyage from Hamburg and Africa and back to London, in the sum of 2684 marks and 50pf. (2739 marks and 35pf.), wherefore I pledge my ship and appurtenances, and bind myself to pay the above sum within six days after my arrival in London, or wheresoever I may put in, said payment to be prompt and uncontested, according to the law of exchange in all parts.—Hamburg, July 13, 1878. (Signed) N. S. THOGENSEN, Master of the schooner *Cecilie*.

These documents were indorsed by Mr. Rodewalt to Elliot's Metal Company (Limited), who now sued as indorsees. Certain persons who had supplied necessaries to the ship, other than the above, disputed the payment on the ground that the said instruments were not bottomry bonds, as they showed no maritime risk, and therefore gave no priority to the plaintiff.

*Butt, Q.C.* and *Hodgson* for the plaintiff.—In *Simonds v. Hodgson* (3 B. & A. 50), which was an action on a policy of insurance on bottomry, the words on the instrument of bottomry were, "I bind myself, my ship, her apparel, tackle, &c., as well as her present freight and cargo, consisting, &c., to pay to B. the above-mentioned sum, with 12 per cent. bottomry, premium, &c., and I do hereby bind myself, the said schooner, brig, &c., to full and complete payment of the said sum, with all charges thereon, in eight days after my arrival at the afore-mentioned port of London; and I do hereby make liable the said vessel, her freight, and cargo whether she do or do not arrive at the above-mentioned port of London;" and Lord Tenterden, delivering the said judgment of the Exchequer Chamber, held that the words "eight days after my arrival" means after the ship's arrival, and that such words show that the lender takes on himself the risk of the voyage. The only difference between that case and this is that here there is no bottomry premium mentioned; but that is not essential; the assumption of the risk is all that is necessary:

*The Elpis*, 27 L. T. Rep. N. S. 664; 1 Asp. Mar. Law Cas. 472.

*Clarkson* for the interveners.—The bond was given at the commencement of the voyage and not during the voyage for its necessities: this, and the fact of their being no maritime premium

(a) Reported by J. P. ASPINALL and F. W. BAUKER, Esqrs., Barristers-at-Law.

ADM.] THE CONFIDENCE, &amp;C.—ATTORNEY-GENERAL v. BIPHOSPHATED GUANO CO. (LIM.) [Ct. of App.

are strong evidence of the instrument not being intended to be a bottomry bond.

Sir R. PHILLIMORE.—I am satisfied that these are bottomry bonds, and I pronounce for their validity. They will bear 4 per cent. interest from the date of their becoming due.

Solicitors for the plaintiff, *Harrisons*.

Solicitors for the interveners, *Thomas Cooper and Co.*

Tuesday, March 11.

THE CONFIDENCE; THE SUSAN ELIZABETH. (a)

County Court Admiralty appeal—Mode of hearing—No notes of evidence—Witnesses in appeal.

In an Admiralty appeal from a County Court, under the County Courts Admiralty Jurisdiction Act 1868, where there are no shorthand writer's notes of the evidence, and no notes taken by the judge of the County Court available for the purpose of appeal, the High Court (Admiralty Division) will order the appeal to be heard on *vivâ voce* evidence.

THIS was an appeal from the County Court at Portsmouth in cross actions of collision brought respectively by the owners of the *Susan Elizabeth* against the *Confidence*, and by the owners of the *Confidence* against the *Susan Elizabeth*. The actions were tried together at Portsmouth on 12th Dec. 1878, and judgment given for the owners of the *Susan Elizabeth* in both actions; and the owners of the *Confidence* appealed under the County Court Admiralty Jurisdiction Act 1868, sect. 26. At the hearing there was no shorthand writer, and in order to bring the evidence before the High Court on appeal the appellants applied to the County Court judge for a copy of his notes of the evidence. The County Court judge refused to supply such copy upon the grounds that he was not aware that he was bound to do so, that he had not been asked by counsel at the hearing to take any note of any points, and that the notes he had taken were only short notes, and not of any use for the purposes of appeal. At the hearing the County Court judge was asked by counsel for the appellants to state his reasons for his judgment, but he declined to do so.

The case now came before the High Court on motion to direct the mode of hearing the appeal.

J. P. ASPINALL, for the appellants, having stated the above facts, asked that the case should be reheard on appeal by means of *vivâ voce* evidence. By the General Orders made in 1869, under the County Courts Admiralty Jurisdiction Act 1868, there is provision made (rule 32) for the evidence of witnesses being taken down by a shorthand writer, and the transcript has always hitherto been used on appeal. This rule, however, has been omitted in the Consolidated County Court Orders and Rules 1875, and consequently there is now no provision by means of which the parties can bring the evidence before the Appeal Court except the judge's notes, which, according to the judge's statement, would be useless. The only mode of hearing the appeal is therefore to rehear the evidence.

E. C. CLARKSON, for the respondents, contended that the judge's notes ought to be procured before any order as to hearing witnesses was made.

(a) Reported by J. P. ASPINALL and F. W. BARKES, Esqrs., Barristers-at-Law.

Vol. XL, N. S., 1013.

Sir R. PHILLIMORE.—I shall order the appeal to be heard on *vivâ voce* evidence, but the parties are at liberty to procure the judge's notes if they can; and, if on their being procured it appears they are of any use for the purposes of appeal, the respondents can apply again to the court to make such use of the notes as they can, or to set aside this order.

Solicitors for the appellants, *Pritchard and Sons*.

Solicitors for the respondents, *Lowless and Co.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Dec. 6, 7, and 9, 1878, and March, 22 1879.

(Before JAMES, BAGGALLAY, and THESIGER, L.JJ.)

ATTORNEY-GENERAL v. BIPHOSPHATED GUANO COMPANY (LIMITED). (a)

Highway—Agreement to dedicate to public—No actual dedication—Purchaser for value without notice—Lessee—Evidence of dedication—Highway Act (5 & 6 Will. 4, c. 50).

B., who was in possession of certain land under an agreement for a lease, entered into an agreement with the vestry of the parish in which the land was situate, whereby the vestry consented to a proposed diversion by B. of a public footpath which crossed the land on condition that he should make a certain new roadway and throw it open to the public. The footpath was diverted (an order authorising its diversion having been obtained from the court of quarter sessions in accordance with the provisions of the Highway Act, 5 & 6 Will. 4, c. 50, but the proposed new roadway was not mentioned to the court) and the new roadway was made.

A lease of the land was subsequently executed to B., the land being described in the lease by the reference to a plan, on which the roadway was marked "private road," and being devised "subject to the existing rights of way" over it. B. assigned the lease to a company, and it afterwards became vested in W., as an assignee for value without notice of the existence of any public right of way over the land, and from him it passed to the defendants, whom the present information and suit sought to restrain from obstructing the new roadway:

Held, that, if there had been an actual dedication of the roadway to the public (which the court held, on the evidence there had not been), the public would have been entitled to have kept it open against all persons, whether they took with notice of the existence of the highway or not; that the making of the new road could not, under the provisions of the Highway Act (5 & 6 Will. 4, c. 50), be made a condition of the diversion of the old footpath, and the public could not be parties to the arrangement made between B. and the vestry of the parish, and that, although there was a moral obligation on B. to make and throw open the new roadway to the public, and an animus *dedicandi* on his part, that could lead to no

(a) Reported by H. FRAT, Esq., Barrister-at-Law.



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*inference of an actual dedication so as to bind a purchaser for value without notice.*

*Decision of Fry, J. affirmed on slightly different grounds.*

*Quære, whether there can be a dedication of a highway to the public by a lessee.*

THIS was an appeal from a decision of Fry, J. The hearing in the court below is reported in 38 L. T. Rep. N. S. 941, where the facts of the case and the judgment appealed from are sufficiently stated.

*Bagshaw, Q.C., North, Q.C., and Speed* for the appellant.

*Fischer, Q.C., Patchett, Q.C., and Kingdon* for the respondent.

The following cases and authorities were cited:

*Phillips v. Phillips*, 5 L. T. Rep. N. S. 855; 4 De G. F. & J. 208;

*Highway Act* (5 & 6 Will. 4, c. 50), ss. 84, 85;

*Roberts v. Hunt*, 15 Q. B. N. S. 17;

*Dovaston v. Payne*, 2 Sm. Lead. Cas. 6th edit. p. 147;

*Reg. v. Wilson*, 18 Q. B. N. S. 348;

*Wood v. Veal*, 5 B. & Ald. 454;

*Rea v. Barr*, 4 Camp. 16;

*Doues v. Hawkins*, 4 L. T. Rep. N. S. 288; 8 C. B. N. S. 848;

*Mercer v. Woodgate*, 21 L. T. Rep. N. S. 458; L. Rep. 5 Q. B. 26;

*Arnold v. Blaker*, L. Rep. 6 Q. B. 433;

*Arnold v. Holbrook*, 28 L. T. Rep. N. S. 23; L. Rep. 8 Q. B. 97.

*Our. adv. vult.*

**March 22.**—**THE SIGER, L.J.** now delivered the following written judgment of the court.—The defendants to this information and bill are the occupiers of certain lands situate in the parish of East Greenwich, under an agreement for a lease made between one Christopher Weguelin and certain persons carrying on business as guano merchants under the firm of Messrs. Mockford and Co., and the benefit of which agreement was in Nov. 1873 transferred by Mockford and Co. to the defendants, the Biphosphate Guano Company. Weguelin himself was entitled to the lands, as assignee from the Agra Bank (Limited) and Wilkinson Dent, of a lease dated the 14th May 1866, by which the trustees of Morden's College let the lands to Theophilus Alexander Blakely for eighty years from the 25th March 1864. That lease was assigned by Blakely to a company called the Blakely Ordnance Company (Limited), and by that company to the Agra Bank and Dent. The object of the information and suit is to restrain the defendants from obstructing a certain road made upon the lands occupied by the defendants, and communicating at one end with the river Thames, and at the other with a public footpath, and which road it is alleged is either a public highway or road which the defendants, by virtue of their privity in estate with Blakely, the original lessee, were bound by agreement to keep open to the public. Upon the hearing before Fry, J., he decided, first, that there had been no dedication of the road to the public; and, secondly, that assuming an agreement such as was alleged between the vestry of Greenwich and Blakely to have been proved, and to be valid, it could not be enforced against the defendants, on the ground that neither the Blakely Ordnance Company nor the Agra Bank and Dent were affected with notice of the agreement, and consequently that Weguelin, even if he himself had notice, took his assignment unfettered by the

agreement. Judgment was accordingly given for the defendants. Upon the appeal it has been objected by the appellants that, looking to the pleadings, the fact of notice was not put in issue by the defendants, except as regards Weguelin, and that the learned judge was not justified in deciding the case upon the want of notice to persons prior in title to Weguelin. We are of opinion that the objection is a well-founded one. The defence of a purchase without notice is one which ought to be specifically alleged as well as proved by those who rely upon it. In this case, on the contrary, the defence as alleged in paragraph 37 of the answer is strictly confined to Weguelin's want of notice, and while Weguelin himself made an affidavit in verification of that defence, no attempt was made on the part of the defendants to carry their evidence further. The objection, too, is one of substance, for the absence from the pleadings of any issue as to notice, except as regards Weguelin, would naturally put the informant and plaintiff off their guard, and prevent their offering any evidence beyond that bearing on the question raised by the pleadings. And, indeed, it would appear that the evidence in relation to this point was limited on both sides to the question so raised. But although we think that the particular grounds taken by the learned judge upon this part of the case were not properly open to him, we are of opinion at the same time that his judgment on this branch of the case may be supported upon the ground of want of notice in Weguelin. The way in which it is attempted to affect him with notice is by showing that upon the plan prepared for the sale by auction, and by reference to which he purchased, the road in question appears as terminating at the river Thames at a point marked "Ferry from Blackwall Stairs," and it is contended that this indicated to all intending purchasers that the road leading to the river was in whole or in part a public one. But the answer to this contention is, first, that no ferry in the legal sense of the term, and no regular ferry in the popular sense of the term, really existed; secondly, the road, a part of which is claimed as public, is marked generally in the plan as a private road, and consequently there is nothing to indicate to the purchaser anything more than that a private road existed, and that persons entitled to use it might be ferried across the river to and from Blackwall. We would add that the lease to Blakely, if inspected by the purchaser, would give still less indication of any public right having been created over the road in question, for upon the plan attached to that lease the very part of the road claimed as public has written upon it the words "private road." Consequently, although the lease was made subject to all rights of way, and a purchaser might be held affected with notice of ways, not shown on the plan, but really existing, he could hardly be said to be affected with notice that a road, which at the date of the lease was a mere paper road, and marked on the plan as private, was, in fact, public. Being of opinion that Mr. Weguelin was a purchaser without notice, it becomes unnecessary to consider whether or no the vestry of Greenwich were compelled to contract, and did in point of fact and law, contract with Captain Blakely for the formation by him of the road in question. But the question remains: was there a dedication of the road to the public; for, if so,

the public are entitled to have it kept open against all persons, whether they took with notice of the existence of the highway or not. This question appears to have been almost passed over in the court below, where the agreement was made the foundation of the present appellants' claim, and the subject of the learned judge's decision. In this court it has formed the prominent feature of discussion, and being sufficiently, although not very definitely, raised by the pleadings, must be decided upon. The argument has raised an important point of law with reference to the power of a lessee to dedicate, at least as against himself and his assignees, a highway to the public; but that point can only, as a matter of necessary decision, arise after the court is satisfied that the evidence establishes such a contract on the part of the lessee on the one hand, and the public on the other, as would if the lessee were an owner in fee amount to proof of dedication in fact. We proceed, therefore, to consider the evidence, but before doing so would first call attention to the allegations of the parties in their respective pleadings. In paragraph 11 of the amended information and bill of complaint, the appellant's case is thus alleged: "In pursuance of the said order (the order made by the court of quarter sessions on the 6th April 1865), and in part performance of the said agreement in that behalf, the said Theophilus Alexander Blakely diverted, turned, and stopped up the said public highway or footway in the manner proposed and agreed as aforesaid, and he caused a new footway, not less than five feet in width, to be made as shown on the said plan, in lieu of so much of the said old public highway or footway as was stopped up, turned and diverted as aforesaid; and he erected and built, or caused to be erected and built upon the said piece or parcel of land so agreed to be demised to him as aforesaid, and over part of the site of the said public footpath, a factory, an engine and boiler house, a smith's shop and office; and in pursuance of his said agreement in that behalf, he caused a new road forty feet in width to be made on and over the said land to the waterside between the places marked with the letters D and E respectively on the said plan, and threw open and dedicated such new road to the public as he had agreed to do, and the said new road was thenceforth, that is to say from the year 1865, used by the parishioners of the said parish of East Greenwich and by the public generally, as a public highway to and from the river Thames without interruption, until it was obstructed and blocked up by the above-named defendants, the Biphosphate Guano Company (Limited)." That case is met by the defendants in paragraph 19 of the answer, which is as follows: "We cannot say to our knowledge, information, belief, or otherwise, whether the said Theophilus Alexander Blakely did or did not cause a new road, and whether or not forty feet in width, to be made on and over the said land to the waterside, between the places marked with the letters D and E respectively, on the said plan. However, speaking to the best of our knowledge, information, and belief, we deny that, if this was the case, he did so in pursuance of any such agreement as in that behalf alleged in the said information and bill, or that he did in fact throw open or dedicate such new road to the public, as he is alleged to

have agreed to do, or that the said alleged new road was thenceforth, that is to say from the year 1865, or from any other time, or in fact has been used by the parishioners of the said parish of East Greenwich, or by the public generally, as a public highway to and from the river Thames without interruption until it was obstructed and blocked up as in the said information and bill in that behalf alleged, for we say that no other road than such private road as herein mentioned has ever existed over the premises, and we insist that, having regard to the limited interest of the said Theophilus Alexander Blakely, he could not, without the consent of both the said trustees of Morden College, and also the Charity Commissioners for England and Wales, dedicate any such road to the public, and in fact he did not make any such dedication. However, we admit that a private road has, as aforesaid, for some time existed from the entrance to the property to the river side, in or nearly in the direction marked in the said plan, but the defendants, the company, insist that they have a right to stop up and put a fence across any such part of the same private road as is north of the ditch mentioned in paragraph 5 of our answer, provided that they do not interfere with the pathway, A D C" (a footway). These being the allegations of the parties, the evidence for the informant and plaintiffs was as follows: In the first place, the proceedings between Captain Blakely and the Vestry of Greenwich in 1864, were proved, and from those proceedings it appears that in the clearest and most unmistakable terms Captain Blakely, as an inducement to the Greenwich vestry to consent to the deviation inland of a public footpath, which ran along or near to the bank of the river Thames, had stated that he proposed and intended, if the old footway were stopped up and diverted in another line proposed by him, to give and make a new roadway to the waterside forty feet in width between the places marked with the letters D and E respectively on a certain plan referred to, and to throw the same open to the public. The vestry, in equally clear and unmistakable terms, made their assent to the proposed diversion of the old footway subject, amongst other things, to the proposed new roadway being formed and thrown open to the public, with free access to and from the river Thames to the full extent of the said width of forty feet. This fact is undoubtedly a most important starting point for the appellants. It establishes, at the very least, a moral obligation upon Capt. Blakely to make and throw open to the public the road in question, and it indicates in the strongest manner that could well be conceived, the existence on his part at the time of the *animus dedicandi*. It tends, therefore, to strengthen and give point and force to any evidence of user by the public of the road when made. But it must not be pressed too far. The public were not and could not be parties to the bargain. The making of the road, though an inducement to the vestry to consent to the diversion of the footpath, was not and could not, looking to the provisions of the Highway Act (5 & 6 Will. 4, c. 50), be made a condition of such diversion. The arrangement was not even put before the court of quarter sessions, which under the Highway Act had to approve, and did approve, of the diversion solely upon the consideration of the advantages of the substituted footpath, and those advantages the public

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have attained. The bargain between Capt. Blakely and the vestry may, in short, explain doubtful acts, but it cannot remove the necessity of proof that the road in question has been in fact thrown open to the public and used by them, for without such proof the existence at one time of the *animus dedicandi*, however clearly established, can lead to no inference of a dedication. [His Lordship examined the evidence upon the alleged dedication of the road to the public and the public user of the road, commenting upon its vagueness and insufficiency, and then proceeded:] It seems to us that the result of the evidence fully accounts for the little reliance placed in the court below upon proof of any dedication to the public. We cannot think that, giving the fullest weight to the intention to dedicate evinced in 1864, when the arrangement with the vestry was made, it is reasonable to hold upon such vague and unsubstantial evidence as that adduced on the part of the appellants that such intention was actually carried out. In order to constitute a dedication binding upon the owner of the land, it is not necessary to prove that the parish in which the road alleged to be dedicated is situate has taken to the road so as to be liable to repair it; but, looking to the importance attributed in 1864 to the promised road by the vestry of East Greenwich, an additional argument against any dedication having existed in the present case is to be found in the fact that after 1864 the parish never repaired or interfered in any way with, and, as far as is shown by the evidence, never raised in any shape or form the question of the road which their officer now claims for the public. The affidavits of Alfred David Lewis, William Henry Welch, Henry Johnson, Benjamin Wood, and John Wm. Atkins, filed on behalf of the defendants, explain the character of such user as there has been of any way from the Thames over the defendants' land, and further strengthen the view that neither as regards the certainty of the way used or the persons using it, has there been any such user as is properly required to create a public right of way. Such rights have been held in some cases to have been acquired by user of not many years' continuance, but in those cases the way itself has been clearly defined and the character of the user left no doubt as to the intention to dedicate by the owner of the land over which the way ran, and the assertion of right on the part of the public; but here everything is left vague and uncertain. Time, place, termini, extent of user, persons using, and all matters requiring clear proof, are either scarcely proved at all, or are even proved in a manner unfavourable to the inference of the existence of a public right, and we are of opinion that the appellants have failed to make out any title to relief, and that the appeal should be dismissed with costs.

JAMES, L.J.—The question whether there can be a dedication of a highway to the public by a lessee we have left untouched, to be dealt with when it arises.

*Appeal accordingly dismissed with costs.*

Solicitor for the appellants, W. Bristow.

Solicitor for the respondents, Mark Shephard.

Friday, Feb. 28.

(Before JESSEL, M.R., JAMES and BRAMWELL, L.JJ.)

Re THE STANHOPE SILKSTONE COLLIERIES COMPANY (LIMITED). (a)

*Company—Winding-up—Secured creditor—Garnishee order not served till after the commencement of winding-up—Bankruptcy Act 1869, ss. 12, 14—Companies Act 1862, s. 163—Judicature Act 1875, s. 10—Rules of Court 1875, Order XLV., rr. 1, 2, 3.*

*A creditor, who before the presentation of a petition for the winding-up of a company obtains a garnishee order nisi against a debtor to the company, but does not serve the order on the garnishee until after the presentation of the winding-up petition, is not a secured creditor within the meaning of the 12th and 14th sections of the Bankruptcy Act 1869, the provisions of which Act with regard to the respective rights of secured and unsecured creditors are now, by the 10th section of the Judicature Act 1875, made applicable in the winding-up of companies under the Companies Acts 1862 and 1867.*

*Decision of Fry, J. reversed.*

THIS was an appeal from a decision of Fry, J.

The facts were briefly as follows:—

On the 16th Oct. 1878 the Sheffield Waggon Company recovered judgment against the Stanhope Silkstone Collieries Company (Limited), for 1684*l.*

On the 22nd Jan. 1879, the judgment being still in part unsatisfied, the Sheffield Waggon Company obtained a garnishee order nisi against the Newmarket Gas Company to attach all debts owing or accruing from them to the Stanhope Silkstone Collieries Company to answer the judgment.

This order was not served on the Newmarket Gas Company until the 25th Jan.

Meanwhile, on the 24th Jan., a petition was presented for the winding-up of the Stanhope Silkstone Collieries Company, upon which a winding-up order had since been made.

The provisional liquidator of the company applied for an injunction to restrain the Sheffield Waggon Company from taking any further proceedings against the Newmarket Gas Company under the garnishee order.

Fry, J. held, on the authority of *Ex parte Joselyne, Re Watt* (36 L. T. Rep. N. S. 661; L. Rep. 8 Ch. Div. 327), that the garnishee order nisi constituted a security on the property of the company, and refused to grant the injunction.

From this decision the liquidator appealed.

Glasse, Q.C. and Everitt for the appellant.—The judgment creditors are not secured creditors, as they did not serve the garnishee order on the garnishees till after the presentation of the winding-up petition. Rule 2 of Order XLV. of the Rules of Court 1875 shows the nature of a garnishee order nisi, and rule 3 shows that it is not binding till it has been served. This case is not governed by *Ex parte Joselyne*, for there the order nisi had been served before the commencement of the bankruptcy. [BRAMWELL, L.J. referred to *Holmes v. Tutton*, 5 E. & B. 65; 24 L. J. 346, Q. B.] The 10th section of the Judicature Act 1875 makes the rules of bankruptcy with regard to the respective rights of secured and un-

(a) Reported by H. PEAT, Esq., Barrister-at-Law.

secured creditors applicable to companies being wound-up under the Companies Acts 1862 and 1867:

*Re The Printing and Numerical Registering Company*, 38 L. T. Rep. N. S. 676; L. Rep. 8 Ch. Div. 538.

They also referred to

*Emanuel v. Bridger*, 30 L. T. Rep. N. S. 194; L. Rep. 9 Q. B. 286;

*Jones v. Farrell*, 1 De G. & J. 208.

*Millar* for the respondents.—*Ex parte Joselyne* is in our favour, and Fry, J. rightly held that it governs this case. In the course of his judgment in that case, Cotton, L.J. says: "It is called an order nisi, but, as against the judgment debtor, it was a final and complete order, transferring at once to Patterson and Co. (the judgment creditors) the right to receive any money which might be due from Kino (the garnishee) to Watt" (the judgment debtor.) [JAMES, L.J.—Those words must be taken as having been used with reference to the case then before the court, and not disconnected from the circumstances of the case. There the garnishee order had been served before the commencement of the bankruptcy. JESSEL M. R. referred to the 163rd section of the Companies Act, 1862]. He also cited

*Re The United English and Scottish Life Assurance Company, Hawkins's case*, 19 L. T. Rep. N. S. 232; L. Rep. 3 Ch. 790.

No reply.

JESSEL, M.R.—The attachment or garnishee order is a mode of enforcing by execution the payment of the debt recovered in the original action, and the order that the debt shall be attached, and that the garnishee, that is the debtor of the original judgment debtor, shall appear to show cause why he shall not pay the debt, does not operate to give the plaintiff in the original action any security until it has been served on the garnishee. It is quite plain that the garnishee may before service pay his original creditor, and then you would have your remedy under the order against the original judgment debtor, because you could issue execution against him upon the original unsatisfied judgment. It is in fact an imperfect execution, and would therefore not be saved by the Bankruptcy Act 1869, as being a security in the hands of a secured creditor. Under the 10th section of the Judicature Act of 1875, the rules in bankruptcy apply in winding-up as to the respective rights of secured and unsecured creditors. But independently of that we must recollect that every attachment not put in force before the commencement of the winding-up is made void under the 163rd section of the Companies Act of 1862. Now this is an attachment against the estate and effects of a company. The debt due to the company is certainly a part of the estate and effects. No one can say that the attachment has been put in force, for nothing whatever has been done under it, and therefore, if it were not saved by the 10th section of the Judicature Act of 1875, it would be avoided by the 163rd section of the Companies Act of 1862. It is plain, therefore, that this creditor has no security and no right to the debt as against the liquidator in the winding-up.

JAMES, L.J.—I am entirely of the same opinion. It is impossible, as it seems to me, on any principle to distinguish this case of execution against debts from an execution against goods and

chattels. Beyond all question in this particular case the creditor is made his own sheriff, and he is allowed to make his own execution, just as a landlord puts in a distress himself for rent. There is no distinction in principle between them, and the writ of execution against goods does not prevail unless it has been actually executed. The order of attachment or the writ of attachment—they are the same things in my opinion—does not prevail until it has been executed by being served upon the garnishee. That being so, it appears to me that this is an imperfect execution which is defeated by the fact of the intervening bankruptcy, or what is in this case equivalent to or as good as bankruptcy, that is the winding-up. Of course that only applies to those orders which were not served.

BRAMWELL, L.J.—I am of the same opinion for the same reasons. The only remark I shall make is this, that the garnishee order does not purport to attach the debts, but orders "that they be attached," that is upon something further being done. It is like the order for the attachment of a person for contempt. He is not attached upon the writ issuing, but he is to be attached under it.

*Appeal accordingly allowed with costs.*

Solicitors for the appellant, Layton and Jaques.  
Solicitors for the respondents, Bell, Brodrick, and Gray.

Saturday, March 22.

(Before JAMES, L.J.)

Re LAMBERT. (a)

*Lunacy—Practice—Undesirable lease—Surrender—Appointment of committee of part of estate—Lunacy Regulation Act 1853 (16 & 17 Vict. c. 70) ss. 127, 136.*

Where a lunatic was entitled to a lease for seven, fourteen, or twenty-one years of a house which it was desirable to surrender at the expiration of the first seven years, and the intended committee's security could not be completed in time for notice to be given in the usual way to determine the tenancy, the Court appointed the lunatic's wife committee of that part of the estate consisting of the house, without security, and authorised her to give notice to determine the tenancy.

THIS was an application in Lunacy under the following circumstances:

Henry Thomas Lambert, who had been found lunatic by inquisition, was lessee of, and had resided in, a house at Queen's-gate, which he held under a lease for seven, fourteen, or twenty-one years from the 29th Sept. 1872, at a yearly rent of 600*l.*

Mrs. Lambert, whom it was intended to make committee of her husband's estate, but whose security had not yet been completed, did not intend to continue to reside in the house, and the present application was made on her behalf that the court would sanction the surrender of the lease at the expiration of the first seven years, for which purpose notice must be given in a few days.

There was evidence that 600*l.* was the full letting value of the house, so that no advantage would be obtained by continuing the lease beyond the first seven years.

(a) Reported by H. FRAT, Esq., Barrister-at-Law.

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*George Henderson* in support of the application.—The difficulty in the case is that the committee has not yet been appointed, and the security cannot be completed in time to give notice to determine the lease. The question is whether the court has power to authorise the surrender by a person who is not committee of the estate. The 127th section of the Lunacy Regulation Act 1853 (16 & 17 Vict. c. 70) empowers the committee, under order of the Lord Chancellor, to dispose of an undesirable lease to which the lunatic is entitled. And the 136th section of the Act empowers the committee to exercise, under order of the Lord Chancellor, any power vested in the lunatic. The question is whether an order can be made authorising the surrender of this lease before the appointment of a committee.

JAMES, L.J.—I think the difficulty may be got over by appointing Mrs. Lambert committee of that part of the estate only which consists of this house, without security, and authorising her to give notice to determine the tenancy.

*Order accordingly.*

Solicitors: *Hume, Bird, and Bird.*

*Monday, Feb. 17.*

(Before JAMES, BRANWELL, and BRETT, L.JJ.)

WRIGHT v. REDGRAVE. (a)

*Jurisdiction—Wife's separate property—Husband's debt—Action in Chancery Division to restrain execution ordered by Common Pleas Division—Judicature Act 1873, s. 24, sub-sect. 5.*

*On a marriage, certain household goods and furniture had been vested in a trustee for the separate use of the wife. The furniture remained in the house occupied by the husband and wife, and it was seized by the sheriff under a fi. fa. issued by a judgment creditor of the husband. The trustee claimed the furniture, and the sheriff took out an interpleader summons in the Common Pleas Division, in which the usual interpleader order was made, providing that, unless the trustee paid a specified sum into court, or gave security for it within fourteen days, the sheriff should sell the goods and pay the proceeds into court. The trustee failed to pay the money or to give the required security, and the sheriff was about to sell. The wife then commenced an action in the Chancery Division against the execution creditor, the trustee, and the sheriff, claiming an injunction to restrain the execution creditor and the sheriff from selling. Malins, V.C. granted an injunction. Held (reversing the decision of Malins, V.C.), that the order for an injunction was an order restraining proceedings in another division of the High Court, and was inconsistent with the Judicature Act, sect. 24, sub-sect. 5.*

This was an appeal from an order of Malins, V.C., granting an injunction to restrain the Sheriff of Middlesex from selling under a *fi. fa.*, upon a judgment obtained against Herbert Wright, certain goods and furniture in his ostensible possession, which were claimed by his wife (the plaintiff in *Wright v. Redgrave*) as trust property included in her marriage settlement. Upon the marriage of Mr. and Mrs. Wright in 1861, Mr. Wright agreed to assign to John Tucker, as a trustee, upon trusts for the intended wife and children of the marriage,

all the household goods and furniture, goods, chattels, property and effects, then or thereafter upon the house in which he (Wright) resided, or other the premises where he and his wife might reside. In 1872 Wright got into difficulties, and on the 11th Nov. 1878 an action was brought against him in the Common Pleas Division upon a bill of exchange which had been drawn by him, and was dishonoured by the acceptor. Judgment was obtained in that action for 104*l.*, and on the 18th Nov. a writ of *fi. fa.* was issued against the goods belonging to Wright at his dwelling-house, and lodged with the sheriff of Middlesex. Possession was taken under the writ, and shortly afterwards Tucker, as trustee for Mrs. Wright, gave notice of his claim to the furniture on her behalf, as being trust property. On the 27th Dec. 1878 an interpleader summons was taken out by the sheriff, and on the 10th Jan. 1879 an order was made upon the summons for payment into court, within fourteen days, of 115*l.*, or that security for that amount be given; or, in default, for the sheriff to sell. The time limited by this order having expired, the sheriff proceeded to advertise the furniture for sale on the 5th Feb. On the 1st Feb. Mrs. Wright, by a next friend, commenced an action in the Chancery Division for an injunction to restrain a sale under the *fi. fa.*, and to restrain the sheriff from remaining in possession, and also claiming the appointment of a trustee of the property comprised in the antenuptial settlement of 1861 in the place of Tucker; and, in the meantime, the appointment of a receiver. It appeared that a summons had been taken out on behalf of Mrs. Wright in the Common Pleas Division for a transfer of the interpleader proceedings there pending to the Chancery Division where the present action was commenced, and on the 13th Feb. Field, J. made an order dismissing that summons, with costs. On the motion in the court below,

MALINS, V.C. made an order restraining the sheriff from remaining in possession and from selling. He was of opinion that the agreement made upon the marriage of Mr. Wright and his wife was a valid settlement of the household goods and furniture upon the wife for her separate use. The doctrine of the court was, that the husband and wife were separate persons in regard to the wife's separate property, which could no more be taken to pay the husband's debts than could the property of a total stranger. The order of the Court of Common Pleas was, that the sheriff should distrain upon the goods of the husband, and the wife, who was no party to the action, was justified in bringing an action in this court to restrain the sale of her private property. He was of opinion that the 24th section, sub-sect. 5, of the Judicature Act 1873 applied only to questions arising between the same persons who were parties to any proceedings in a particular court, but not to third persons who were not parties to such action. He was not interfering with the order of the Common Pleas Division, but was protecting the separate property of the wife. He would grant the injunction, but there would be no objection to an inquiry what portion of the furniture was actually in the house at the time the settlement was executed, and the plaintiff might have a receiver, if necessary.

On the appeal by the execution creditor,

Glasse, Q.C. and O. Curtis Price, for the appel-

(a) Reported by E. S. ROCHER, Esq., Barrister-at-Law.

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lant, contended that the learned judge below had exceeded his jurisdiction in granting an injunction, it being specially provided by the Judicature Act 1873, sect. 24, sub-sect. 5, that "no cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction," and the order for sale being a proceeding in an action pending in the Common Pleas Division of the High Court. They relied upon

*Garbutt v. Favcus*, 33 L. T. Rep. N. S. 617; L. Rep. 1 Ch. Div. 155;

*Marston v. Smith*, W. Notes, 1877, p. 169.

T. L. Wilkinson for the sheriff of Middlesex.

G. A. Young, for the plaintiff, submitted that the order of the Vice-Chancellor was right, inasmuch as the subject-matter of the interpleading proceedings was trust property settled on a married woman, the administration of which was by the Judicature Act assigned exclusively to the Chancery Division. The plaintiff was ready to assert her claim in the interpleader proceedings, but the court ought not to allow this property, to which she claimed to be entitled, to be impounded by a premature judgment.

JAMES, L.J.—I am of opinion, having regard to the express provisions of the Judicature Act 1873, sect. 24 (5), that the order of the Vice-Chancellor, which is to all intents and purposes an order restraining a proceeding in an action pending in another division of the High Court, cannot be sustained. Together with the absolute prohibition contained in the former part of sect. 24 (5) there is the subsequent provision in the same sub-section, enabling any person, whether a party or not, to apply, not to a distinct court as was formerly the case, but to the court in which the action is pending, for a stay of proceedings, either generally, or, so far as may be necessary, for the purpose of doing complete justice. The fact that the plaintiff in the Chancery proceedings is a married woman makes no difference, as she will be entitled, by her trustee, to assert her equity to the property in question, which was ordered to be sold in the usual course by the master. Any appeal from the master's order should have been brought to the Divisional Court, and with that order we cannot interfere. The order of the Vice-Chancellor must therefore be discharged, with costs to the execution creditor and the sheriff, such discharge not to affect the appointment of a receiver, but the receiver will be only of the goods after the sale by the sheriff under the *f. fa.*

BRAMWELL, L.J.—I am entirely of the same opinion.

BART, L.J. concurred.

Solicitors: *Emanuel; John Holder; W. Maynard.*

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

March 5 and 6.

(Before JAMES, L.J., for MALINS, V.C.)

Re HOLT, an Infant. (a)

*Practice—Contempt—Untrue copy of order delivered—Attachment—36 & 37 Vict. c. 12.*

An order was made, and was served, ordering the father of an infant to deliver the infant to her

(a) Reported by W. M. HARRIS, Esq., Barrister-at-Law.

mother. The order was entitled in the matter of the infant and in the matter of the Act 36 & 37 Vict. c. 12. The copy delivered was entitled only in the matter of the Act, and not in the matter of the infant, but was indorsed on the outside "Re Holt," the surname of the infant. A writ of attachment was issued for non-compliance with the order, and the father was imprisoned.

Held, that the service was insufficient, and the writ of attachment must be set aside.

MOTION to discharge an order of attachment. The motion was heard by the Lord Justice in consequence of the illness of the Vice-Chancellor, under the provisions of the Judicature Act 1873, sect. 51.

On the 28th June 1878 an order was made by Malins, V.C., in the matter of Florence Elizabeth Holt, an infant, and in the matter of the Act 36 & 37 Vict. c. 12, on the petition of Hannah Holt, the mother of the infant and wife of Charles Herbert Holt, the father of the infant, ordering that the father should within four days after service of the order deliver the infant to the mother.

The order as drawn up, was entitled "In the matter of Florence Elizabeth Holt, an infant, and in the matter of the Act 36 & 37 Vict. c. 12, intituled 'an Act to amend the law as to the custody of infants.'" This order was served on the father by showing him the original and delivering to him a document purporting to be a copy thereof; but this copy so delivered was entitled only in the matter of the Act, and not entitled in the matter of the infant, though there was indorsed on the outside of the copy "Re Holt."

He never complied with the order.

On the 12th Dec. 1878 leave was given by Malins, V.C. to issue a writ of attachment against him for not having complied with the order.

The father did not appear on Dec. 12, but there was an affidavit of service of notice of motion upon him, and also an affidavit by a person who had served the order of the 28th June on the father, stating that he had delivered a true copy of the same order to and left the same with the father. Accordingly a writ was issued, and Holt was arrested, and was now in prison.

W. O. Renshaw, for the father, moved to discharge the order of Dec. 12, and to set aside the writ of attachment, on the ground that a true copy of the order of the 28th June had not been delivered to the father, and that the service was therefore insufficient, and all the subsequent proceedings were invalid:

*Hinde v. Blake*, 5 Beav. 431;  
*Mackenzie v. Mackenzie*, 5 De G. & S. 338;  
*Rex v. Calvert*, 2 C. & M. 189;  
*Re Reynolds*, 10 W.R. 709;  
*Daniell's Chancery Practice*, 5th ed. 905.

W. Freeman for the mother.—The omission was immaterial. The indorsement on the copy was sufficient to inform the father to whom the order related, and it is clear he understood it; the blot is merely technical.

JAMES, L.J.—The omission was a material one, and rendered the service of the order ineffectual. I have mentioned the point to the Master of the Rolls, who has had great experience in matters of this kind, and he agrees with me. The order of the 12th Dec. must therefore be discharged, and the writ of attachment set aside, but no costs will be

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given to the applicant, for I have no doubt that he understood to whom the order referred.

Solicitors for C. H. Holt, Shaw and Tremellen, agents for A. M. Blair, Manchester.

Solicitors for Hannah Holt, Makinson and Carpenter.

Friday, March 21.

(Before FRY, J.)

*Re DIXON'S TRUSTS.* (a)

*Trustee Relief Act—Person of unsound mind not so found—Jurisdiction of Chancery Division to order payment out.*

*Where a married woman was entitled under the trusts of a will to a fund in court, and her husband was of unsound mind, not so found by inquisition; the fund was ordered to be paid to her on her separate receipt, she undertaking to apply the same towards the maintenance of her husband and herself.*

THIS was a petition by John Maughan (a person of unsound mind, not so found by inquisition), and his wife, by their next friend, for payment out to the wife, on her separate receipt, of a sum to which she was entitled under the trusts of a will, and which sum had been paid into court by the trustees of the will under the Trustee Relief Act (10 & 11 Vict. c. 96).

*Oust, for the petitioners, cited*

*Peters v. Grote*, 7 Sim. 238;

*Re Macfarlane*, 6 L. T. Rep. N.S. 154;

*Re Baker's Trusts*, L. Rep. 13 Eq. 168; 25 L. T. Rep. N. S. 783;

*Re Marmans' Trusts*, L. Rep. 8 Ch. Div. 256; 38 L. T. Rep. N. S. 797.

*Grenside* for the trustees.

FRY, J. directed the petition to be amended by adding a statement that there had been no settlement, or agreement for a settlement, of the wife's property, and that there was no other fund available for maintenance; and made the order for payment out to the wife on her undertaking to apply the sum towards the maintenance of her husband and herself.

Solicitors for the petitioners, Nicholl, Manisty, and Co.

Solicitors for the trustees, Lucas and Sons.

March 6 and 7.

(Before FRY, J.)

SWANSTON v. THE TWICKENHAM LOCAL BOARD OF HEALTH. (a)

*Public Health Act 1848* (11 & 12 Vict. c. 63), ss. 2, 45, 46, 84, 144; *Public Health Act 1875* (38 & 39 Vict. c. 55), ss. 4, 16, 175, 308—*Local board of health—Power to make "side entrances" or man-holes to sewers—"Street"—"Sewer."*

*Where part of a man's land had been so dedicated to the public as to form a "street" within the meaning of the Public Health Act 1848, but not so as to deprive him of the ownership of the soil,*

*Held, that the defendants had no power under the Act to construct in such street a shaft called a "side entrance" or man-hole communicating with their drains, without first purchasing the land required for the purpose, or obtaining the consent of the owner of the land.*

*Held, also, that their powers with respect to the con-*

*struction of such works were not enlarged by the Public Health Act 1875.*

THE defendants, under their powers, constructed under the Station-road, Twickenham, which was a public road, a sewer nearly thirty feet deep for the purpose of conveying the town drainage to an outfall.

The plaintiff's land abutted on the south side of the Station-road, and on a portion of the land which formed a footpath to the Station-road, and ran along the front of certain houses erected on the plaintiff's land; the defendants constructed a side entrance or manhole, consisting of a large brick shaft, covered with an iron plate, which led down to a junction in their drains.

The defendants had no drain running through the land of the plaintiff, and his house did not drain into the defendants' sewer, but into a private sewer.

The plaintiff alleged that scarlet fever had broken out in one of his houses owing to the escape of sewage gas.

He also stated that no notice of the board's intention to erect the structure had been given, and that no report of a surveyor that it was necessary had been previously made.

The defendants had given the plaintiff notice that they intended to erect two more side entrances on his land, and in October he commenced an action claiming an injunction to restrain the continuance of the first-mentioned side entrance, and for its removal, and to restrain the defendants from constructing any more "side entrances," and for damages.

The defendants, in their statement of defence, alleged that the footway in which the man-hole had been constructed was a highway or public footpath, and (whether public or not) was part of a street or place laid out as, or intended for, a street within the meaning of the Public Health Act 1875 (38 & 39 Vict. c. 55). The 4th and 5th paragraphs of the statement of defence were as follows:

The said man-hole is a necessary part of the sewers which the defendants have been and are constructing in accordance with the duties imposed on them by the Act of Parliament (38 & 39 Vict. c. 55). It is essential to any proper system of sewers that man-holes should be provided at all junctions of sewers, and such man-holes are used, not for the purpose of bringing sewage up them, but to enable workmen to descend when necessary to examine the state of the sewers. The said man-hole in Station-road is situate at the point where the sewer, which passes under and along Station-road, will be joined by the sewer now about to be constructed, which will pass under and along Avenue-road. The said man-hole is perfectly covered at the top with a cover of the same description as those used for covering man-holes within the district of the Metropolitan Board of Works, and no sewer gas or other gas does or can escape round it. The cover of the said man-hole is level with the surface of the ground, and the said man-hole does not prevent any person from using the ground on which it stands for the purposes of a footway. No sewage has been, or will be brought up the said man-hole.

The defendants also alleged that the man-hole was openly constructed and completed in 1875, without any complaint or remonstrance; that, though it was made on the report of their surveyor and after notice, such report and notices were unnecessary. They stated that the man-holes to be constructed would be under the road or footway, and that it was necessary to make them, and they urged that the plaintiff, as a mere reversioner, was

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.



not entitled to maintain the action; and that if he had any remedy it was for compensation under the 308th section of the Public Health Act 1875.

A motion was made before Malins, V.C., for an injunction, but no order was made, the defendants undertaking to give to the plaintiff fourteen days' notice before continuing any existing works, or constructing any new ones affecting his land. Notice having been given by the defendants of their intention to commence the construction of the two new man-holes, the plaintiff moved for an injunction as claimed by him, and by consent the present hearing was treated as the hearing of the action.

*Higgins, Q.C. and E. J. Payne* for the plaintiff.—The case of the side entrance already constructed is governed by the Public Health Act of 1848 (11 & 12 Vict. c. 63). The place where the "side entrance" is constructed is not a "street" within the meaning of the 2nd section of that Act, which includes any highway (not being a turnpike-road), and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, or passage, whether a thoroughfare or not." A drain is defined in the same section as "Any drain if and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom, with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings, or premises occupied by different persons, is conveyed." "Sewer," in the words of the Act, includes "sewers and drains of every description except drains to which the word 'drain' interpreted as aforesaid applies." The defendants had no right to make this side entrance on the land, unless they had previously purchased it. The law as to the side entrances which the defendants threaten to construct is contained in the Public Health Act of 1875. In this Act the words "street drains" and "sewer" are defined in nearly the same words as in the Act of 1848. Sect. 16 of the Act of 1875 only gives power to "carry any sewer through, across, or under any turnpike road, or any street, or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriage-way of any street, and, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary), into, through, or under any land whatsoever within their district." The defendants intend not to carry a sewer, but to sink a shaft. If they want our land they must buy it, but they have no right to take it for the purpose of making a man-hole, merely giving compensation. The 175th sect. of the Act of 1875 gives them power to purchase lands for the purposes of the Act, and the following section makes regulations as to the method of purchase. An actual nuisance has been caused. They cited

*Wood v. Veal*, 5 Barn. & Ald. 454;

*Hughes v. Metropolitan Board of Works*, 4 L. T. Rep. N.S. 318;

*Rodericks v. Aston Local Board*, 36 L. T. Rep. N.S. 170, 328; L. Rep. 5 Ch. Div. 328.

*Lloyd on Compensation*, 4th ed. 265.

*J. Pearson, Q.C. and Vaughan Hawkins* for the defendants.—We are not compelled to purchase any land, but can do anything named in the Act on paying compensation. The case, so far as relates to the side entrance already constructed, is

governed by the 45th section of the Public Health Act 1848. The plaintiff has acquiesced in the making of the first side entrance, and has disentitled himself to apply for an injunction. A junction between two sewers is a sewer within the meaning of the Act. We have power, under the Public Health Act 1875, to make the side entrances of the intended construction of which we have given notice.

Fry, J.—In this action the plaintiff is the owner of property at Twickenham, and the defendants are the local board who have jurisdiction in that parish. The plaintiff seeks to restrain the defendants from continuing a certain structure described as a side entrance in a road known as the Station-road. He also seeks for an injunction to restrain the construction of any side entrances to any deep sewers on any other part of his land. Now, the two cases as to the Station-road and the other land of the plaintiff require separate consideration, for this reason, that the one is under the Act of 1875, and the other is affected by the earlier Act of 1848. Now, it appears that the side entrance in the Station-road is upon the piece of land which is described on more than one plan of land before me. The strip of land on which this is situate runs along the front of a row of villas which belong to the plaintiff, and really constitutes a footpath by the side of the road known as the Station-road. It appears that that footpath has been asphalted or gravelled, and that for eight or ten years it has been used by the public without interruption. It further appears to me to be plain that it was dedicated to the public as part of the building scheme of the plaintiff, and the public have passed over it with the consent of the plaintiff. I infer that consent, not from the building scheme, but from the fact that some of the property has been in his hands as lessor since the buildings have been erected, and has been redemised by him in a manner which shows that all he intended to demise was the inclosure, leaving, therefore, this open space dedicated to the public. Now, the law with regard to this side entrance in Station-road, depends upon the Public Health Act of 1848, under which the defendants were acting at the time they made it, which was in April 1875. There are four sections in this Act which require to be attended to. The first is the 45th, which enacts that the local board of health may "cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act, and they may carry any such sewers through, across, or under any turnpike-road, or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriage-way of any street, and, after reasonable notice in writing in that behalf (if upon the report of the surveyor it should appear to be necessary) into, through, or under any lands whatsoever;" and then follows a power to "enlarge, lessen, alter, arch over, or otherwise improve all or any of the sewers vested in them by this Act, and discontinue, close up, or destroy such of them as they may deem to have become unnecessary." The 46th section enacts that "The local board of health shall cause the sewers vested in them by this Act to be constructed, covered, and kept so as not to be a nuisance, or injurious to health, and to be properly cleared, cleansed, and emptied, and for the purpose of clearing, cleansing, and empty-

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ing the same, they may construct and place, either above or under-ground, such reservoirs, sluices, engines, and other works as may be necessary, and may cause all, or any of such sewers to communicate with, and be emptied into such places as may be fit and necessary, or to cause the sewage and refuse therefrom to be collected for sale, and for any purpose whatsoever, but so as not to create a nuisance. The 84th section gives the local Board power to take lands by agreement, and the 144th section provides full compensation for the damage sustained by any person by the exercise of the powers given to the Board of Health. Now, the 45th and 46th sections require particular attention; they authorise the construction of a sewer, and that sewer may be constructed, either in a street, or through any land, and therefore the same power applies to private and inclosed lands as applies to streets. It is no larger in the one case than in the other, with this exception, that in the one case notice is required and a report is required also before the notice is given. It is said in this case that the notice was insufficient. In my opinion that question does not arise, because, looking at the expression here used with regard to "street," it appears to me that the *locus in quo* of this side entrance was either a street or a place laid out as, or intended for a street. In coming to that conclusion, I bear in mind the definition of street given in the 2nd clause of the Act of Parliament. [His Lordship read the definition as already given.] It appears to me as I have already indicated that the spot in question is dedicated to the public, and it is a footway. Therefore it appears to me the question upon the sufficiency of the notice does not arise. The next point which requires consideration is the meaning of the expression "sewer." [His Lordship read the definition of the Act, as cited.] I am bound to say that that provision does not appear to me to throw very much light upon the case, but this is to be observed, that the word "sewer" as defined is not in any way extended, that is, nothing incident or appurtenant to the sewer is said to be included in it; it is the sewer simply, and nothing but the sewer. Of course, whatever was necessary for the sewer is included in the word; whatever may be merely convenient or an accessory, not absolutely necessary, is not by any provision brought within the scope of the word. Then the 46th section must be contrasted with the 45th; because that enables the board of health, for the purpose of clearing, cleansing, and emptying the same, to construct such reservoirs, sluices, engines and other works as may be necessary. It appears to me therefore, there is a distinction drawn between the sewer, and nothing but the sewer on the one hand, and those works which may be necessary for clearing, cleansing, and emptying on the other hand. It appears to me that a sewer, and nothing but a sewer can be made through any man's land, whereas the other works which are necessary are not to be made through the land of a private individual unless that land is acquired under the power of purchasing with which the Board of Health is clothed. It is said, and no doubt truly said, that the Board of Health may be exposed to difficulty from that construction, but it appears to me it would be a very strong conclusion to come to, that the Board of Health might make such reservoirs and such engines and sluices on the private land of any man simply compensating him

for the injury done. It appears to me if that had been the intention the Act Parliament would have said so. It is given the power expressly in the case of a sewer, but not in the case of other works, and it is given the power to acquire land by purchase. The inference to my mind, therefore, is pretty strong that a sewer may be made on any inclosed private land, or any street, by simply compensating the owner for the land; but, with regard to other works, the board must so contrive their plans as to be able to carry them into effect upon land which they can acquire by purchase. I may observe that the difficulty which that construction leads to, namely, the possibility of the board not being able to find suitable land, has been provided for by the Legislature in the Act of 1875, because there the power is given to take land by compulsion. Now, as I have already observed, the 45th section gives a like power, and a like power only, of doing in a street that which may be done upon private land. I am bound to bear that in mind in construing the clause with regard to the sewer. Now what is the structure in the present case? It is the side entrance or manhole—it is a shaft of some 30ft. elevation, beginning at the point of junction of the sewer in question, and coming to the surface of the ground. It has been there placed for the purpose of enabling the men to descend into the drains with the view of seeing what might be necessary for the purpose of clearing, cleansing, and emptying the same. Is that the kind of sewer mentioned in the 45th section, or is it a work under the 46th section? Now, upon looking at the evidence of the surveyor of the defendants it appears to me that it is the second. According to his statement it appears to be common to place these works at the point of junction of these sewers, and nowhere else. It does not appear to me, therefore, that it is strictly part of the sewer, though it may be very necessary as part of the general works of drainage which the board of health is entitled to carry into effect. Now the inconvenience of supposing that these man-holes may be made upon a man's private lands is very considerable, because it is apparent that, if the Act of Parliament has given the power to make a man-hole, it has given the power to approach the man-hole, in order that the men may go down it; and therefore the result would be that they would have a right to make a sewer upon the private land of any landowner, or might place on various spots on that sewer a series of man-holes over which the lauded proprietor would never be able to build, and you must infer a right of access to these man-holes in perpetuity. I quite agree if the Act of Parliament says so, I should have no hesitation in following it, upon giving the landlord compensation, but is that the conclusion that I ought to arrive at, or is it clear upon the Act of Parliament? To my mind it is not. The result, as it appears to me, is that the Board of Health under the 45th section had no power to construct this work, except they first purchased the land of the plaintiff. It is next said that the plaintiff has acquiesced in the construction of these works, and that he has debarred himself from the right he otherwise would have had. It appears that this work was completed in April 1875, but it further appears, and very properly, that the surface of the man-hole was covered with gravel, and was not apparent to the plaintiff, and

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in the result he swears, and I believe what he says, that he did not know of the existence of the structure. It is impossible for me, under the circumstances, to conclude that he has so acquiesced in what the defendants have done that he has lost the right he would otherwise possess. Then the plaintiff has come upon another ground, viz., the ground of nuisance. The evidence as to this merely speaks in general terms of the nuisance being created, but does not give any particulars of the amount, of the duration, or the extent of time, or space, of the smell. Therefore I reject that. Upon the construction of the Act of Parliament, I feel bound to hold that the defendants have committed a technical trespass upon the soil of the plaintiff in this street. It is not disputed that the soil is in him, although subject to the right of way. The result must be that I must grant an injunction to restrain the defendants from continuing that side entrance, but I shall suspend the injunction for six months in order to give the defendants the power of acquiring the land from the plaintiff either by agreement or under the compulsory power with which they are now clothed. The next question I have to determine is with regard to the other side entrances intended to be constructed on other parts of the plaintiff's land. Notice with regard to them was given in 1878, and that is regulated therefore, not by the Act of 1848, but by the Public Health Act of 1875. The sections which relate to the question in controversy are: the 16th, which is substantially the same as the 45th section of the earlier Act, the 175th and the 308th. [His Lordship read the sections.] It appears to me that notice has been given in this case, and the notice was that the defendants would construct a sewer through the private land of the plaintiff, and would construct two side entrances on that private land. The 175th section gives power to take private land either by agreement or compulsion; and the 308th section creates a liability to make full compensation. The observations I have made as to the construction which I put upon the word "sewer" apply substantially to this case, and lead me to conclude that all that the defendants can do upon the plaintiff's land, without the plaintiff's consent to purchase, is to construct sewers simply, and that this does not include the side entrances. I say the observations apply substantially, because there is no clause precisely identical with the 46th section of the Act of 1848 to be found in the recent Act; but the 19th section of the latter Act provides that "every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied," and the 27th section provides that "for the purpose of receiving, storing, disinfecting, distributing, or otherwise disposing of sewage any local authority may construct any works." This appears to me to have in substance the same effect as the 46th section of the earlier Act. I cannot, upon the ground of a mere difference in the phraseology of the Act, extend the meaning which I have put upon the word "sewer." From what I have said it is apparent that I do not determine, as an universal proposition, that a side entrance may not be part of a sewer; but, finding that in this case the scheme of the defendants' engineer has been to erect side entrances only

where there are junctions—that that is not necessary for a mere sewer. I hold that the defendants have not a right to construct the side entrances of which they have given notice, except by the consent of the plaintiff, or after the purchase of the land in question. Therefore there must be an injunction also in the second case, restraining the defendants from making these side entrances unless and until they have acquired a right in the land, and of course the defendants must pay the costs of the action.

Solicitor for the plaintiff, *W. H. Thompson.*

Solicitors for the defendants, *Wright and Pilley,* agents for *Ruston, Clark, and Ruston,* Brentford.

## COMMON PLEAS DIVISION.

Nov. 25 and 26, 1878.

(Before Lord COLERIDGE, C.J., GROVE and LINDLEY, JJ.)

BLAKE v. THE ALBION LIFE ASSURANCE SOCIETY. (a)

*Evidence—Remoteness—Connection between principal and evidentiary facts—System of fraud—Series of acts—Proof of agency.*

*In an action for the return of money paid by the plaintiff to the defendant through the fraud of the defendant's agent, evidence that by the same false pretences as in the particular case, the defendant's agent had induced other persons to pay money to the defendant is admissible to prove either the agency or the fraud, and defendant's knowledge of it.*

THIS was an action to recover a sum of 59l. 6s. 3d., the amount paid by the plaintiff as a premium upon a policy effected with the defendants. The statement of claim alleged that in Nov. 1874, the plaintiff, a clergyman living in Norfolk, saw an advertisement in a newspaper inserted by one Henry Howard, an agent of the defendants, offering to lend money upon personal security. The plaintiff applied to Howard by letter, requesting a loan of 1500l., and received the following reply:

11, Euston-square, London, N.W., 21st Nov. 1874.

Dear Sir,—I can entertain your application for an advance of 1500l. for three or fourteen years, at 4 per cent. interest per annum, payable half-yearly. The 1500l. to be repaid in one sum at the end of the term. You will have to insure your life in an insurance office, to be selected by me, for 1500l., and deposit the policy as collateral security, the policy to be returned to you upon repayment of the money advanced, when you can either sell or keep for the benefit of your relatives. Let me know per return of post if this meets your views.—Yours truly,

H. HOWARD.

The plaintiff called at the office of Howard on two occasions, but on neither did he see him, but only saw his manager, who, on the last occasion, agreed, on behalf and by the authority of Howard and the defendants, to lend the plaintiff, who agreed to borrow from Howard, 1500l. upon the condition that the plaintiff would insure his life in the defendants' office, and pay them a premium for such insurance, and would deposit the policy with the defendants as security for the repayment of such loan with interest, and the manager, on behalf of and for Howard and the defendants, agreed that no other security than the policy should be required from the plaintiff. The plaintiff accordingly applied to the defendant company

(a) Reported by A. H. BITTLETON, Esq., Barrister-at-Law.

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to effect a policy of insurance on his life, which they accordingly did effect upon the payment by the plaintiff to the defendants of the sum of 59*l.* 6*s.* 3*d.* The plaintiff informed Howard that he had so insured his life, and forwarded to him the company's receipt for 59*l.* 6*s.* 3*d.* to show that he had done so, as agreed. Howard, instead of advancing the 1500*l.* as agreed, sent to the plaintiff the following letter:

11, Euston-square, 21st Jan. 1875.

Dear Sir,—By book-post you will receive draft securities, as prepared by my solicitor, for your perusal and approval, which please return to me at your earliest convenience, with any comments you may have to make indorsed thereon.—Yours truly,

H. HOWARD.

The draft securities mentioned in the letter were—(1) a bill of sale of furniture, (2) a guarantee of two sureties for the repayment of the loan, (3) an assignment of the policy, (4) a bond for the amount to be advanced, to be signed by the plaintiff, (5) a declaration as to debts to be made before a bench of magistrates sitting for the division of Norfolk. Upon the receipt of this letter, the plaintiff made several efforts to see Howard, but failed. The plaintiff was unable to procure the loan, or any part of it, notwithstanding his performance of, and readiness to perform, the agreed conditions, and the defendants and Howard had not and never intended to advance the loan. The arrangement between the defendants and Howard was that Howard should be the pretended lender of the money, and as if had no connection with the said office. The defendants and Howard, by the contrivance appearing above, fraudulently induced the plaintiff to pay the 59*l.* 6*s.* 3*d.* upon the pretence that the sum of 1500*l.* should be advanced to him upon the terms agreed and hereinbefore set forth, whereas in fact they never intended that the sum should be advanced, and always intended without any notice to the plaintiff to demand securities which they knew he would not give or agree to. After the receipt of the 59*l.* 6*s.* 3*d.* by the defendants, the same was divided between the defendants and Howard. Howard, as the defendants well knew, was wholly unable, from his circumstances, to pay any sum of money recovered from him, and with the knowledge and contrivance of the defendants changed his name and address from time to time. The policy was effected by the plaintiff, and the premium paid only for the purpose of procuring the loan, and for no other purpose whatsoever, of which the defendants always had knowledge, and there never was any consideration whatever for the defendants retaining the 59*l.* 6*s.* 3*d.* The policy lapsed before this action. Every matter and act done by Howard or his manager were done for and on behalf, and with the sanction of, and were ratified by, the defendants, and Howard and his manager were in all things their agents to carry out the contrivance to procure them the premium of 59*l.* 6*s.* 3*d.*, there being no intention at any time, either by Howard or the defendants, that the loan of 1500*l.* should be advanced. The plaintiff claimed the 59*l.* 6*s.* 3*d.*, and also the expenses he had been put to in endeavouring to procure the advance to him of the 1500*l.* The plaintiff further prayed that the policy might be declared void, and cancelled on the ground of fraud, and that the premium was obtained by fraud.

By their statement of defence, the defendants

denied the agency of Howard or his manager, their knowledge of the alleged fraud, or any connection whatever with him; and admitted only the making of the policy and payment of the premium, alleging that it was paid as the first year's premium on the policy, and no other premium was ever paid; that the year expired, and the policy was not kept up; that there was good consideration for the defendants retaining the premium, and the plaintiff had the benefit of the insurance until the policy lapsed. The plaintiff joined issue upon the statement of defence. The statement of claim had originally contained four paragraphs, which went to show that the transaction with the plaintiff was only one of several others of a similar kind by which other persons were defrauded into paying the defendants for effecting policies under the pretence of a loan by third persons who were, in fact, as the plaintiff alleged, agents acting in concert with the defendants for that purpose; but these paragraphs had been struck out by order of the court as irrelevant: (see *Blake v. The Albion Life Insurance Society*, 35 L. T. Rep. N. S. 269.) At the trial, before Lord Coleridge, C.J., the plaintiff proved the circumstances alleged in the statement of claim. Evidence was then tendered and admitted to show that this was a system of fraud, and that money had been obtained under similar circumstances from several other persons. This evidence showed that advertisements signed either Howard, Gard, Wood, Rogers, Preston, Seymour, Holland, or some other name, and often expressed in the identical words of the advertisement seen by the plaintiff, appeared offering an advance of money; that the witness placed himself in correspondence with the advertisers, insured his life in the office of the defendants, and paid them a premium, which they divided with the person who had offered the loan; that unreasonable requisitions for further securities were made, and the loan never advanced; that the policies were not renewed by the insurer; that they would not have been paid had they fallen in; that the names of the advertisers were all aliases of a man called Wood, who was constantly for hours together, and, week after week for years had been, in close communication with the managing director and secretary, and sometimes other directors of the company; that cheques drawn in favour of Wood, Gard, or Rogers, or of the other different names, were all indorsed with the respective names in the handwriting of Wood. The jury found a verdict for the plaintiff for the sum claimed. A rule for a new trial having being granted on the ground of misreception of evidence,

*Willis, Q.C.* and *Tindal Atkinson* showed cause.—We were asking the jury to find that the acts of Howard were the acts of the company; and one instance was not sufficient to prove collusion between them. A jury, at the Central Criminal Court, has now found these defendants guilty of conspiracy to defraud, and, therefore, that this agreement between Howard and the defendants did exist. The two allegations in the statement of claim were—(1) that this was a company formed for the purpose of robbery, and (2) that the plaintiff had been robbed by it. The evidence in question was required to prove the first proposition. In cases of coining or receiving stolen goods, evidence of acts other

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than the one charged is admissible to show the fraudulent intent. They cited

*Mackay v. The Commercial Bank of New Brunswick*,  
L. Rep. 5 P. C. 394;

*Barwick v. English Joint Stock Bank*, L. Rep. 2  
Ex. 259.

*M'Intyre*, Q.C. and *Patchett*, Q.C. in support of the rule.—There are dicta of Lord Coleridge, C.J. and Brett, L.J., in *Blake v. Albion Life Insurance Company* (35 L. T. Rep. N. S. 269), which are conclusive of this case. [Grove, J.—Directly a link is found to connect the acts of fraud that it is proposed to prove with the fraudulent design charged, they become evidence. Lord COLERIDGE, C.J.—If we meant that evidence of fraudulent acts, unconnected with the fraud charged, was not admissible, that was right, but will not help you. If we meant that acts of fraud, connected with the particular fraud charged, could not be given in evidence, we were wrong. GROVE, J.—When the question is whether an act was or was not fraudulent, acts of a similar kind are given in evidence to show intention. I remember in a housebreaking case in which I was counsel, a man was found under suspicious circumstances in a bedroom; it was set up that he was there courting the servant; to show a guilty intention, Erle, C.J. admitted evidence of the fact that he was seen in the house a week before under circumstances equally suspicious and which rebutted the idea that he was there for the purpose of courting.] The evidence that similar frauds had been committed under similar circumstances was given in this case in order that the jury might find that the company were responsible for the frauds of Howard. But if it cannot be proved that Howard was the agent of the company on the particular occasion, then the plaintiff's case fails; he cannot show that Howard was agent for the company on various other occasions. *Prima facie*, a company cannot appoint an agent to commit a fraud: (*Western Bank of Scotland v. Addie*, L. Rep. 1 S. & Div. App. 145). That Howard was the agent of the directors, there can be no doubt. As between Northcote, Thomson (the managing director and secretary of the company), and the various agents, there was no doubt an agreement to defraud the public. But the company are not bound by fraudulent acts of the directors outside their authority. [Lord COLERIDGE, C.J. cited *Ranger v. Great Western Railway Company*, 5 H. of L. Cas. 72.] In *Western Bank of Scotland v. Addie* (*ubi sup.*, pp. 166, 167) Lord Cranworth says: "An incorporated company cannot, in its corporate character, be called on to answer in an action for deceit. But if, by the fraud of its agents, third persons have been defrauded, the corporation may be made responsible to the extent to which its funds have profited by those frauds. If it is supposed that in what I said when the case of *Ranger v. Great Western Railway Company* was decided in this House, I meant to give it as my opinion that the company could in that case have been made to answer as for a tort in an action for deceit, I can only say I had no such meaning. . . . An attentive consideration of the cases has convinced me that the true principle is, that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited from these frauds, but that

they cannot be sued as wrong-doers by imputing to them the misconduct of those whom they have employed." [LINDLEY, J.—That has been said in several cases. Lord COLERIDGE, C.J.—This is not an action for deceit; this is an action to recover back the money that has been paid as premium for the insurance, paid for the benefit of the company, and obtained by the fraud of its directors.] A dictum of Bramwell, L.J., in *Weir v. Bell* (L. Rep. 3 Ex. Div. 238), throws doubt upon the reasoning in the case of *Barwick v. English Joint Stock Bank* (*ubi sup.*), cited on the other side.

GROVE, J.—In this case I regret that I have to give judgment first, as the evidence is voluminous, and my Lord who tried the case would have been better able to state it. I rather expected that when the argument came to be heard two objections would have been taken to the admissibility of this evidence—one treating it as a totality, and the other splitting it up and objecting to particular parts. But there has been no argument on the latter alternative; and therefore all I have to consider is whether this evidence, taking it as a whole, is admissible. The action was brought by the plaintiff to recover back money paid to the defendant company, which it was alleged had been obtained from him by their agent fraudulently. The nature of the alleged fraud is this: The plaintiff says that he saw an advertisement of one Howard offering to lend money on personal security. He wrote to Howard, asking for a loan, and received a favourable answer, the only condition being, "You will have to insure your life in an office to be selected by me." The plaintiff proposed to borrow 1500l. on these terms, insured his life with the defendants at the instance of Howard, and paid to them 59l. odd by way of premium. He did not, however, get the 1500l., various other conditions being proposed to him which he refused. He could not get back the money which he had paid; he therefore only got a policy of insurance, which might or might not be worth anything. The plaintiff's case was that, under pretence of a promised loan, Howard was to induce persons to insure their lives in an office with which he was connected, and by this means was enabled to pocket their money without giving any consideration. In his statement of claim the plaintiff says that "the defendants and the said H. Howard, by the contrivance in this statement of claim mentioned, fraudulently induced the plaintiff to pay the 59l. 6s. 3d. upon the pretence that the sum of 1500l. should be advanced to him upon the terms agreed and hereinbefore set forth, whereas, in fact, they never intended that the sum should be advanced, and always intended, without any notice to the plaintiff, to demand securities which they knew he would not give or agree to;" and then he claims, not damages for the fraud, but, practically, a rescission of the contract. This is, therefore, an action for money had and received by the defendants without consideration, and obtained from the plaintiff by the fraud of the defendant company, or of its agents. Whether an action for deceit can or cannot be maintained against a company, where a company has obtained money through the fraud of its agents, such money can undoubtedly be recovered back by the person from whom it has been so obtained. That is the case here; the money was clearly obtained from the plaintiff by fraud, and it went into

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the coffers of the defendant company. How is the plaintiff to prove the fraud? Here is a man, giving the name of Howard, which, as far as the transaction with the plaintiff goes, might be his real name, who, by requiring further securities than he originally stipulated for, virtually broke his undertaking to grant a loan, and received from the company, in return for introducing the insurer, 50 per cent. of the premium. These are all the elements of fraud in the transaction; and there is nothing on the face of them conclusive of fraud. Then other evidence was tendered to show that this was a fraud; that the policy was a sham policy; and that the loan was never intended to be made. The plaintiff says, I will show that there is no such person as Howard, and that exactly analogous transactions had been carried out with ten or a dozen other persons. The defendants contend that the plaintiff cannot show general transactions on the part of this company in this and other cases in which they have put forward a fictitious name, and obtained money on the faith of exactly similar promises of loans which they have never advanced to the persons to whom they promised them. I am of opinion that this evidence was admissible for the purpose of establishing fraud, which you can only prove by showing what was behind the ostensible transaction. The only way to prove that acts are fraudulent is to show the intent, the motive, the design, that is to be coupled with these acts. Therefore, were we to hold otherwise, and such evidence was not admissible, fraud could never be proved at all. To take the common instance of fraud committed by means of begging letters. If a single letter to one individual only were proved, the evidence would probably be insufficient for a conviction; but the particular transaction is shown to be a guilty one by proving that the person charged has done the same thing twenty times before, and that in each case he has told false stories, and given fictitious names. Then is there any rule of law to exclude this evidence? I am of opinion that there is not. Where the act itself does not *per se* show its nature, the law permits other acts to be given in evidence for the purpose of showing the nature of the particular act; as for instance, in cases of uttering counterfeit coin, even in some cases of murder, and, generally, wherever it is necessary to show the intent with which an act was done. There is no difference between the rules of the civil and the criminal law in this respect; (a) if anything, the criminal law of evidence, which deals with cases where life and liberty are in dispute, is more strict than the civil. Therefore, supposing this action was brought against Howard, and it was doubtful whether his acts were fraudulent, you might give evidence of other acts to show that he did intend fraud. Now, that being so, can this evidence be given as regards a third person? Now I will assume that if such third person had been charged with frauds similar to the particular act by Howard, but unconnected with it, they would not have been admissible. But cannot you give such evidence, when you identify these frauds with the person by whom the particular

fraud was committed? Suppose Howard to be a fictitious name, and that the defendants perfectly well knew that these transactions were fraudulent, and that they were committed by Howard, and the defendants got the benefit of them; then it appears to me that this evidence is admissible. If you show similar shams, carried out under the same false name, and that the defendants are the people who put the money in their pocket in each case, the difficulty arising from any possibility of mistake in the case is removed, and the jury may reasonably be called upon to infer that the defendants intended to pocket the money of the plaintiff in the particular case. The instances that I have cited from the criminal law show that this evidence is admissible; and I know of no case the other way. Supposing Howard to be a fictitious person, then the evidence would be admissible in order to satisfy the jury that the defendants had used a fictitious name for the purpose of fraudulently getting money. To show that Howard was only one of ten fictitious names, was to show that the use of that pseudonym was a fraudulent fiction, and not a mistake. How could that be shown except by the fact that they did transact business under various fictitious names? The very same man whom they called Howard, they called Gard and other names. I am at a loss to see how that evidence can be thought to be inadmissible. Every fraud must consist of a number of acts all calculated to further the fraudulent design. Is the plaintiff not entitled to show that the company entered in their books a series of fictitious names? Suppose that there was no person at all acting as agent of the company, and Howard, Gard, Wood, and the rest were names and nothing more; then the plaintiff would be entitled to show that the real persons he was dealing with were these directors, who put forward fictitious names in order to get letters into their own hands surreptitiously; he would be entitled to connect those fictitious names with the defendants, and to show that the insurance company, with whom the plaintiff insured, was connected with the name of the person who had advertised for persons wishing for loans. It would be a natural supposition of the plaintiff that Howard desired an insurance in a good solvent company, and that there was nothing novel in his making it a condition of the loan that the plaintiff should insure in a company to be named by him. I think that the plaintiff was entitled to show that the insurance company were really the principals, and had no agents. It is very doubtful whether an action for deceit will lie against a company. All that we have to decide, however, is that the plaintiff can bring this action, which is for the return of money paid without consideration, and that the benefit which the company derived from the frauds of their agent, if they had one, must be given up. It follows that the only evidence by which it could be shown that the money was obtained by fraud, and that the company benefited by it, was admissible.

LINDLEY, J.—I am of the same opinion, and after the exhaustive judgment of my brother Grove, I have very few words to add. The plaintiff's case is: I was induced by the fraud of Howard to pay certain money to you, the defendants, and, at the time I paid it, you knew it was obtained by the fraud of Howard. How is that case to be proved? We are asked to exclude all the evidence that was given as to the mode in which the

(a) *R. v. Burdett*, 4 B. & A. 95, 122, per Best, J.; *Attorney-General v. Le Merchant*, 2 T. R. 201, N. : *R. v. Murphy*, 8 C. & P. 297, 306; *Leach v. Simpson*, 5 M. & W. 309, 312, per Parke, B.; 25 How. St. Tr. 1314; 29 *Id.* 764.—[Note by Reporter.]



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defendant company carried on its business; in other words, all the evidence that throws light on this particular transaction. It is said by the plaintiff that this transaction of which he complains is only one of a class, and that a fraudulent class. Let it be shown that a fraud on A. is one of a class of similar frauds upon B., C., and D., and the frauds upon B., C., and D. at once become evidence in an action by A. It comes to this—is the plaintiff to be at liberty to show that this money was obtained from him by false pretences? He can only show that the pretence made to him was fraudulently false, by showing a series of similar pretences similarly falsified. If that evidence is to be excluded, it must be by some very strict rule that I do not know of. The true answer to such a suggestion is that the rule that excludes evidence of transactions other than the one that is being inquired into does not apply where the transaction that is the subject of the inquiry is one of a class. It does not appear to me to be necessary to decide the point as to the liability of companies for frauds of agents.

LORD COLERIDGE, C.J.—I am of the same opinion. Many questions have been raised in this case which I do not think it necessary to decide now. The simple question raised by this rule is whether certain evidence was properly received at the trial. Now it is obvious that in order to discover whether evidence is admissible at *Nisi Prius* the statement of claim has to be looked at. Objections might possibly have been taken to the statement of claim; but that question does not arise now. The general outline of the fraud alleged in the claim is this: A person called Howard offers by advertisement a loan of money, and the plaintiff answers the advertisement. Howard makes it one of the terms of the loan that the plaintiff shall insure his life in the defendant company's office. The negotiation is effected, and the premium is paid; outwardly there is no connection between the company and Howard. Afterwards exorbitant conditions are added to the terms on which the money was to be advanced, which conditions the plaintiff refuses, and no money is advanced. Obviously, so stated, there is nothing in the transaction which may not be *bonâ fide*. Suppose the office selected by Howard had been one of undoubted character, no jury upon those facts alone would find complicity between the office and Howard, and a verdict for the plaintiff. But, on inquiry, it was found from other cases that there was the most intimate connection between Howard and the defendants, and that the transaction between the plaintiff and Howard was quite well known to the defendants; offers of loans having been made for years under various names upon condition of insuring in the defendants' office, and upon the premium having been paid, the loan being in each case refused. It is not difficult to see that the obtaining of these premiums on policies of which there were no renewals, and upon which nothing was ever paid, was greatly to the benefit of the directors of this company. Such a state of facts, if proved, would show a gross and abominable fraud; but the proposition is that, though those facts would disclose a gross and abominable fraud, and though they could only be proved by giving in evidence the other cases that had been discovered, yet the rules of evidence prevent that being done. If that proposition were correct, many claims per-

fectly just and fair must fail by reason of it. There was a time when that would have been no argument against the correctness of the proposition; but that time has passed; and now the general rule is that almost everything that can throw light upon the matter is admitted. In any but an English court, and to anyone but an English lawyer, the controversy whether this evidence is admissible or not would seem, I imagine, supremely ridiculous; because it is admitted that it is most cogent and material to the plaintiff's claim. Some legal ground having, however, to be shown for receiving it, I think it is receivable on two distinct legal grounds. Two things are necessary to be established here, agency and fraud. It was necessary to show that those who effected the contract were agents of the defendants, and that what was done was done with fraud. Now, except as to Howard, the agency was clear. The secretary, manager, and others, were manifestly agents to effect insurances for the company. It is therefore clear that the company would be responsible for acts done by them in the course of their duty. As regards Howard, this was not so manifest; and, therefore, this evidence was receivable to prove the agency of Howard. It would not be the less receivable on this ground, because it would prejudice the defendants in another way. There is no such rule of evidence. This evidence does clearly go to prove Howard's agency. Evidence—in many cases conclusive evidence—was given that Howard and all these other names that were used were aliases of Wood; that Wood was in intimate connection with the company, through its managing director and secretary; and that Wood received half of the premium paid to the company on an insurance being effected. Now it is clearly evidence of Howard's agency to show that this man who called himself Howard was Wood, that he was in intimate connection with these directors, and that they were repeatedly benefiting by his frauds; because the moment that you establish that all these names were aliases of one person, and that under those names this business was conducted for the benefit of the company, it seems to me that you establish also that that person was an agent of the company. This evidence is therefore receivable on that ground. But, secondly, you must also show that these acts were fraudulent. Supposing that this case had stood alone, there was certainly no conclusive evidence of fraud on the part of the company, but when it appears that the various names are aliases of one and the same agent, and that these repeated acts of getting money from persons who receive no corresponding benefit were known to the defendants, I think it is proved that the acts were fraudulent in their nature. Then the facts that the plaintiff had to establish, viz., that Howard was the agent of the defendants, that he had committed frauds, and that by those frauds the defendants had benefited, are made out. I think that this evidence does not fall within the rule, *Res inter alios acta alteri nocere non debet*, because the facts given here in evidence are necessary links in the chain of proof in the particular case. As to the previous decision of this court in the same case (35 L. T. Rep. N. S. 269), by which certain paragraphs were struck out from the claim, I think that does not conflict with our present decision, because they contained statements of *res inter alios acta* without any attempt to connect them with the *res inter partes acta*.



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As to the observations of two of the judges in that case, it is not necessary to decide whether they can all be supported. They had reference only to the subject then before the court. I am of opinion, therefore, that this evidence was admissible, and that the rule should be discharged.

*Rule discharged.*

Solicitor for the plaintiff, *J. Robinson.*

Solicitors for the defendants, *Phelps, Bennett, and Woodforde.*

[Note by Reporter.—Where, in an action against A., to recover the value of work done by the plaintiff to certain houses on the order of B., the question was, whether A. or B. was liable as principal; evidence was held to be admissible to prove that A. had given orders to persons, other than the plaintiff, to do work at the same houses: *Woodward v. Buchanan*, L. Rep. 5 Q. B. 285; 22 L. T. Rep. N. S. 123. See also *Reg. v. Francis*, L. Rep. 2 C. C. 128, 131; 30 L. T. Rep. N. S. 503.]

### EXCHEQUER DIVISION.

*Thursday, Feb. 20.*

(Before *KELLY, C.B.* and *POLLOCK, B.*)

*GREAVES v. KEENE. (a)*

*Contempt by solicitor in nonpayment of money into court—Committal of solicitor to prison for—Detention in custody beyond twelve months—Action against gaoler for false imprisonment—Warrant of committal—Nature of contempt not disclosed on face of—Duty and liability of gaoler—Debtors Act 1869 (32 & 33 Vict. c. 62), s. 4.*

*For disobedience to an order for payment by him, as a solicitor, of money into court, the plaintiff was arrested on a writ of attachment, and on the 12th Aug. 1876, was committed to gaol under a warrant commanding the gaoler to "safely keep him, so that the sheriff might have his body before the Queen in the Common Pleas Division of the High Court of Justice, wheresoever, &c., to answer Her Majesty as well touching a contempt as also such other matters as shall be then and there laid to his charge." The nature of the contempt, or that it was for nonpayment of money into court, was not disclosed on the face of the warrant, and the plaintiff, having never been brought before the court, remained in prison until the 16th Aug. 1877, when he was discharged from custody in pursuance of an order of the Common Pleas Division of the High Court of Justice to that effect.*

*The plaintiff then brought an action against the defendant, the gaoler, for false imprisonment in detaining him in custody after the expiration of twelve months from the date of the committal, when, as the plaintiff contended, the defendant ought to have discharged him in accordance with the provisions of sect. 4 of the Debtors Act 1869.*

*Held by the Exchequer Division (Kelly, C.B. and Pollock, B.), that the action was not maintainable. The defendant was bound to obey the warrant according to its exigency, viz., to keep the plaintiff until he was brought up to the court to answer a contempt, and until that was done the defendant had no authority or power to discharge the plaintiff from custody without an order of the court; nor, the nature of the contempt not being disclosed by the warrant, was he bound to inquire whether it was such as brought the*

*case within the operation of sect. 4 of the Debtors Act 1869.*

*Quære, per Kelly, C.B., whether default in payment of money ordered to be paid into court is within the meaning and operation of the Debtors Act 1869, and whether, if the nature of the contempt here had been disclosed on the face of the warrant, the case would then have come within that Act of Parliament.*

*Moone v. Rose* (20 L. T. Rep. N. S. 608; L. Rep. 9 Q. B. 486; 38 L. J. 236, Q. B.) distinguished.

This was an action for false imprisonment brought by the plaintiff, a solicitor, against the defendant, the governor of the Surrey County Gaol, at Horsefonger-lane; and by his statement of claim the plaintiff alleged (paragraph 3) that on the 12th Aug. 1876 he was arrested on a writ of attachment for nonpayment of money, and on that day was committed to the custody of the defendant (paragraph 4); that he remained in custody until 11th Aug. 1877, when, by force of the statute in that behalf, he became and was entitled to be discharged, and could not by law be detained in custody, as the defendant had notice; (paragraph 5) that there was no other detainer against him, or cause for his detention in custody, as the defendant well knew; and (paragraph 6) that on the 10th Aug. 1877 he gave notice in writing to the defendant, and demanded his discharge from custody, but the defendant wrongfully and maliciously kept and detained him in custody, and imprisoned him, until the 16th Aug. 1877, when the plaintiff obtained his discharge by order of the judge. Paragraph 7 contained an allegation of damage, and a claim of 500*l.* as damages.

The circumstances under which the arrest and imprisonment of the plaintiff took place are fully set forth in the defendant's statement of defence, and, shortly stated, appeared to be as follows:

Paragraphs 2 to 5: The plaintiff was the solicitor of one James Ruddock, in a certain action brought by Ruddock against one Henry Lake, to recover penalties amounting to £100 for an alleged infringement of the 25 Geo. 2, c. 36, and as such solicitor in the said action the plaintiff, on the 8th March 1876, improperly and wrongfully signed judgment and issued execution against the said Henry Lake; and on the same day the plaintiff, as solicitor acting for and on behalf of the said James Ruddock, received from the officer of the sheriff of Middlesex the sum of 100*l.*, the amount of the levy on such execution. On the 9th March 1876, on the application of the solicitors of the said Henry Lake, an order was made by a master at chambers that the judgment of the 8th March should be set aside, and all subsequent proceedings stayed, and the money paid by the sheriff of Middlesex to the plaintiff should be paid into court by him forthwith. The plaintiff not complying with the above-mentioned order, an order was made by Pollock, B., at chambers, on the 23rd March 1876, for a writ of attachment to issue against him for disobedience thereto, and on the 5th May 1876 a further order was made by Pollock, B., for the issue of a writ of attachment into Surrey against the plaintiff for his continued disobedience to the said order of the 9th March. Thereupon a writ of the Queen was on the said 5th May issued out of the Common Pleas Division of the High Court of Justice, directed to the sheriff of Surrey, commanding him to attach the plaintiff, so as to have him before the Queen in the Common Pleas Division of the High Court of Justice, wheresoever, &c., there to answer Her Majesty as well touching a contempt which it was alleged he had committed against Her Majesty, as also such other matters as shall be then and there laid to his charge; and further to perform and abide such order as the said court should make in that behalf. Under that writ the plaintiff was arrested on the 12th Aug. 1876, and committed to the defendant's custody on that day, under a

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

warrant of the sheriff of Surrey, directed to "the keeper of the gaol of the said county, and also to others the sheriffs and bailiffs therein named, commanding them, by virtue of the said writ, to attach the plaintiff and him safely keep, so that the said sheriff might have his body before the Queen in the Common Pleas Division of the High Court of Justice, wheresoever, &c., to answer Her Majesty as well touching a contempt as also such other matters as shall be then and there laid to his charge."

6. The defendant denies that the plaintiff was ever arrested or committed to custody save under the circumstances and on the warrant and writ aforesaid. He never was arrested on a writ of attachment for nonpayment of money as alleged in paragraph 3 of the Statement of claim.

7. The plaintiff remained in custody until the 16th day of August 1877, when he was discharged in pursuance of a rule made absolute on that day for his discharge by the Common Pleas Division of the High Court of Justice immediately on such rule being made absolute.

8. The defendant denies the allegations contained in paragraphs 4, 5, and 6 of the statement of claim other than the allegation that the defendant kept and detained the plaintiff in custody until August 16. The said detention was rightful, not wrongful or malicious.

9. During all the time that the plaintiff was in custody down to the date of the plaintiff's discharge under the order of the said court the defendant had no notice or knowledge of any of the matters set forth in paragraphs 2, 3, 4, and 5 of this defence other than of the said warrant, nor was any rule or order of any court for the plaintiff's discharge save as aforesaid, made during the said period, and the defendant always held and detained the plaintiff in custody under and in obedience to the said warrant and not otherwise.

10. The defendant denies the allegations contained in paragraph 7 of the statement of claim.

Upon his discharge from custody under a judge's order on the 16th Aug. 1877, as above-mentioned, the plaintiff presently afterwards brought the present action against the defendant.

The notice in writing given by the plaintiff to the defendant on the 10th Aug. 1877, while still in custody, as mentioned in the statement of claim was in the following terms:

In the High Court of Justice,  
Common Pleas Division.

Between James Ruddock (plaintiff) and Henry Lake (defendant).

Sir,—Take notice that I hereby demand my discharge to-morrow, Saturday, the 11th day of August, 1877, being the expiration of one year's imprisonment according to the Imprisonment for Debts Act, 32 & 33 Vict. c. 62, having been arrested on the 12th August, 1876.—

Dated this 10th day of August 1877.

Yours, &c.

ALBERT GREAVES.

To the Governor or his deputy of Surrey County Gaol, Horsemonger Lane, in the county of Surrey.

The Debtors Act 1869 (32 & 33 Vict. c. 62), being "An Act for the abolition of imprisonment for debt, for the punishment of fraudulent debtors, and for other purposes," enacts (*inter alia*) sect. 4:

With the exception hereinafter mentioned no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money. There shall be excepted from the operation of the above enactment. . . . (4.) Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order. . . . Provided, first, that no person shall be imprisoned in any case excepted from the operation of this Act for a longer period than one year; and secondly, that nothing in this section shall alter the effect of any judgment or order of any court for the payment of money as regards the arrest and imprisonment of the person making default in payment of such money.

At the trial of the action before Pollock, B., and a special jury at the Middlesex sittings on the 8th

March last, the learned judge stopped the case at the conclusion of the opening of the plaintiff's counsel, and directed the jury to find a verdict for the defendant, for whom he also directed judgment to be entered, his Lordship observing that the action was a "groundless" one, and holding that the attachment under which the plaintiff was arrested did not come within the Debtors Act 1869.

Subsequently, on the 14th Nov. last, an order was moved for and obtained by the plaintiff's counsel, for the defendant to show cause why the nonsuit herein, and the judgment, if any, entered or signed thereon, should not be set aside and a new trial had, on the ground of misdirection, in the learned judge ruling that a prisoner under process of contempt for nonpayment of money is not entitled to his discharge, at the end of twelve months' imprisonment, without the order of a judge or the court. And now

Feb. 10.—*O. S. Bowen* (with him was *G. E. Lyon*), for the defendant, in showing cause against the order, contended, first, that the case did not fall within the Debtors Act 1869; and, secondly, that the defendant had done no more than, as governor of the gaol, into whose custody the prisoner had been delivered, he was bound to do, and was justified in doing, by the terms of the warrant under which the prisoner was arrested and imprisoned, and which warrant had never been set aside. The question turned on the 4th section of the Debtors Act 1869. The scope and object of that Act were wholly alien to the case of an officer of the court, where the order was not to pay money to a creditor, but to pay money into court. It was not competent for the gaoler, nor was it his duty, to go behind or beyond the warrant and the order of the court, to ascertain what was the precise nature of the contempt charged against the plaintiff. Nor can my learned friend on the other side now do that; and, unless he can, he cannot discharge the plaintiff from the effect of the order and warrant. Nor can the defendant be held liable for acting in strict accordance with their terms. The plaintiff here was not a debtor within the Act of 1869, nor was he in default for nonpayment of money, but for not obeying the order of the court. Moreover, if he were entitled to his discharge at the expiration of twelve months, he could only be discharged by an order of the court, for which the cases of

*Re Thompson's Trusts, Nally v. Aylett*, 30 L. T. Rep. N. S. 783; 43 L. J. 721, Ch. Div., and

*Re Deere*, 33 L. T. Rep. N. S. 115; L. Rep. 10 Ch. App. 658; 44 L. J. 120, Bank.,

are authorities.

*Gibbons and Yeatman* for the plaintiff, *contra*, in support of the rule.—The statute (Debtors Act 1869) expressly says that no man shall be imprisoned beyond twelve months for the nonpayment of money, and it is contended on the part of the plaintiff that nonpayment of money into court is the same thing, so far as the present question is concerned, as the nonpayment of money to a creditor. The course of legislation, with regard to imprisonment for debt, from the 33 Geo. 2, c. 28, down to the present time, shows the spirit of the Legislature. Prior to the 1 & 2 Vict. c. 110, there was a distinction between debtors in default for nonpayment of money into court and ordinary debtors; but that statute

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abolished the distinction, and all were brought into one category, and reduced to one common denominator, and then came the Act of 1869, expressly limiting the duration of imprisonment to twelve months. The terms of the proviso in sect. 4 of the Act are as wide, general, and comprehensive as they possibly could be, and control the order of any court or judge in whom there is, it is submitted, no power to order imprisonment, or in any gaoler or anybody else to detain a person in custody beyond twelve months. To hold otherwise would be to repeal all the Acts passed for the abolition and reduction of imprisonment of debtors. Had the warrant stated that a plaintiff was arrested for nonpayment of money into court the gaoler would have been bound to discharge him at the end of twelve months. [KELLY, C.B.—If that be conceded to you, yet that is not this case.] Then it is submitted that the warrant is too wide and general, and bad for not more precisely specifying the offence. But the gaoler was bound to read the warrant by the light of the statute, which limits and restricts the imprisonment to twelve months, and was bound to discharge the plaintiff at the expiration of that time, and is liable to an action for the detention beyond it. For this the case of *Moone v. Rose* (20 L. T. Rep. N. S. 606; L. Rep. 9 Q. B. 486; 38 L. J. 236, Q. B.) is a direct authority in favour of the plaintiff. [POLLOCK, B.—The gaoler was bound to obey the warrant.] He was bound also to obey the Act of Parliament. [POLLOCK, B.—Suppose he had been called on to produce his prisoner, and bring up his body under a writ of *habeas corpus*?] He would have answered that he had the prisoner in custody until he was discharged under the Act of Parliament. [POLLOCK, B.—I should hold that that would be no answer.]

KELLY, C.B.—I should, I must say, be very glad indeed if the law enabled us to hold that under all circumstances whatever, a warrant under which anyone of the Queen's subjects is to be imprisoned should express upon its face, in clear and distinct terms, the precise nature and character of the offence for which the committal to prison is ordered, and the length of the term for which the imprisonment is to continue; but no such rule of law exists. Now it is not, and indeed it could not for a moment be, denied that the warrant in question here is a warrant of committal in a very old and very well-known form, and which must be obeyed by the gaoler as an officer of the court according to its exigency as expressed on the face of it. In the first place, the warrant directs that the plaintiff is to be safely kept, so that his body may be brought up to the court, there to answer for contempt, and until the plaintiff's body has been so brought up to the court, the defendant, as the officer of the court, is not relieved from the duty of detaining him in custody, nor can the defendant's conduct be impeached in any way by reason of such imprisonment. But, further than that, I am of opinion that if an action be brought against a gaoler for false imprisonment, for imprisoning a person for a longer time than it should be alleged he was justified in doing, and in his defence he produces a warrant in the form and terms of the warrant in the present case, which gives him no notice whatever of what was the conduct or the precise offence of the party for which the imprisonment was ordered, and speci-

fies no limited term of imprisonment, he is not bound to inquire whether or not any statute has been violated, or whether or not any statute exists requiring that the imprisoned party should be discharged at a particular time or under particular circumstances which have not been communicated to the gaoler. All that the defendant here knew or had notice of was, that he was to imprison the plaintiff for contempt, and that for that contempt the plaintiff was to answer before the court. It may, perhaps, be questioned whether default in payment of money ordered to be paid into court is within the meaning and operation of the Debtors Act 1869, and whether, if the fact that the contempt in question here was the disobedience to an order for the payment of money into court had been disclosed on the face of the warrant, as it was in the case of *Moone v. Rose* (*ubi sup.*), this case would then have come within that Act of Parliament. But it is enough to say that this is a different case, and that down to the time of the plaintiff's bringing his action the defendant had no notice whatever of what the contempt was with which the plaintiff was charged. For aught the defendant knew it might have been some improper act committed in court, for which the judge was empowered to commit him for contempt of court, and he might have been committed for such an offence, and for nothing whatever having any connection with or in relation to the payment of money, in which case the warrant would have been in the precise terms of the present one. But the defendant had no notice of anything of the sort. He was simply called upon by the writ to "safely keep the plaintiff, so that his body might be brought before the Court of Common Pleas, wheresoever, &c., to answer Her Majesty as well touching a contempt, as also such other matters as shall be then and there laid to his charge." Under these circumstances the defendant, having had no notice of the nature of the plaintiff's contempt, and the plaintiff's body not having been brought before the court to answer the contempt, I am of opinion that the defendant was justified in not discharging the plaintiff from custody before he was released by the order of the court, and, consequently, that this action is not maintainable, and that my learned brother Pollock was right in assuaging the plaintiff.

POLLOCK, B.—It seems to me unnecessary that we should express any opinion with regard to the proper construction of the Debtors Act 1869 with respect to its bearing upon the present case, although for myself I should entertain no doubt upon that question, if it had arisen on this present occasion. For the purpose of the present decision, however, it is quite sufficient for the defendant to say that, in obedience to his duty as an officer of the sheriff of Surrey, he was acting under a warrant which had been delivered by the sheriff to him as keeper of one of his goals, to detain the plaintiff in custody. All that the defendant could or was bound to look to was that written warrant, and, looking to that, it is clear there was nothing in it to tell him that he was to keep the plaintiff for any particular specified time, or for any particular offence other than that of "contempt" generally. The defendant had no voice or option, nor could he exercise any choice, in the matter. A writ of attachment from one of the Superior Courts is, and has always been considered to be, a writ of a quasi criminal nature; and

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the present warrant is not a warrant to imprison the plaintiff for a certain specified period, but to keep him safely until he is brought before the court; and until the body of the plaintiff had been so brought before the court, neither the sheriff nor any of his officers, of whom the defendant is one, had any authority or power to discharge him without an order of the court to that effect. The only mode, therefore, in which the defendant could obey this warrant was by detaining the plaintiff in custody until he had some order from the court to the contrary. The case of *Moone v. Rose* (ubi sup.), which was cited by Mr. Yeatman as an authority in favour of the plaintiff, is very intelligible when we examine it, but it is also very clearly distinguishable from the present case. In *Moone v. Rose* the warrant of committal disclosed on its face the nature of the particular contempt for which the plaintiff there was committed, and it was expressly enacted by the statute relating to committals for that particular contempt that, in case the individual in custody for the contempt should not be brought to the bar of the court within the time specified and limited by the same statute, the gaoler, in whose custody such individual should be, should thereupon discharge him out of custody. The defendant, the gaoler in that case, therefore, having detained the plaintiff beyond the limited time was held liable to her in damages. But the present case is an entirely different one from *Moone v. Rose*, which really has no relation to nor any bearing whatever upon the present action. The plaintiff's rule, therefore, must be discharged.

*Rule discharged with costs.*

Solicitor for the plaintiff, *W. F. Morris.*

Solicitors for the defendants, *F. F. Smallpiece,*  
agents for *Smallpiece and Sons*, Guildford.

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*Jan. 27 and 29.*

(Before Sir R. PHILLIMORE.)

#### THE CONSTITUTION. (a)

*Jurisdiction—Foreign vessel of war—Maritime lien—Ex-territoriality—Salvage.*

*The High Court of Justice, Admiralty Division, will not allow a warrant to issue for the arrest of a foreign vessel of war, or of private property on board of her, and of which the Government to which she belongs have the care, at the suit of salvors.*

There was a motion on behalf of the owner, master, and crew of the steam-tug *Admiral* for two warrants of arrest to issue against the U.S. vessel *Constitution*, and against the cargo laden on board of her.

The *Constitution*, whilst on a voyage from Havre to New York, and having on board a large quantity of empty cases, and also of goods returned from the Exhibition at Paris, got ashore on Bolland Point, near Swanage, and whilst in that position salvage services were rendered to her by the steam-tug *Admiral* and other vessels.

*Jan. 27.*—Dr. *Phillimore* applied to the court that warrants of arrest should be issued against the

ship and cargo, as the plaintiffs were unable to obtain proper remuneration for their services, and the vessel was about to leave the country.

Sir R. PHILLIMORE.—As a question of jurisdiction is raised, I shall certainly not grant the application till the question has been argued; but I will give leave to serve short notice of motion, so that the question may be argued on Wednesday next, the notice to be served on the vessel and American Consul, but not personally on the captain, and I think a letter should be also sent to the American Ambassador stating that the application will be made.

*Jan. 29.*—The question of jurisdiction came on for argument on the following motion:

*Between the Owners, Master, and Crew of the steam-tug Admiral (plaintiffs), and the ship or vessel Constitution, her cargo and freight (defendant).*

#### *Constitution.*

We, *Clarkson, Son, and Greenwell*, solicitors for the plaintiffs in this cause, give notice that we shall by counsel at 10.30 o'clock in the forenoon of the 29th Jan. 1879, move the judge in court to order a warrant to issue for the arrest of the vessel and for a further warrant to arrest her cargo and if necessary to unlive the same, to answer the claim of the plaintiffs for salvage services rendered to the *Constitution* her cargo and freight; and further take notice that leave has been given by the court to serve short notice of this motion.

Dated the 27th Jan. 1879.

CLARKSON, SON, and GREENWELL.

On behalf of the plaintiffs the following affidavit of the owner of the *Admiral* was read:

1. I am the owner of the steam tug *Admiral* and one of the plaintiffs in this action.

2. On the 17th Jan. inst. I received a telegram from Lieut. Vry, Swanage station, to the following effect: "American frigate *Constitution* ashore on Bolland Point. Send strongest tug immediately, two if possible." I thereupon despatched my tug *Admiral* to the assistance of the vessel *Constitution*, and she rendered important and efficient salvage services to the ship *Constitution* and her cargo, and was instrumental in getting her off the ground.

3. After the several services were completed, I, on the 21st Jan. inst. received the following letter from the consular agent at Portsmouth:

"United States of America Consular Agency, Portsmouth, 20th Jan. 1879.

"Mr. George Drover,

"Sir,—If you have any claim to present against the U.S. frigate *Constitution* please put it in writing and bring it to my office as early as possible to-morrow forenoon. If you cannot come, forward it to me by return of post. The ship sails soon.—Yours respectfully,

"C. E. M'CHERANE, United States Consular Agent."

In reply to this letter I, on the 21st inst., sent the following telegram: "Impossible my coming to Portsmouth. I claim one thousand five hundred pounds services rendered by my tug *Admiral*. You, no doubt, are aware my tug was the means of towing *Constitution* off. *Malta* and the three other tugs could not move the ship, but when we commenced towing ship immediately came off. Please wire reply immediately as I leave shortly for London."

4. Afterwards, on the 23rd inst., I received a sum of 200*l.* in recognition of the services rendered by the said tug, accompanied by the following letter:

"United States of America Consular Agency, Portsmouth.

"Mr. George Drover,

"Sir,—I am instructed by the captain of the U.S. frigate *Constitution*, on behalf of the United States Government, to forward to you a cheque for 200*l.*, in recognition of the services rendered to that vessel upon the occasion of her stranding on Bolland Point by your tug *Admiral*, and by the master and crew of that tug. I shall be obliged to you to settle with the master and crew accordingly.

(a) Reported by J. P. ASPINALL and F. W. RAYNES, Esqrs., Barristers-at-Law.

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"It may prevent some misconception on your part if I inform you the value of the *Constitution* and cargo, principally empty cases and machinery, on board her does not exceed 12,000*l*. My government are happy that the services, with the important co-operation of H.B.M. tug *Malta*, were rapidly and easily successful.—I am, sir, your obedient servant,

"C. E. M'CHEANE, U.S. Consular Agent.

"Please acknowledge this in course."

5. Such sum of 200*l*. is entirely inadequate and insufficient compensation for the services rendered, and on the 25th inst. I returned the said sum to the consular agent, accompanied by the following letter:

"M'Cheane, Esq. "25th Jan. 1879.

"*Constitution*."

"Sir,—Herewith please find cheque received to-day for 200*l*. I cannot think of accepting so small a sum. I am willing to refer the matter to the Admiralty Court. If you wish to communicate with me, please address letter to care of Clarkson, Son, and Greenwell, 24, Carter-lane, Doctors' Commons, London. I shall be there Monday morning ten o'clock.—Yours truly, GEORGE DROVER."

6. The frigate *Constitution* had on board her at the time of the services a valuable cargo, consisting principally of machinery belonging to private individuals, exhibitors at the Paris Exhibition, and was on a voyage from Havre to New York. I am informed and believe that the value of the vessel *Constitution* and her cargo amount to considerably over 12,000*l*.

7. On the 28th Jan. inst. I received a further letter from the American Consulate to the following effect: "Your favour of the 25th inst., returning the cheque for 200*l*., has been received. This award for the services of your tug *Admiral* to the *Constitution* was made advisedly, and is considered by competent and disinterested experts as ample and liberal, and my information is that it is final. Cheque will remain at my office till noon of the 15th Feb. next, when, you having failed to call for it, its amount will be forwarded by me to the United States Navy Department."

8. The said vessel *Constitution* and the cargo on board her are now lying off Portsmouth, and will leave immediately for New York. That applications have been made by my solicitors to the American Legation, and I am unable to obtain sufficient compensation for the services of the said tug without the aid and process of this honourable court.

The notice of motion was served, as directed by the judge, on the ship and the American Consul, and a copy of it sent to the American Embassy, accompanied by the following letter:

24, Carter-lane, Doctors Commons, E.C.,  
27th Jan. 1879.

The American frigate *Constitution*.

Your Excellency,—Our clients, the owners, master, and crew of the steam-tug *Admiral*, of Cowes, Isle of Wight, lately rendered very valuable salvage services to the American frigate *Constitution*, which was ashore at Bollard Point.

Application for remuneration for such services was made to the American Consul at Portsmouth, and he forwarded a sum of 200*l*. to the owners of the tug. This sum is quite insufficient to compensate for the services rendered, and was returned to the consul. The *Constitution* had on board a valuable cargo, consisting of machinery, the property of the exhibitors at the Paris Exhibition. We this morning moved the judge of the Admiralty Division for leave to arrest the *Constitution* and her cargo, and an order was made that the motion should be adjourned till Wednesday, in the meantime notice of the motion to be served on the vessel and American Consul. In accordance with the judge's request, we beg to give your Excellency notice of the application to be made, and inclose a copy of the notice of motion.—We are your Excellency's obedient servants,

CLARKSON, SON, and GREENWELL.

The Envoy Extraordinary and Minister Plenipotentiary for the United States of America.

The defendants produced the following letter:

Legation of the United States,  
London, 28th Jan. 1879.

Messrs. Thomas Cooper and Co.,  
Solicitors, &c.

Gentlemen,—The accompanying notice marked A.,

having been left at this Legation with the janitor after the office was closed last evening, I shall be obliged to you to instruct counsel to be present in court to-morrow morning to inform the Right Honourable the Judge of the Admiralty Court that the ship against which the warrant has been applied for by the owners, master, and crew of the steam-tug *Admiral* is the United States national ship of war *Constitution*, regularly commissioned by the Government of the United States, and that the *Constitution* at the time of the alleged salvage services was engaged in the national service of the United States for public purposes, and in pursuance of a special Act of Congress passed in that behalf. You will please also instruct counsel to inform the judge that the so-called cargo consists of property of which the United States Government has for public purposes charged itself with the care and protection. Under these circumstances I, as the representative of the United States, cannot recognise that the High Court of Justice has any jurisdiction whatever in the case.—I am respectfully yours,

JOHN WELSH.

Counsel will be good enough to inform the learned judge that application should have been made to the Marquis of Salisbury, Secretary for Foreign Affairs, had time permitted it.

Milward, Q.C. and Dr. Phillimore, for the plaintiffs, owners, master, and crew of the *Admiral*.

E. C. Clarkson for the American Minister.

The Admiralty Advocate (Dr. Deane, Q.C.), with him the Attorney-General, for the Crown.

Milward, Q.C.—This application is of a twofold nature: (1) to arrest the ship herself; (2) to arrest the cargo laden on board of her, and, if necessary, to nlliver it. In ordinary cases, the warrant to arrest a ship and cargo for salvage services rendered to her would issue as a matter of course. We have come to the court to ask its leave; but there is nothing to induce it to withhold that leave. There is a precedent for the arrest of a vessel under similar circumstances in the time of Lord Stowell: (*The Prins Frederik*, 2 Dods. 451). There is no dispute as to the fact that, as sworn in the affidavit, there was a distinct request to the salvors in this case to come and render assistance to a vessel ashore on the coast of England. What is there, then, to shut the doors of this court to the salvors when they take the ordinary legal means of securing a due compensation for their services? The vessel, it is true, belongs to a foreign Government, but she was not at the time the services were rendered engaged in the public service of that Government, but in carrying a cargo, the property of various private individuals. [Sir B. PHILLIMORE.—It is, I understand, admitted that the vessel herself is a vessel in the war service of the United States Government, and that the cargo sought to be arrested is now on board her.] Yes; but that is precisely the case of *The Prins Frederik* (*ubi sup.*), except that there the cargo seems to have been laden on Government account.

E. C. Clarkson, on behalf of the American Government, asked permission to read the letter of instructions from the American Ambassador to Messrs. Thomas Cooper and Co., given above, and was permitted to do so.

The Admiralty Advocate, on behalf of the Crown, informed the court that a communication had been received by the Foreign-office as to the application now before the court, and that he was instructed to inform the court that the Government recognised the public character of the *Constitution*, and, whilst submitting to any course which the court might consider it its duty to pursue, to protest

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against any exercise of its jurisdiction against this ship. [Sir R. PHILLIMORE.—Under these circumstances, the onus lies on the salvors to show that they are entitled to arrest the ship.]

*Milward, Q.C.*—The exemption of vessels of war of foreign states from civil process is only granted to them by the comity of nations in consequence of the public service they are engaged in. This is no more a public service than that of any other vessel hired to bring goods from France to America for private citizens. [Sir R. PHILLIMORE.—It will be convenient to keep distinct the question of arrest of the ship from that of the cargo.] As far as possible; but the cargo being on board the ship in question cannot be absolutely dissevered. The American Embassy does not deny that the property in the cargo is in private owners; it only alleges that it has the care of it. In the *Prins Frederik (ubi sup.)* it actually belonged to the Government (2 Dod. 465), and yet the warrant of arrest was actually issued and executed (p. 451). If access to this court is refused to the salvors, they have no means of obtaining justice. The exemption of foreign vessels of war is only an exemption from ordinary civil process. It does not apply to causes *in rem*; there the maritime lien attaches *jure gentium* at once, either *ex quasi contractu* or *ex quasi delicto*, whatever be the character of the vessel :

*The Charkish*, L. Rep. 4 Adm. & Eoc. 59, 93, 96; 23 L. T. Rep. N. S. 513.

*The Exchange*, 7 Cranch, U.S. Sup. Court Rep. 116.

It is true that the last case was one where the question arose as to prize property; but that is *a fortiori* in favour of the salvors here, as prize property is the property of the Crown or Government; here the property in the goods is private.

Dr. *Phillimore*, on the same side, adopted as a portion of his argument the following extract from the Opinions of Attorney-Generals of United States, vol. I., p. 54, as quoted in the Report of the Royal Commission on Fugitive Slaves, p. 74: "The question again arose . . . whether judicial process could be lawfully served on board a public ship of war belonging to his Britannic Majesty lying alongside a wharf in the city of New York and within the territorial jurisdiction of the state of New York; and the opinion of the Attorney-General, Charles Lee, was taken on the subject. After quoting passages from Vattel and Martens, he then proceeds: 'According to the general rule established by these citations, every ship, even a public ship of war of a foreign nation, at anchor within the harbour of New York, is within the territory of the state of New York and subject to a service of judicial process; if an exemption from this rule is claimed by a foreign ship of war, it is incumbent on such ship to set forth and maintain clearly and satisfactorily its right to the exemption, or it must be deemed within the general rule. The officers and crew of a public ship of war being admitted into the United States are entitled to be treated with hospitality and kindness; but that does not in reason require that the ship should be exempt from judicial process; and more especially when they are bound by every kind of obligation to act in conformity to the laws of the country which affords them and their ships its sovereign protection whilst within its jurisdiction. It is expressly provided by article 23 of the Treaty of London that the ships of war of each of

the contending parties shall at all times be hospitably received in the ports of the other, their officers and crews paying respect to the laws and government of the country. This is conceived to be declaratory of the usage of nations; and here it may be observed that hospitality which includes protection is to be enjoyed upon condition that the laws and government of the country are respected. To disobey judicial process authorised by law, or to resist it on board the ship, is inconsistent with a due respect to the laws and government of the country. The article further stipulates that the officers shall be treated with that respect which is due to the commission which they bear; and if any insult shall be offered to them by any of the inhabitants, all offenders in that respect shall be punished as disturbers of the peace and amity of the two countries." [Sir R. PHILLIMORE.—That is an opinion written, I think, in the year 1799. It is questionable how far the same would have been written in 1879; besides it relates rather to the liberty of the subject than to civil actions against the property.] Yes, but it shows at all events that the ex-territoriality enjoyed by a foreign vessel of war is not absolute: (Report of Royal Commission on Fugitive Slaves, p. 33.) It was the opinion of Chancellor Kent that civil and criminal process might be served on board the ship, though not on the ship itself (Kent's Comm. on Amer. Law, ed. 1851, p. 157, note e); but if it may be served on any private property on board and therefore on the cargo, the court has certainly jurisdiction to inquire into the property in goods on board:

*The Santissima Trinidad* 7 Wheaton (Amer.) Rep. 273.

If this motion is refused, foreign vessels of war will themselves be the chief sufferers, as, if a claimant has no right to enforce his claim against them by law, he will be loathe to render assistance when they stand in need of it. [Sir R. PHILLIMORE.—It is not proper to suppose that any Government will act otherwise than equitably towards those who render services to its ships.] In this very case we contend that what they propose to give us is altogether inadequate, and we are anxious to have the opinion of the court on the merits.

*E. O. Clarkson* for the American Minister.—The Government is desirous of showing all courtesy to the court, and has therefore instructed me to appear and argue the case. It cannot admit that the court has any right to entertain a suit, or to issue a warrant against this ship. Had the ship in any way been divested of its character as a public ship of war, and had it been engaged in ordinary trading operations, it would have been liable to arrest for one of the reasons for which the *Charkish (ubi sup.)* was held liable to process; but it has not done so. It is not possible to distinguish the case of the vessel itself and of the cargo on board her. The ex-territoriality of the ship must be violated to enable the officer of the court to get at the cargo: (*The Exchange, ubi sup.*) Supposing the captain of that American man of war ordered the removal of the officer of the court as a trespasser *molliter manu*; what power would any court have to interfere? The goods are in the possession of the Government, and cannot be arrested without dispossessing the Government. If the salvors consider that the

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liberal award they have received is not sufficient, they can invoke the services of the Foreign-office.

The *Admiralty Advocate* (Dr. Deane, Q.C.), for the Crown.—In a case of this description it may almost be doubtful if the Government have not a right of prohibition, as so unusual a proceeding as the arrest of a foreign vessel of war might occasion serious danger to the relations of amity existing between the countries. Whilst countries are at peace it is an implied condition of the peace that their ships of war should be free from civil process in one another's countries. The *Charkieh* (*ubi sup.*) is not in point, she was not a public ship of war, but a trader, and not the property of a sovereign prince.

Milward, Q.C. in reply.

Jan. 29.—Sir R. PHILLIMORE.—On Monday last an application was made to this court to allow a warrant of a peculiar character to issue and to be served upon a ship of war belonging to an independent state in amity with Her Majesty. The court directed the case to stand over, and suggested that it would be proper that notice should be given to his Excellency the Minister of the United States in this country, and also to the Secretary of State for Foreign Affairs. The court has had reason to congratulate itself that it took that step, because the result has been that I have had the advantage of having the opinion of counsel on behalf of the United States Government, and also the opinions of the law officers of the Crown. Now, it is admitted—and indeed it could not be denied—that, if I were to exercise the jurisdiction prayed in this case, I should be doing that for which there is no legal ground or precedent. It is clear upon all the authorities, which are to be found in the case of *The Charkeih* (L. Rep. 4 A. & E. 59; 28 L. T. Rep. N. S. 513), that there is no doubt as to the general proposition that ships of war belonging to another nation with whom this country is at peace are exempt from the civil jurisdiction of the country. I have listened in vain for any peculiar circumstances to take this case out of the general proposition. It has happened to me more than once since I have had the honour of sitting in this chair to have been requested by foreign states to sit as arbitrator, and to make an award in certain cases—one of collision and two of salvage, I think. If such an application had been made to the court in this case, I would gladly have undertaken the duty sought to be imposed upon me; but such is not the case. I have now to consider whether there is any authority for the proposition that, when a foreign state refuses to waive the privilege which it has, it is competent to this court nevertheless to treat it as an individual, and serve civil process on its property. I am clearly of opinion that it would be very wrong and improper in me to assent to the request on the part of the owner of the steam-tug. I see no distinction in this case between refusing the warrant prayed for against the ship and that against the cargo, and I refuse it equally in both cases. I think it unnecessary to go into the cases cited, because they are distinguishable from the present, inasmuch as the important point decided in the *Charkieh* (*ubi sup.*) was that the Khedive of Egypt was not an independent sovereign, and also that the ship had been treated as a vessel of commerce and not of war. There

was another point to which notice has been drawn, but it was not necessary for the decision of that case, and the points decided in that case are those which I have mentioned. I state these facts to show that that case is materially different from the case now before the court. It has been alleged that great hardship will ensue from the decision of the court, inasmuch as it would expose ships to great difficulty in future, if necessity should arise for salvage services to be rendered to them. To that I must answer that it would be improper to suppose that any foreign Government would not remunerate the services of salvors, taking proper means to ascertain what those services were. I have no reason to suppose that such would not be the case. Be that as it may, I have to discharge my duty, which is to say, in the absence of precedent and principle I cannot feel warranted in allowing the process to issue. I cannot consent that any warrant shall issue from this court, and I must dismiss the motion with costs.

Solicitors for the salvors, *Clarkson, Son, and Greenwell*.

Solicitors for the American Minister, *Thomas Cooper and Co.*

Feb. 4, 18, and 26, and March 15.

(Before Sir R. PHILLIMORE.)

THE PARLEMENT BELGE. (a)

*Jurisdiction—Collision—Arrest—International law—Constitutional law—Ex-territoriality—Mail packet—Government vessel—Foreign sovereign State—Crown and subject—Treaty-making power.*

*A vessel belonging to or chartered by a foreign Government, and regularly employed for the purposes of carrying mails and passengers and some cargo, is not entitled to the privileges of a man-of-war as to ex-territoriality; but is liable to an action for damage done by her to the vessel of a British subject, and to arrest if the suit is in rem.*

*The Crown of this country has not power, by treaty with a foreign Government, to give to vessels of, or employed by, that Government other than vessels of war the privilege of freedom from civil process extended by international law to vessels of war.*

*Where the Crown appears to protest against the jurisdiction of the court being exercised against a vessel belonging to a foreign power, it has the same right of reply as in cases where it appears on its own behalf.*

*This was a motion in a cause of damage by collision.*

Feb. 4, 1879.—Dr. W. G. F. Phillimore, on behalf of the plaintiffs, moved the court in the terms of the following motion:

IN THE HIGH COURT OF JUSTICE, ADMIRALTY DIVISION.

Between owners of steam tug *Daring* (plaintiffs) and the owners of the steamship or vessel *Parlement Belge* and her freight (defendants).

Ship *Parlement Belge*.

We, L. and Company, solicitors for the plaintiffs in this cause, give notice that we shall by counsel on the 4th Feb. 1879 move the judge in court to direct that judgment with costs may be entered for the plaintiffs in respect of damages sustained by their tug *Daring*, through collision

(a) Reported by J. P. ASPINALL and F. W. RAIKES, Esqs., Barristers-at-Law.



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with the steamship *Parlement Belge*; that the accounts and vouchers relating to such damage may be referred to the registrar and merchants to report thereon, and that a warrant may issue for the arrest of the said steamship *Parlement Belge*.  
LOWLESS AND CO.

Dated 25th Jan. 1879.

The facts of the case, as set out in the statement of claim, and verified by affidavit, and for the purposes of the argument undisputed, were that

At about 4.30 p.m. on 14th Feb. 1878, the steam tug *Daring*, of 109 tons gross register . . . brought up to an anchor in Dover Bay, within the port and harbour of Dover, in a safe and proper berth, about half a mile east of Dover pier.

2. In the course of the evening a fog began to rise from off the shore, about 10.30 p.m. the wind was to the S. and W., and the weather nearly a calm, the fog still continuing. The tide was ebb; the *Daring* was riding in the same place, having her anchor regulation light clearly exhibited, and burning brightly; her fog bell rung at proper intervals, and a good look-out kept on board her.

3. In these circumstances, the paddle steamship, *Parlement Belge*, was seen and heard by those on board the *Daring*, when a short distance off, approaching rapidly towards her from the direction of the harbour, and although the fog bell of the *Daring* was loudly rung, and her captain hailed the *Parlement Belge* to stop, she came on and ran her stem right into the starboard side of the *Daring*, cutting into her about 14 feet, and doing her a great deal of damage.

4. The collision was caused by the bad navigation and negligence of those on board the *Parlement Belge*. The collision was not caused or contributed to by the plaintiffs, or by any of those on board the *Daring*.

5. A writ *in rem* in this action was duly served on the *Parlement Belge* on the 26th Feb. 1878, and no appearance has been entered in this action.

6. The *Parlement Belge* is a Belgian vessel, and was and is now employed in the service of carrying the mails between Dover and Ostend in Belgium.

7. Before and since the time of the collision in question she was engaged in carrying, besides the mails, passengers and merchandise, and in earning passage money and freight. The plaintiffs are unable to discover whether the *Parlement Belge* was at the time of the collision, or is now, the property of His Majesty the King of the Belgians, or whether she was only chartered for the purpose by His Majesty, or by some officer or officers of His Majesty's Government. They have caused application to be made to the Government of His Majesty to give them compensation for the damage done to them, but have been unable to obtain such compensation.

The plaintiffs claim as follows:

- (1.) Judgment against the *Parlement Belge*, her tackle, apparel, and furniture, for the damage occasioned to the plaintiffs by the collision, and for the costs of this action.
- (2.) A warrant to arrest the *Parlement Belge*, her tackle, apparel, and furniture, and if necessary a sale thereof.
- (3.) Such further and other relief in the premises as the nature of the case may require.

Filed 4th Jan. 1879.

The writ *in rem* was in the usual form (see R. S. C., Dec. 1875, r. 2). After the hearing of the motion had been adjourned, in order to allow time for the Crown to appear and plead if they thought fit, on the 24th Feb. the following "Information and Protest" of the Attorney-General was filed:

The Attorney-General, under protest on behalf of Her Majesty the Queen, gives the court to understand and be informed as follows:

1. Before, and at the time of the alleged collision, and thenceforward till the present time, the *Parlement Belge* was one of the mail packets running between Ostend and Dover, and one of the packets mentioned in Article VI. of the Convention of Feb. 17, 1876, hereinafter referred to.

2. During the period hereinbefore mentioned, and at all material times, the said packets were and are the property of His Majesty the King of the Belgians, and in his possession, control, and employ, as reigning sovereign of the State of Belgium, and have been and still are public

vessels of the Government and Sovereign State of Belgium, carrying his said Majesty's royal pennon, and were and are being navigated and employed by and in possession of such Government and not otherwise.

3. The said packets were and are officered by officers of the royal Belgian navy holding commissions from His Majesty the King of the Belgians, and in the pay and service of his Government. The said officers are appointed by and are under the control and orders of the Belgian Minister of Public Works.

4. During the period hereinbefore mentioned, and at all material times, a Convention, dated Feb. 17, 1876, has been and is in force between Her Majesty the Queen and His Majesty the King of the Belgians, to a copy of which in the French and English languages the defendants crave leave to refer as if the said convention were duly set forth at length herein.

5. During the period hereinbefore mentioned, and at all material times, the *Parlement Belge* was carrying the public mails, under the said Convention, between and from the royal post offices of Great Britain and Belgium.

6. The Attorney-General, under protest, says that this honourable court has no jurisdiction to entertain this suit, and that the plaintiffs cannot prosecute the same therein.

7. The Attorney-General, under protest as aforesaid, gives the court to understand and be informed herein, that he does not admit the matters alleged in any of the paragraphs of the statement of claim to be true.

Wherefore the Attorney-General, on behalf of Her Majesty the Queen, prays the court to stay all proceedings in this action, and to dismiss the motion of the plaintiffs with costs to the Attorney-General, on behalf of Her Majesty, of and incident to this application and action.

(Signed)

JOHN HOLKER.

The Convention referred to is as follows:

*Convention between Her Majesty and the King of the Belgians, regulating the Communications by Post between the British and Belgian Dominion.*

Signed at London, February 17, 1876.

[Ratifications exchanged at London, March 24, 1876.]

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the King of the Belgians, being desirous of strengthening the friendly relations which unite the two countries, and wishing to regulate by special arrangements (forming a sequel to the General Postal Treaty concluded at Berne on the 9th of October 1874) the postal relations between their respective offices, have named as their Plenipotentiaries for this purpose, that is to say: Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, the Right Honourable Edward Henry Stanley, Earl of Derby, Baron Stanley of Bickerstaff, a Peer and a Baronet of England, a Member of Her Britannic Majesty's Most Honourable Privy Council, Her Majesty's Principal Secretary of State for Foreign Affairs, &c., &c., and the Right Honourable John James Robert Manners (commonly called Lord John Manners), a Member of Her Majesty's Most Honourable Privy Council, a Member of Parliament, Her Majesty's Postmaster-General; and His Majesty the King of the Belgians, Baron Henry Solvyns, Grand Officer of the Order of Leopold, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King of the Belgians to Her Britannic Majesty, &c., &c. Who, after having reciprocally communicated to each other their respective full powers, found in good and due form, have agreed upon the following Articles:

ARTICLE I.—There shall be between the Post-offices of Great Britain and Belgium a periodical and regular exchange of correspondence of every kind in international service as well as in transit.

ARTICLE II.—The exchange of correspondence between the two offices shall be carried out through the following Post-offices:—On the part of Great Britain: 1. Dover. 2. London. On the part of Belgium: 1. Ostend (local office). 2. The office travelling between Brussels and Ostend. 3. The office travelling between Brussels and Tournai. 4. The office travelling between Ghent and Mouseron. The two offices may, if they think proper, agree to name other offices for the exchange of correspondence.

ARTICLE III.—The mails between Great Britain and Belgium shall be conveyed by means of special packets

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running between Ostend and Dover. Each office shall have the right to employ subsidiarily, and so far as it shall be of any advantage on the score of speed, the route *à la France*, and the French packets from Calais to Dover for the conveyance of its correspondence in closed bags to the other office. With regard to the mails conveyed on account of other offices, it will be the duty of the despatching office to indicate the route to be followed.

ARTICLE IV.—The Post-offices of Great Britain and of Belgium shall fix by a mutual agreement, the time for the departure of the packets from Ostend and Dover and they shall regulate this service in connection with the railway trains, so as to insure with the greatest possible speed the transmission of mails for international as well as for transit service.

ARTICLE V.—The Belgian Government shall continue to perform, at its own expense, the double daily service for the conveyance of the mails from Ostend to Dover and *vice versa* (a service which must be performed at least six days in the week, the service on Sunday being optional).

ARTICLE VI.—The packets employed for the conveyance of the correspondence between Ostend and Dover shall be steamboats of sufficient power and size for the service in which they are to be employed. They shall be vessels belonging to Government, or freighted by order of Government. (Ce seront des bâtiments appartenant à l'Etat ou frétés pour le compte de l'Etat.) These vessels shall be considered, and treated in the port of Dover and in all other British ports at which they may accidentally touch, as vessels of war, and be there entitled to all the honours and privileges which the interests and importance of the service in which they are employed, demand. They shall be exempted in those ports, as well on their entrance as on their departure, from all tonnage, navigation, and port dues, excepting however the vessels freighted by order of Government (pour le compte de l'Etat), which must pay such dues in those ports where they are levied on behalf of corporations, private companies, or private individuals. They shall not be diverted from their special duty—that is to say, the conveyance of the mails—by any authority whatever, or be liable to seizure, detention, embargo, or arrêt de Prince. (Ils ne pourront être détournés de leur destination spéciale, c'est à dire du transport des dépêches, par quelque autorité que ce soit, ni être sujets à saisie arrêt, embargo, ou arrêt de Prince.)

ARTICLE VII.—The captains of the Belgian packets shall receive from the agents appointed for the service of exchange, the mails at Ostend and at Dover, the bags being closed and sealed. The number of these bags and the time of their delivery shall be entered on a way bill, which the captains or the officers intrusted under their orders with the care of the mails, shall deliver on their arrival to the office for which they are destined. They shall bring back to the despatching office a certificate of the punctual delivery of the mails, delivered to them by the agent who shall have received them.

ARTICLE VIII.—Unless prevented by causes over which they have no control, the captains of the packets engaged in carrying the mails between Ostend and Dover shall proceed directly to their destination. If in consequence of stress of weather or damage, they should be compelled to alter their course, and to put into any other port than Ostend or Dover, they must justify such deviation in the manner that their respective offices shall deem advisable. Whenever a packet conveying mails shall be compelled to put into any other than its destined port, the captain shall immediately deliver the mails to the local post-office, or forward them towards their destination, under the charge of an officer of the vessel.

ARTICLE IX.—The boats which shall be necessary for taking on board or lading the mails, or for assisting the steam packets upon their arrival or departure, shall be provided, both at Dover and Ostend, by the Belgian Government, and at its expense.

ARTICLE X.—The mail packets shall be at liberty to take on board or land at Dover, as well as at other British ports where they may be obliged to put in, any passengers of whatever nation they may be, with their wearing-apparel and luggage, and also with their horses and carriages, on condition that the captains of the said packets shall conform to the regulations of the United Kingdom concerning the arrival and departure of travellers. They shall be prohibited from conveying

goods or merchandise on freight, with the exception, however, of postal packets and small parcels, the weight of which shall be limited by mutual agreement between the two offices. (Ils ne pourront transporter aucune marchandise à titre de fret, à l'exception toutefois des colis postaux et des articles de messagerie dont le poids sera limité de commun accord entre les deux Administrations.)

ARTICLE XI.—The expenses which may be incurred for signals of every kind, and for the burning of Bengal lights upon the pier for the use of the steam packets, shall be borne both at Dover and at Ostend by the Belgian Government.

ARTICLE XII.—The captains of the packets specially engaged in the conveyance of the respective mails of the two offices are forbidden to take charge of any letter not included in their mail bags, with the exception, however, of Government despatches. They must take care that no letters are conveyed illegally by their crews or passengers, and must give information in the proper quarter of any breach of the laws which may be committed in that respect.

ARTICLE XIII.—In case of war between the two nations, the mail packets shall continue their navigation without impediment or molestation, until a notification is made on the part of either of the two Governments that the service is to be discontinued, in which case they shall be permitted to return freely, and under special protection, to the port in Belgium where they were fitted out.

ARTICLE XIV.—The British Government engages to pay annually to the Belgian Government, in consideration of the advantages which it derives from the double daily packet service between Ostend and Dover, viz.: 1. For the night service, the sum of four thousand pounds sterling; and 2. For the day service the sum of five hundred pounds sterling. These sums shall be paid quarterly to the Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King of the Belgians at the Court of Her Britannic Majesty. It is understood that the British Government shall be at liberty to terminate such payment on giving to the Belgian Government a notice of at least six months; and that even without such notice, the payment of either or both of the above-mentioned sums shall be lawfully discontinued at any time that the Belgian Government should cease to perform either a portion or the whole of the service.

ARTICLE XV.—The two Governments engage to cause to be conveyed, by the means which the respective post offices employ for their own business, the closed mails which one of the offices may wish to exchange, through the medium of the other office, with countries which are not parties to the General Postal Union. The one of the two offices on whose account this conveyance shall take place, shall pay to the office performing this service, in consideration of the distance traversed beyond the limits of the union, rates which shall be determined by mutual agreement between them, and which shall not exceed the rates to be determined for the despatch of correspondence in open mails, in conformity with Article XI. of the Treaty of Berne, of the 9th Oct. 1874.

ARTICLE XVI.—In order to secure the whole of the receipts upon the correspondence passing between the two countries, the British and Belgian Governments engage to prevent by every possible means the said correspondence being sent by any other way than by their respective posts.

ARTICLE XVII.—The post-offices of Great Britain and Belgium shall determine by mutual agreement, in accordance with the conditions laid down in the Treaty of Berne of the 9th Oct. 1874, the matters of detail connected with the execution of the present Convention, as well as all other arrangements deemed necessary for regulating the postal regulations between the two countries.

ARTICLE XVIII.—The present Convention which abrogates and takes the place of all previous postal arrangements concluded between Great Britain and Belgium, with the exception of those relating to post-office money-orders, shall come into force immediately after the exchange of the ratifications. It is concluded for an indefinite period, each party reserving to itself the right to terminate it at any time upon giving at least twelve months' notice to the other party of its intention in this respect.

ARTICLE XIX.—The present Convention shall be ratified, and the ratifications shall be exchanged at London as soon as possible. In witness whereof the respective plenipotentiaries have signed the present Convention, and have affixed thereto the seal of their arms. Done in duplicate, at London, the seventeenth day of February, in the year of our Lord one thousand eight hundred and seventy-six.

(L.S.) DERBY.  
(L.S.) JOHN MANNERS.  
(L.S.) SOLVYNS.

The plaintiffs produced, as evidence in the case, the following documents.

1. An affidavit of John Simonds, owner of the *Daring*, verifying the allegations in the statement of claim.

2. An affidavit of George Henry Gregory, as follows:

1. That I did, on the 8th day of February 1879, attend at the office of the Continental Daily Parcels Express, to make inquiries as to the conveyance of goods and merchandise from London to Belgium, *via* Dover and Ostend by the mail boats, and in reply to my inquiries, I was handed the exhibit, marked with the letter "A," hereto annexed. The exhibit referred to is a sort of time and charge table relative to the conveyance by the Government mail packets *via* Dover, Ostend and Calais of samples of every description, papers, plans, books, articles for private use, luggage, and packages of all kinds up to 200lbs. weight between England and the Continent, *vis.*, France, Belgium, &c.

2. By a reference to paragraph 5 thereof, it appears that the said Continental Daily Parcels Express has been in existence for the last thirty years, and further, that they ship their goods to Belgium by the mail boat, *via* Ostend. I asked the gentlemen in the office of the said Continental Daily Parcels Express, whether there was any other means by which they sent to Belgium, and the reply was "No, we can only ship by the mail boats, *via* Dover and Ostend."

3. By reference to page 9 of the exhibit "A," it appears there is no limit as to size or weight of the parcels that are so shipped, the printed tariffs on the said page going up to 200lbs., but stating as to the rate generally, as well as to the special rates to Ostend alone, an additional charge is made for every 10lbs., according to the tariff.

The exhibit "A" was a small paper book of charges to be made by the company for the conveyance of parcels to various places on the continent of Europe, *via* Dover and Ostend.

3. An affidavit of Eugene Carder, solicitor, of Dover, of which the material part was as follows:

2. That I did, on the 10th and 11th days of January 1879, search in the records at the offices of H. M. Customs in Dover, for the dates and particulars of the voyages of the said vessel *Parlement Belge* made between the ports of Ostend and Dover, between the 1st day of January and the 31st day of March 1878.

7. The exhibit, marked "A," hereto annexed, is a certified extract from the books of H. M. Customs, in Dover, and is signed by the local collector of Customs.

A.

#### Port of Dover.

Account of the arrivals and sailings of the Belgian mail steamer *Parlement Belge* from and to Ostend from 1st Jan. to 31st March 1878.

From Ostend with cargo.

Jan. 5, 7, 9, 11, 14, 16, 22, 24, 26, 28, 31	= 11	} 29
Feb. 2, 4, 6, 8, 11, 14, 27	= 7	
Mar. 2, 5, 7, 9, 11, 13, 16, 20, 23, 25, 27	= 11	

With mails and passengers only.

Jan. 20.

To Ostend with cargo.

Jan. 8, 10, 12, 14, 16, 21, 23, 25, 29, 31	= 10	} 26
Feb. 5, 7, 9, 11, 14, 28	= 6	
Mar. 2, 5, 8, 12, 14, 16, 20, 23, 26, 28	= 10	

With mails and passengers only.

Jan. 6, 27	= 2	} 4
Feb. 3	= 1	
Mar. 10	= 1	

On 14th Feb. vessel returned to harbour again, in consequence of a collision, left Dover 16th Feb. for Ostend in ballast.

Custom House, Dover, J. M. Clarke, Col.,  
11th Jan. 1879. Deputy of the Bill of Entry.

Dr. W. G. F. Phillimore.—A writ in *rem* was served in the ordinary way (Order IX., r. 10), but no warrant of arrest was issued (Order IX., r. 9). No appearance being entered in the time limited, a statement of claim was filed, and the ordinary steps in a cause by default taken (Adm. Rules 1871, r. 4; L. Rep. 3 A. & E. 614; and *The Polymede*, 1 P. Div. 121; 34 L. T. Rep. N. S. 367). I have an affidavit by the master of the *Daring* verifying the statement of claim, therefore, in an ordinary case, I should be entitled to judgment (Adm. Rules 1871, r. 5; L. R. 3 A. & E. 614). But there are peculiar circumstances in this case. It will be seen by the statement of claim that the *Parlement Belge*, the vessel which ran down the *Daring* whilst at anchor in Dover Bay, is a vessel employed by the Belgians in the mail service between Ostend and Dover, and by the correspondence which has passed, it appears that an exemption from the ordinary process of the court is claimed for her under the provisions of a convention. The most important articles of that Convention are Articles 6 and 10 (*ubi sup.*). The affidavit of Eugene Carder (*ubi sup.*) shows clearly that the *Parlement Belge* was carrying cargo at the time, and by so doing, in violation of Art. 10, she has waived the privileges, if she ever was in a position to claim them, of Art. 6. A vessel of war, by carrying cargo for purposes of trade, would waive her privilege of ex-territoriality (*The Charkieh*, L. Rep. 4 A. & E. pp. 99, 100; 23 L. T. Rep. N. S. 513); *a fortiori*, a vessel which only claims the privilege conditionally on not carrying cargo: (*The Exchange* 7 Cranch (Amer.) 116.) This right of action and of process is a common law right, of which the plaintiffs cannot be ousted by anything except the common law or a statute; this special Convention, even if valid at all, cannot affect the rights of a subject, because the Crown puts a construction upon it which the Convention will not bear. In the recent case of *The Stadt Flushing* (not reported) it was proved that the vessel was a mail packet, and under contract with the Government to proceed at a certain rate of speed, but that did not prevent the plaintiffs from recovering from her for damage resulting from a collision occasioned by the *Stadt Flushing* proceeding at a high rate of speed in a fog.

The Admiralty Advocate (Dr. Deane, Q.C.), for the Crown, was stopped.

Sir R. PHILLIMORE.—The question is one of such great importance, that I think it would be more convenient to have it raised and solemnly argued on some form of pleading, which will enable it the more easily to be taken to a Court of Appeal. I shall direct the motion to stand over for a fortnight to give time to the Crown to consider if it will appear and intervene in any way.

Feb. 18.—The Admiralty Advocate (Dr. Deane Q.C.) informed the court that the Crown proposed to appear, but that, through inadvertence or misunderstanding, no pleadings had as yet been put in. The motion was thereupon directed to stand over further for a week.

Feb. 25.—Webster, Q.C., Dr. W. G. F. Phillimore, and Johnstone for the plaintiffs in support of the

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motion.—The mode in which the Crown has appeared is irregular; an appearance by the Attorney-General by information and protest is not the practice of this court. A petition on protest should have been filed according to the ancient practice of the Court of Admiralty, which is not altered by the Judicature Acts in this respect:

*The Viva*, 2 P. Div. 29: 35 L. T. Rep. N. S. 782.

But I don't wish to press a technical objection. I shall consider it as a petition on protest. We are in order to move for judgment; all the steps necessary to entitle us to judgment by default have been taken, and it is for the Crown to show any reason why the vessel should not be treated in the ordinary way. She had cleared from the Custom-house at Dover with cargo in the ordinary way. It is shown by the affidavits that the Continental Daily Parcels Express was in the habit of forwarding goods by her and her consorts, and by the tariff issued by that company it appears that they forward parcels up, at least, to 200lbs. weight, and without any limit to value. It cannot be said that a vessel employed in such a traffic as this, for profit and freight, is not carrying merchandise. Assuming, for the purpose of argument, that the statements in the information and protest are correct, there is nothing to show that the Convention set up is valid to bind British subjects, and to preclude them from having recourse to legal means to establish their rights. A convention or treaty which in any way interferes with the common law rights of a subject must be confirmed by Parliament. [Sir R. PHILLIMORE.—Supposing there were no convention at all, but the vessel carried the flag and crew of a man-of-war, do you contend that she would be liable to civil process?] This vessel is by necessary implication not a vessel of war, she claims to be exempt as a vessel of war under the treaty; to enable her to do so, something more is necessary than the mere fiat of the executive. An Act of the Legislature is necessary:

Wheaton International Law by Lawrence, 2nd ed. (1863), p. 455;

Mahon Hist. of Eng., p. 49;

Halleck's International Law, ed. 1878, vol. 1, s. 229.

[Sir R. PHILLIMORE.—Do the authorities show more than that a treaty, whilst unconfirmed by Parliament, cannot contravene an Act of Parliament?] The statute law cannot stand on a higher footing in this respect than the common law, and therefore a treaty unconfirmed by Parliament cannot deprive a subject of his common law or statutable rights:

Blackstone, bk. 4, pt. 1, ch. 6 *passim*;

Vattel, bk 2, ch. 12, sect. 154;

D. D. Field, International Code, tit. 4, ch. 15, sect. 192, p. 80.

[Sir R. PHILLIMORE.—Does not the ratification of the Legislature referred to by the last-mentioned authority, the work being that of an American author, mean the ratification by the home authority, whatever that may be, of the act of their ambassador?] That does not seem to be the case. Speech by Mr. Gladstone, Aug. 10, 1870. He says (Hansard's Parl. Debates, ser. 3, vol. 100, c. 111, p. 1790) that the Legislature can give power to the Crown to make such treaties, therefore without the Act of the Legislature, either previous or subsequent to the treaty, the Crown has no such power. The Treaty of Berne, which is referred to in the

preamble to this Convention, was confirmed by Act of Legislature (38 Vict. c. 22), and that is a treaty on precisely the same subject, i.e., the International Postal Regulations. Extradition treaties, too, have always to be confirmed by Parliament. [Sir R. PHILLIMORE.—Does it not make a great difference that those treaties of necessity affect the liberty of the subject?] The treaty as to the Newfoundland Fisheries was confirmed by Act of Parliament (35 & 36 Vict. c. 45), and so also were the treaties as to International Copyright (1 & 2 Vict. c. 59; 7 Vict. c. 12). The fact that all these various international rights required the confirmation of Parliament before the treaties affecting them became valid throws the onus of proof on the Crown to show why this particular convention should be valid without it. But the present jurisdiction of the Court of Admiralty is regulated by statute, and includes "all claims and demands whatsoever . . . for . . . damages received by any ship or sea-going vessel" (3 & 4 Vict. c. 65, s. 6), and also "any claim for damage done by any ship" (24 Vict. c. 10, s. 7). These being statutable provisions, unless this vessel can show an exemption by statute, she is claiming an exemption under a treaty in contravention of a statute. There is no allegation in the information and protest, which, if proved, can oust the jurisdiction of this court to arrest the ship. The treaty or convention referred to in it only confers the privilege (Art. 6) conditionally on the vessel not carrying cargo (Art. 10). This vessel has broken the condition, and cannot therefore claim the privilege. Even a vessel of war carrying cargo would be liable to civil process:

*The Charkieh*, L. Rep. 4 Ad. 59, p. 87 *et seq.*; 28 L. T. Rep. N. S. 513.

In the recent case of *The Constitution* (*ante* p. 219) it was stated that the carriage of goods was not for freight, but under a special Act of the Legislature, empowering a vessel of war to be so employed in the service of the nation, but there is no such allegation here. This case is even stronger than that of *The Charkieh* (*ubi sup.*), because it is not the waiver of a right, but the contravention of the condition on which a privilege was granted. [Sir R. PHILLIMORE.—Art. 10. apparently contemplates the employment of the vessel as a merchant vessel to some extent, as it expressly permits the carriage of passengers' luggage, carriages, and horses.] Yes, but the enumeration of those particular articles make the case all the stronger against her when she carries other articles.

Dr. W. G. F. Phillimore on the same side.—The plaintiffs claim the ordinary common law and statute rights of subjects against the property and persons of those who injure them within the realm; to exempt the ship from this ordinary process, she must prove that she is within some special or general legal exemption. We are not now asking for process out of the Admiralty court; this court prior to the Judicature Acts was a Prerogative Court, and had special relations to the Crown, which might have affected the question; but we come to this court as a branch of the High Court of Justice, and claim by the process peculiar to this division an arrest of the *res*, our statutory remedy for a wrong committed against us in the body of a county. The statutes giving this remedy (3 & 4 Vict. c. 65, s. 6, and 24 Vict. c.

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10, a. 7) do not apply to vessels of war, because by international law, well recognised at the time the statutes were passed, they were exempt from civil process, and if exempt by international law, they were so by common law (Stephen's Blackstone, 4th ed. vol. 4, p. 282); but a vessel circumstanced as the *Parlement Belge* is is not so exempt by international law, and the sovereign of a constitutional country cannot *ipso motu* so construct international law as to violate or infringe upon the rights of his subjects at common law. The decision in *The Schooner Exchange v. McEadden* (7 Cranch, U. S. Supreme Court Rep. 116) is based on the distinction that that vessel was an "armed" vessel. The doctrine laid down in *The Charkieh* (L. Rep. 4 A. & E. 59; 28 L. T. Rep. N. S. 513), that the goods of a sovereign engaged in trade are not exempt from proceedings *in rem* is exactly in point. There is a difference recognised by the law of this country between vessels of war and other vessels in the public service:

*The Cybele*, 37 L. T. Rep. N. S. 774, note;

*The Helen*, 3 C. Rob. 224;

*The Bellona*, Edw. 63

If this vessel is not within the exemption allowed to vessels of war, is she exempt on the ground that the property of a sovereign *quâ* sovereign is free from process? In *Morgan v. Larivière* (L. Rep. 7 H. L. 423; 32 L. T. Rep. N. S. 41) the Lord Chancellor (Lord Cairns) says: "The court having a trust fund under its control might well proceed to administer that fund, even although a foreign Government might be interested in it, and might not be before the court or subject to the jurisdiction of the court." The constitutional power of the Crown to make treaties is limited to those at the termination of war, and is an incident of the right to declare war and make peace. Any other treaty interfering with private rights is *ultra vires* so far as it infringes upon them. There is no doubt that some treaties, i.e., those of extradition, require confirmation of Parliament before they become operative; and if those affecting the liberty of a subject, why not those affecting what is next in value to him, his property? The Convention, should it be decided that its words deprive a subject of his right of action, deprives him of a valuable right and a valuable property. Her Majesty has authority by Order in Council to allow to foreign ships certain privileges granted to British ships, as to measurement for dues; but, inasmuch as the granting of such privileges indirectly affected the rights and privileges of subjects, it was necessary to grant that authority to the Crown by statute, as also in cases of life salvage for foreign ships out of the jurisdiction of this country (25 & 26 Vict. c. 63, ss. 59, 60). Before a treaty could be made with the United States of America, it was necessary to get an Act of Parliament (22 Geo. 3, c. 46). [Sir R. Phillimore.—In that case authority was required to allow the Crown to pass with a portion of British territory.] Yes; but as a treaty at the end of war it would appear to come within the general prerogative of the Crown, and therefore that general prerogative is limited to initiating a treaty, but the treaty itself is only valid when confirmed. The fact that the Conventions as to international copyright have been authorised by Parliament shows that those conventions, unless authorised by the Legislature, would not have been recognised by the courts of law in this

country. So in the case of the fishing convention with France (31 & 32 Vict. c. 45, title, ss. 6, 66), the latter section is on a matter almost exactly similar to this Convention in one respect, viz., that under certain circumstances the fishing boats should be exempted from dues, an exemption purporting to be granted by Art. 6 of this convention to these packets. This grant of an exemption is not within the prerogative of the Crown at all. "The King cannot grant an exemption from the jurisdiction of any court if he does not erect another jurisdiction of the like nature, for that would be a failure of justice."

2 Rol. 281 c. 45;

Comyn's Dig. tit. Prerogative p. 443, D. 33.

A power to grant exemption by treaty cannot be put on a higher footing than a direct grant by the Crown, but the rule of law on that point is that "the King cannot grant to any that he shall not be impeached, and if he makes such grant it will be void" (Viner's Abridgment, tit. "Prerogative of the King," T. 6); and "if a man is indebted to me, and the King grants to him that I shall not have action against him, it is void;" (Ib. T. 7.) But even assuming the treaty itself not to be *ultra vires*, can the vessel claim an exemption from civil process under it? The meaning of Art. 6 is only that the vessel shall be free from public process, not from private suit; "seizure" is the ordinary word used in policies of insurance, and does not mean seizure by the officer of a court at the suit of an individual, but "seizure" by the Government in case of hostilities, actual or imminent. "Detention" and "embargo" are also well-understood expressions relating to the same state of affairs, and "arrêt de prince," an expression which, for want of an exact English equivalent, remains untranslated in the English version of the treaty, is defined by Oussy to be nearly the same thing as "embargo." "*L'arrêt de prince* ou par ordre de Puissance, autrement dit l'*embargo*, est l'obstacle qu'un souverain apporte au départ de tous ou de quelquesuns des navires qui se trouvent dans les ports de sa domination, sans distinguer s'ils appartiennent à ses sujets ou à des étrangers;" (Oussy, "Phases et Causes Célébres du Droit Maritime des Nations," vol. 1 L. 1, titre 2, s. 49, p. 120.) And again: "*L'arrêt de prince* peut-être exécuté en pleine mer par les vaisseaux de guerre du souverain qui l'a prononcé; l'arrestation, en pareil cas, d'un navire étranger n'est point une capture semblable à celle qui est faite par des bâtiments armés en course, en temps de guerre; elle n'est pas *hostile*, elle est uniquement comminatoire; mais elle peut, il faut le reconnaître, de même que l'*embargo* lui même pratiqué dans les ports conduire à des hostilités." (Ib. p. 121.) [Sir R. Phillimore.—The special expressions no doubt relate to a state of war, or a state bordering on it, but does that condition limit the general expression "by any authority whatever?"] The general expression can only be taken to mean generally all the causes individually mentioned afterwards, and others of a like nature. Treaties are not drawn with the precision of deeds; they must be interpreted with this consideration in mind, and therefore this treaty, if valid at all, must be considered only as granting such privileges, ceremonial and others, as the Crown can grant, and not as interfering with the private rights of subjects. The grant of the

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privilege is at all events a conditional grant, and the grantee cannot claim under an instrument at the same time that he has broken the condition of the instrument.

The *Solicitor-General* (Sir H. Giffard), the *Admiralty Advocate* (Dr. Deane, Q.C.), and *Bowen*, for the Crown.

The *Solicitor-General*.—It would probably be sufficient for the Crown to rest entirely in this case on general public grounds, but I will not rely on what is in some respects an artificial hypothesis. These vessels are not ordinary traders; they carry certain continental parcels, but not general merchandise. There is nothing to show that the provisions of Art. 10 have been infringed; the vessels are to be allowed to carry "small parcels, the weight of which shall be limited by mutual agreement between the two offices;" no such mutual agreement has yet been come to, and therefore, pending any regulation being made, the vessels are entitled to carry such parcels as are forwarded by the Continental Daily Parcels Express. Art. 6 grants in the most general way possible all the privileges of vessels of war. The article must be taken in its entirety, and the special provision must not be held to control the general ones. But even supposing there has been a breach of the provisions of Art. 10, the analogy that the plaintiffs would draw between such an infringement of an article of a treaty and of a condition in a contract is incorrect. Even between individuals, it is not every breach of a covenant that will vitiate a bargain. Suppose there has been a breach of the treaty of which the Government may complain, how can that affect the rights and liabilities of private individuals? The treaty itself is not void by reason of a breach; it might be voidable by proper notice on the part of the contracting powers; but it cannot, in default of a special provision which does not exist here, become *ipso facto* void. There can be no doubt, as a matter of constitutional law, that the treaty-making power is in the Crown; how far *ipso motu* depends on other considerations. How far a treaty made by the Crown, and without any further confirmation, binds a subject, may be a matter for discussion, but not as to the validity of the treaty itself. The remedy of the subject whose rights are invaded by a treaty may be against the Crown. The Extradition Treaties are not in point; it is necessary to get the sanction of Parliament for them, or else every person sought to be surrendered could take advantage of the Habeas Corpus Act. The position of the court is not altered by the Judicature Acts. The exemption of sovereigns and their property is not the creature of statute law, but is a principle of the common law. The statute of Anne (7 Anne, c. 12) is declaratory of the common law:

*Triquet and others v. Bath*, 1 Taunton 107.

The case of *The Charkieh* (*ubi sup.*) is not in point; the decision there was based on the ground that the Khedive of Egypt was not a sovereign prince, and that therefore his property was not privileged from process. In *The Exchange* (*ubi sup.*), p. 144, the distinction is clearly marked: "But in all respects different is the situation of a public armed ship. . . . The implied licence, therefore, under which such a vessel enters a friendly port may reasonably be construed, and it

seems to the court ought to be construed, as containing an exemption from the jurisdiction of the sovereign in whose territory she claims the rites of hospitality." There is no right of suit given *ab initio* against the public ships of a foreign country.

The *Admiralty Advocate* (Dr. Deane, Q.C.) on the same side.—The distinction which it is endeavoured to make between armed and unarmed public ships is illusory:

*The Prins Frederic*, 2 Dods, 451.

A yacht of the sovereign would be unarmed, but it could not be contended that on that account she was not entitled to be treated as a public vessel of war. Art. 6 expressly says that those ships "shall be vessels belonging to Government or freighted by order of Government." They must therefore be public vessels. *The Constitution* (*ubi sup.*) was not armed, but she was held to be a public vessel, and entitled to the immunities of such vessels. [Sir R. PHILLIMORE:—If the Government had power to make this Convention, I have no doubt on the matter. The question appears to me to be whether they had the power.] That is determined by the fundamental laws of the country, which in this country, as in most other monarchies, vest the treaty-making power in the sovereign (Halleck International Law, by Baker, vol. 1, p. 229). On grounds of public convenience the court will not allow the warrant to issue.

C. Bowen on the same side.—There is no precedent in the history of this or any other country for subjecting a vessel specially invited by the Crown into our ports to civil process. A treaty is not a contract, the conditions of which can be subjected to courts of law; the parties to it are beyond the reach of the law. The treaty-making power of the Crown is absolute. The provisions of a treaty, however, may or may not bind the subject; some do so *proprio vigore*, others require the sanction of Parliament; which treaties fall into which category can only be ascertained by examining each class of treaty. The language which is appropriate enough in discussions on municipal law is out of place in questions of international law. A treaty is not void, but at most voidable by reason of a breach:

1 Halleck International Law, 268;

1 Kent's Comm. 175.

Even in municipal law, where the condition of a patent is broken, a third party cannot take advantage of the breach until the patent itself is revoked by the Crown. It is, however, no doubt competent to the court to consider the stipulations of a treaty. But, as a principle of law, applying to the interpretation of Art. 6, acts of state determining the diplomatic status of foreign persons and things are binding on the courts of the country of that state; unless the central authority in the state can authoritatively say what that status is, it must remain wholly undetermined. The Judicature Acts have made no difference in this respect; they, like every other statute, must be read *Salvo jure regis*, and therefore, if it was competent to the Crown, before the statute, to make such regulations as this, exempting these vessels from process out of this court, it is still competent to it to do so. The limitations of the prerogative of the Crown, referred to in Viner's Abridgment (*ubi sup.*), relate only to rights of suit already



existing; i.e., rights between subjects. The same principle of common law which says that those who commit wrongs, within the jurisdiction, against others shall be subject to punishment says also, that ambassadors and public ships shall not be subject to punishment, and therefore the right of suit is not a common law right against all ships. It is evident that treaties conferring any diplomatic status upon aliens do not require to be confirmed by the Legislature, because the treaties themselves are of record: "All leagues and safe conducts are, or ought to be, of record; that is, they ought to be enrolled in the Chancery, to the end the subject may know who be in amity with the King, and who be not; who be enemies, and can have no action here; and who in league and may have action personal here" (4 Coke Inst. 126, ed. 1809, p. 152); and also that the Crown alone is the competent authority to make such treaties, for, "with regard to foreign concerns, the sovereign is the delegate or representative of his people," for otherwise "foreign potentates . . . might scruple to enter into any engagement that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation:" (Stephen's Blackstone, 7 ed. vol. 2, bk. 4, p. 1, ch. 6, p. 490.) No doubt in any country the municipal law may limit this sovereign or supreme executive power, but that has never been done in this country. There is no doubt that the Sovereign of Belgium is recognised as an independent sovereign prince. There can be no doubt as to the status of Belgium and its sovereign, and this recognition is an act of state (Wheaton Inter. Law by Lawrence, 2nd ed. part 1, ch. 2, p. 45), and therefore the court must take judicial notice of his status:

*The City of Berns in Switzerland v. The Bank of England* 9 Ves. 347, and note thereto as to the so-called Columbian Government;

*The Columbian Government v. Rothschild*, 1 Sim. 94;

*The United States of America v. Wagner*, L. Rep. 2 Ch. App. 582; 16 L. T. Rep. N. S. 86;

*Cherokee Nation v. State of Georgia*, 5 Peters (Amer.) Rep. p. 1.

Again, the recognition of the status of belligerents is an act of state:

Wheaton's International Law, by Lawrence, 2 edit. pt. 1, ch. 2, p. 40.

The decisions of the Supreme Court of the United States in prize causes in the late civil war show that a declaration of the President is conclusive on the courts of law there, and also that the Queen's proclamation was an estoppel on British subjects. So also it has been always considered an act of state to decide what articles—*ancipitis usus*—are in time of war contraband. The Declaration of Paris was never submitted to Parliament, it is an act of state. So again a declaration of a blockade and licences to trade with an enemy are acts of state; the status of an ambassador which the Crown allows after receiving his letters of credit addressed to itself is another instance. So the treating of Belgian Government vessels as vessels of war are treated, is an act of state. But apart altogether from the treaty, as the immunity of an ambassador extends to those of his goods which pertain to his functions, so the immunity of a foreign sovereign extends to his goods, and, with regard to his

ships, cannot depend on the accident of their being armed or unarmed. The not carrying of cargo is not a condition precedent to the grant of the privilege, and in these matters there can be no waiver of a right. The privilege is the privilege of Government vessels:

*Briggs v. The Light Boats*, 11 Allen, Mass. Amer. Rep.

*Webster*, Q.C. in reply.—I do not know if the Crown in this case claims any right of reply over.

The *Solicitor-General* intimated to the court his intention of claiming the privilege of the Crown to reply over.

*Webster*, Q.C.—The Crown have no right to reply over in this case. The action is not against the Crown; the writ was served on the ship, and the action is against her and her owners. The Crown only intervenes, and should have done so by petition on protest. The Crown, not being a party to the suit, has no special right of reply. [Sir R. PHILLIMORE.—In cases such as these it has always been the practice of this court to allow the Crown to appear and be heard, and to give them all the rights exercised by the Crown in cases where they are parties.] It is the first time that a treaty unconfirmed by Parliament has infringed the liberty of a British subject. As between English subjects and foreign vessels the character of the ship depends on its being armed or not armed. It may be that no right of action exists against an unarmed ship of our own Government on account of different considerations, but the whole reading of the cases shows that the extraterritoriality is only accorded to foreign armed ships: (*The Eschwege*, *ubi sup.*) The case of *Briggs v. The Light Boats* (*ubi sup.*) was one of an American citizen suing the Government vessel of his own nationality, and is therefore not in point. In *The Eschwege* (p. 141) it is pointed out by the court that by treaty the ports of all civilised countries are open to the private ships of other countries when driven in by distress; but could it be contended that it was competent to the Government to deprive its subjects of right of action against ships so driven in? And again, the distinction between the private ships or property of a foreign sovereign and the public armed vessels of the nation of which he is the sovereign is drawn (p. 145), in referring to the case of the Spanish war ships arrested by a subject of the States General, for a debt alleged to be due from the King of Spain, and which ships were released either by judicial sentence or authority of the State. [Sir R. PHILLIMORE.—Might not there be a case of a vessel used for purposes of war and yet not armed?] Certainly; but, if she was regularly commissioned as a vessel of war, she would be to all intents and purposes a portion of the military marine of her country, and therefore, by the reasoning of all the cases on that point, as exempt from jurisdiction as if she were armed. But the vessel is not used for war purposes, and is not commissioned as a vessel of war. The mere carrying of a pennon, even by licence of its own Government, is not sufficient to clothe a vessel with the character of a man-of-war. The *Charkish* (*ubi sup.*) carried the flag and pennant, but was not exempt. It is contended that the Crown has power to make treaties, and it depends on their provisions whether they require confirmation or not; even if that is so, it is plain that the treaty or convention is one of those which do require confirmation. On the face of it is declared



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to be a "sequel" to the General Postal Treaty concluded at Berne, and that treaty had to be confirmed by Parliament (38 Vict. c. 22). That statute declares that the Treaty of Berne could not "be carried into effect except by the authority of Parliament," and this Convention contains provisions similar to those of the Treaty of Berne.

The *Solicitor-General* (Sir H. Giffard) replied over on behalf of the Crown.—It is no doubt competent to the courts of law in this country to consider whether the acts of the Crown are *ultra vires* or not. But there is nothing done here beyond the rights of the Crown. The fact of a vessel being armed is only one of several *indicia* of her public character :

Wheaton Internat. Law, by Lawrence, 2nd edit. p. 198.

In commenting on that case of *The Exchange* (*ubi sup.*) in the subsequent case of *The Santissima Trinidad* (7 Wheaton Amer. Rep. 283), Story, J.: all along draws the distinction between public and private vessels, not using the word "armed" as a necessary condition for the public vessel claiming exterritoriality. The trading by the *Parlement Belge* is not a private trading by the King of the Belgians for his own benefit, but part of the public national employment of the vessel for the benefit of the State. [Sir R. PHILLIMORE.—It is noticeable that the immunity purporting to be granted by the Convention is only an immunity in port, and not on the high seas.] On the high seas it would not be necessary; for a vessel carrying the flag and pennant of a public vessel would be notice to everyone that she was such a public vessel. The Crown has a right to remit port dues because they are originally a portion of the royal revenue, and can be granted to whom it will:

Chitty, Prerogative of the Crown, p. 174.

In none of the treaties to which reference has been made has there been any question of the common law rights of the subject. They conferred rights on certain persons, and therefore required to be incorporated formally in the statute law. Admitting that the Crown cannot grant to a person not to be sued, yet, if the Crown accepts a debtor to a subject as ambassador, the right to sue him for the debt is suspended so long as he remains ambassador. By parity of reasoning the same thing applies to ships. It is a part of the law, independent of any act of state, that an ambassador cannot be sued, and it is part of the law that a public ship cannot be subjected to process. It is for the Crown to say who is or who is not an ambassador, and what is or is not a public ship. [Sir R. PHILLIMORE.—The Convention stipulates for the payment of a certain subsidy; how is the money for that payment obtained?] The money would be voted in the estimates like all other supplies, and so confirmed by Parliament. Moreover, the trading does not preclude the claim of a public character in this vessel, inasmuch as the licence to trade under the treaty is a portion of the pecuniary consideration granted to the Belgian Government for the employment of the ship.

*Our. adv. vult.*

March 15.—Sir R. PHILLIMORE.—In this case questions of international and public law of the gravest importance have been raised. The court has to acknowledge the great assistance which it has derived from the learned and able arguments of counsel, especially valuable in a case which is, I believe, *primæ impressionis*, and which must be

decided upon general principles and analogies of law rather than upon any direct precedent. On the 16th Feb. 1878 the owners of the steam-tug *Daring* served a writ on board the steamship *Parlement Belge* against the owners of that vessel and her freight, in which they claimed the sum of £5000 for damage arising out of a collision which occurred between that vessel and the steam tug *Daring* on the 14th Feb. 1878 off Dover. The defendants put in no appearance, and took no steps whatever; the plaintiffs have proceeded by default, and taken the usual and proper course, and the case being ripe for judgment, the plaintiffs, on the 25th Jan. in this year, gave notice that, on the 4th Feb., the court would be moved to direct judgment with costs to be entered for them in respect of the damages so claimed, and that the usual order might be made of reference to the registrar and merchants, and that a warrant should issue—the action being *in rem*—against the steamship *Parlement Belge*. Having looked at the papers and pleadings, I perceived that the arrest of the ship and the judgment which were prayed might affect the prerogative of the Crown and its relations with a foreign State; I therefore directed that notice should be given to the law officers in order that they might have an opportunity, if they thought fit, of showing cause against the prayer of the plaintiffs. The Attorney-General has appeared and filed what is called an information and protest, which I will now read. [His Lordship here read the information and protest set out above and proceeded:] I have had the advantage of an argument from the Solicitor-General on the whole case. The protest of the Attorney-General raises a question of constitutional law, and a question of international law, both of great moment, and which I will endeavour to consider separately. By the protest it is in substance contended that the steamship *Parlement Belge* is not answerable to the process of this court, (1) On the ground that she is the property of the King of the Belgians, and at the time of the collision was controlled and employed by him; (2) That Her Majesty the Queen, by a convention with the King of the Belgians, has placed this packet boat in the category of a public ship of war. I will endeavour to deal with these questions in the order in which I have stated them, though perhaps they cannot be kept quite distinct. It is expedient to make a preliminary observation which is important in its bearing upon one, if not both, of the questions. The collision in this case took place in Dover Harbour; that is, within the body of a county, and therefore previously to the year 1840 the court would have had no jurisdiction in the matter; but by the joint operation of the statutes 3 & 4 Vict. c. 65, and 24 Vict. c. 10, the court was given a jurisdiction both *in rem* and *in personam* in cases where the collision happened in a harbour, as well as when upon the high seas. It follows, therefore, that the plaintiffs in this suit have a statutable right of action against the *Parlement Belge*, unless that vessel be of that privileged class which are not amenable to a court of law. The burden of proving that she does belong to this class lies upon the defendants, more especially as it appears from the papers before me that she was engaged in carrying on commerce, howsoever limited in its nature, at the time of the collision. I turn now to the consideration of the first ques-

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tion raised in the protest. I had occasion to consider most, if not all, of the authorities upon the point in the case of *The Charkieh* (L. Rep. 4 Ad. & Ecc. 59; 28 L. T. Rep. N. S. 513). I desire to state at once that, in my opinion, every public ship of war belonging to a State at amity with Her Majesty is exempt from the jurisdiction of the court. This proposition I maintained in the recent case of *The Constitution* (ante p. 219) and it has been laid down in a variety of cases adjudicated both in our courts and in those of the United States of North America. They will be found collected in *The Charkieh* (*ubi sup.*), and in the case decided in the Supreme Court of Massachusetts (*Briggs and another v. Light Boats*, 11 Allen (Mass.) Rep. 180), and it may be considered, notwithstanding certain dicta in the case of *The Prince Frederic* (2 Dod. 464), to be firmly rooted in the jurisprudence of both countries. It has been contended on the part of the Crown, not that the *Parlement Belge* is a ship of war in the general international sense of that word, but that she is a privileged mail packet the property of the Crown of Belgium, carrying the Royal pennon and officered by the commissioned officers of the Royal Belgian navy. On the other hand it must be taken that she is not a public armed ship constituting a part of the military force of her nation, nor is she a vessel, so to speak, of pleasure belonging to the Crown, and on that ground perhaps by the comity of nations in the class of privileged ships. In the case of the *Charkieh* (*ubi sup.*) I said: "I am not prepared to deny that the private vessel—for instance, the yacht of the Sultan—though equipped for pleasure, and not for war, would be entitled by international comity operating, at least so long as it is not withdrawn by the State conceding it, as international law, to the same immunity as a ship of war; though dicta to the contrary may be found in the writings of some jurists." Since that time I have not found reason to alter the opinion I then expressed. The especial duty—to borrow the terms of the treaty to which I will presently advert—is the conveyance of the mails. But, though such be the especial duty of the packet, it is by no means its sole occupation. Mr. Gregory has made an affidavit in the following words. [His Lordship here read the affidavit set out above and continued:] The *Parlement Belge*, it would appear, is neither a public ship of war nor a private vessel of pleasure belonging to the Crown of Belgium. Nor is she a public ship sent by the Government on an exploring expedition, like those employed in the Arctic expeditions, all of which ships—belonging to England—were, it should be observed, regularly commissioned as ships of war. She is a packet, conveying certain mails, and carrying on a considerable commerce, officered, as I have said, by Belgian officers, and flying the Belgian pennon. Can such a vessel so employed be entitled to the privileges of a public ship of war? The analogy between the immunity of the ambassador and the ship of war is obvious. It has been holden by high authorities, both in this and other countries, that an ambassador may lose his privileges by engaging in commerce. Indeed, Lord Campbell was of opinion that in such a case "all his goods unconnected with his diplomatic functions may be arrested to force him to appear, and may afterwards, while he continues ambassador, be taken in execution on the judgment."

(*The Magdalena Steam Navigation Company v. Martin*, 2 E. & E. 94, 114, cited in *The Charkieh*, *ubi sup.*) "A distinction," says Story, J., "has been often taken by writers on public law as to the exemption of certain things from all private claims; as, for example, things devoted to sacred, religious, and public purposes, things *extra commercium et quorum non est commercium*. That distinction might well apply to property like public ships of war, held by the sovereign *jure coronæ*, and not be applicable to the common property of the sovereign of a commercial character, or engaged in the common business of commerce." (*United States v. Wilder*, 3 Sumner (U.S.) Rep. 308, also cited in *The Charkieh*, *ubi sup.*) In the *Santissima Trinidad* (7 Wheaton (Amer.) Reps. 283), Story, J. said: "The commission, therefore, of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable. The property"—it was a prize case—"must be taken to be duly acquired, and cannot be controverted. This has been the settled practice between nations, and it is a rule founded in public convenience and policy, and cannot be broken in upon, without endangering the peace and repose, as well of neutral as of belligerent sovereigns. The commission in the present case is not expressed in the most unequivocal terms; but its fair purport and interpretation must be deemed to apply to a public ship of the Government." Looking to the character of the suit, and the other passages in the judgment, it seems to me clear that by the expression "public ship of the Government," he meant a ship of war, and not any vessel employed by the Government. But even if the term could be treated as more comprehensive, and as including public ships such as I have referred to, sent by the Government on exploring expeditions, it would not include vessels engaged in commerce, and whose owner is, to use the expression of Bynkershoek (*De Leg. Mercatore*, ed. 1730 vol. 6 p. 500) "*strenue mercatorem agens*." Upon the whole, I am of opinion that neither upon principle, precedent, nor analogy of general international law, should I be warranted in considering the *Parlement Belge* as belonging to the category of public vessels which are exempt from process of law and all private claims. I now approach the consideration of the second question, namely, whether the Convention between Her Majesty and the King of the Belgians, ratified 24th March 1876, does, so far as this country is concerned, place the *Parlement Belge* while in British ports in the category of a public ship of war and exempt from the process of an English court. I may observe in passing, that the very fact that this packet is in terms given by the Convention the privileges of a ship of war in British ports, and there only, tends to show that she had not such privileges by general international law, and that a convention was deemed necessary to confer them. It is admitted that this Convention has not been confirmed by any statute, but it has been contended on the part of the Crown, both that it was competent to Her Majesty to make the Convention, and also to put its provisions into operation without the confirmation of them by Parliament. The plaintiffs admit the former, but deny the latter of these propositions. The power of the Crown to make treaties with foreign states is indisputable. Passing by other authorities, I will cite the language

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of Blackstone, who was not disinclined to maintain the prerogative of the Crown: "It is," he says, "also the King's prerogative to make treaties, leagues, and alliances, with foreign states and princes, for it is by the laws of nations essential to the goodness of a league that it is made by the sovereign power, and that it is binding upon the whole community; and in England the sovereign power, *quoad hoc*, is vested in the person of the King. Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist, or annul; and yet lest this plenitude of authority should be abused to the detriment of the public, the constitution (as was treated before) hath here interposed a check by the means of parliamentary impeachment for the punishment of such ministers as from criminal motives advise or conclude any treaty which shall afterwards be judged to derogate from the honour and interest of the nation:" (Blackstone's Comm., ed. 1844, vol. 1, ch. 8, s. 2, p. 256.) The learned writer, however, was certainly aware that this general proposition must receive some modification and restraint besides that which he has mentioned. Blackstone must have known very well that there was a class of treaties, the provisions of which were inoperative without the confirmation of the Legislature; while there were others which operated without such confirmation. The strongest instance of the latter, perhaps, which could be cited, is the Declaration of Paris in 1856, by which the Crown, in the exercise of its prerogative, deprived this country of belligerent rights which very high authorities in the state and in the law had considered to be of vital importance to it. But this Declaration did not affect the private rights of the subject, and the question before me is whether this treaty does affect private rights, and therefore require the sanction of the Legislature? The authority of Chancellor Kent was relied on. That learned writer observes that, "Treaties of peace, when made by the competent power, are obligatory upon the whole nation. If the treaty requires the payment of money to carry it into effect and the money cannot be raised but by an Act of the Legislature, the treaty is morally obligatory upon the Legislature to pass the law, and to refuse it would be a breach of public faith:" (Kent's Comm. ed. 12, 1873, vol. 1, p. 166.) And he further observes, "There can be no doubt that the power competent to bind the nation by treaty may alienate the public domain and property by treaty:" (Ib. 167.) He refers to the case of *The United States v. The Schooner Peggy* (1 Cranch. Amer. 103), decided by the Supreme American Court. That was a case of prize capture, in which the vessel had been condemned, but subsequently a treaty had been made between France and the United States, by the terms of which the prize among others was restored to its original owners. The Court of Appeal in that case held the treaty to be binding upon it, and indeed said: "That where a treaty is the law of the land and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an Act of Congress:" (Ib. 110.) But the sentence in the case was founded upon the power of the President with the consent of the Senate to make a treaty affecting the rights of a captor in time of war, and the judgment was given upon that point. The Court said: "It is true that in mere private

causes between individuals a court will and ought to struggle hard against a construction which will by a retrospective operation affect the rights of parties; but in great national concerns, where individual rights acquired by war are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens it is not for the court, but for the Government, to consider whether it be a case proper for compensation:" (Ib.) The whole sentence is founded upon the right of the American executive with respect to "prize of war." The like question arose in England in the famous case of the *Elisee*. In that case Lord Stowell said: "Prize is altogether a creature of the Crown, and no man has or can have any interest but what he takes as the mere gift of the Crown. Beyond the extent of that gift he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the Crown. The acquisitions of war belong to the Crown; and the disposal of those acquisitions may be of the utmost importance for the purposes of both war and peace:" (*The Elisee*, 5 C. Rob. 181). Brougham, L.C., in the case of the booty captured by the army of the Deccan, referred to the *Elisee* as undoubted law, observing that it was therein determined, "that when the Crown saw fit to restore the capture, the captors who had run the risk and suffered the loss, who had moreover borne the charge of bringing the prize into port, and the further costs of proceedings in the Admiralty to adjudication, and had even undergone additional expenses in contesting their claim upon appeal, were altogether without a remedy." Lord Brougham goes on to say: "The title of a party claiming prize must needs in all cases be the act of the Crown by which the royal pleasure to grant the prize shall have been signified to the subject. Whether, where that act has once been completed, and it distinctly appears that the Crown was minded to part with the property finally and irrevocably; whether, even in that case, the same paramount and transcendent power of the Crown might not enure to the effect of preserving to His Majesty the right of modifying or altogether revoking the grant, is a question which has never yet arisen, and which, when it does arise, will be found never to have been determined in the negative. But this, at all events, is clear, that when the Crown, by an act of grace and bounty, parts, for certain purposes and subject to certain modifications, with the property in prize, it by that act plainly signifies its intention that the prize shall continue subject to the power of the Crown as it was before the act being done:" (*Alexander v. Duke of Wellington*, 2 Russ. & Myl. 54.) The judgment in the case of *The Schooner Peggy* (*ubi sup.*) does not establish the proposition that the Crown can dispose of the rights of a subject without the sanction of Parliament. A treaty may contain provisions which are *ultra vires* of the prerogative, in part valid and operative, and in part invalid and inoperative. A treaty is, indeed, not necessarily void by reason of the infraction of some of its conditions, though it may be voidable; and the validity of it cannot be challenged, speaking generally, by any private person. But a court

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of justice, when called upon to execute the provisions of a treaty, may, at the instance of the subject who is affected by them, examine whether those provisions are such as to be capable of legal enforcement, just as it may inquire into the validity of letters patent granted by the Crown (*Long v. Bishop of Capetown*, 1 Moore P. C. N. S., 411), and also into the validity of an Order in Council duly passed and gazetted: (*Attorney-General v. Bishop of Manchester*, L. Rep. 3 Eq. 346.) There have been, not to go further back than during the reign of her present Majesty, various treaties confirmed by Parliament; and by statute, power has been given to the Crown by Order in Council to do certain things which it must be presumed without such order it could not have done; for instance, 25 & 26 Vict. c. 63 (A.D. 1862), empowers the Crown by Order in Council to make rules and regulations respecting collisions and salvage services relating to the ships of foreign states; 31 & 32 Vict. c. 45 (A.D. 1868), relating to a convention between France and England as to sea fisheries, and reciting that doubts had arisen whether part of the convention relating to exemption from dues had been confirmed by Parliament, proceeded to give such confirmation; 35 & 36 Vict. c. 45 (A.D. 1872), confirms the Treaty of Washington between the United States and England; and, as will presently be seen, the very treaty of which this Belgian treaty is a sequel was confirmed by statute. Some of these treaties confirmed relate to the payment of, and exemption from, dues in harbours. One more, and not an insignificant one, will presently be added; I mention this merely as illustrative of the position that certain treaties do require parliamentary confirmation. I now turn to the provisions of the treaty which have been relied upon in this case. In the preamble it is said that, "Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and His Majesty the King of the Belgians, being desirous of strengthening the friendly relations which unite the two countries, and wishing to regulate by special arrangements (forming a sequel to the general Postal Treaty concluded at Berne on the 9th Oct. 1874) the postal regulations between their respective offices, have named as their plenipotentiaries for this purpose" certain distinguished persons whose names are then mentioned. The Treaty of Berne referred to, and to which this Belgian Treaty of 1876 is "to form a sequel," being concluded in the year 1874, was specially confirmed by a statute passed in 1875 (38 & 39 Vict. c. 22), the preamble of which is as follows: "Whereas under the Post Office Duties Act, 1840 to 1871, divers powers are given to the Treasury of fixing by warrant the rates of British, foreign, and colonial postage: and whereas by a treaty made at Berne on the 9th Oct. 1874, and detailed regulations made under it, various stipulations and regulations have been made with respect to the duties on postage and other matters connected with the exchange by post with foreign countries of letters, post cards, books, newspapers, and other printed papers, patterns of merchandise, and legal and commercial documents," and it goes on as follows: and whereas such treaty and regulations cannot be carried into effect except by the authority of Parliament, and it is expedient to give such authority, and to comprise in one Act

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the powers of the Treasury in relation to fixing the rates of postage, be it therefore enacted," &c. The statute then proceeds to enact a variety of provisions relating to the duties on postage and the post-office, and provides (sect. 2) for future arrangements with foreign countries with respect to the conveyance of postal packets and payments by the Treasury. This clause may perhaps suffice to render legally operative the clauses in the subsequent Belgian treaty relating to these particular matters. I find in that treaty a variety of enactments relating to the conveyance of mails between Great Britain and Belgium. By Article 10, it is provided that [His Lordship read Article 10 of the treaty (*ubi sup.*) and proceeded:] It is the 6th Article however, which has the most important bearing on this case, and which has been chiefly discussed at the bar; it is as follows [His Lordship read the article (*ubi sup.*), and proceeded:] With respect to the interpretation of the last clause of this article, it was agreed by counsel—and I am of the same opinion—that the words "seizure," "detention," "embargo," or *arrêt de prince*, related to the belligerent rights of the Crown, including the *droit d'angarie*. With respect to the other clauses of the article, I think it cannot be denied that they purport and intend to place this Belgian packet in the category of a ship of war while in a British port. It is remarkable that this privilege—by the words of the article "Privilege"—is not extended to these packets in territorial waters, nor—so far as even British ships are concerned—to the high seas, and does not give them when on the high seas immunity from actions for salvage and collision happening out of a port, and of course the treaty cannot constitute these packets ships of war in their relation to foreign states. If the Crown had power without the authority of Parliament by this treaty to order that the *Parlement Belge* should be entitled to all the privileges of a ship of war, then the warrant which is prayed for against her as a wrong-doer on account of the collision cannot issue, and the right of the subject, but for this order unquestionable, to recover damages for the injuries done to him by her is extinguished. This is a use of the treaty-making prerogative of the Crown which I believe to be without precedent, and in principle contrary to the laws of the constitution. Let me consider to what consequences it leads. If the Crown, without the authority of Parliament, may, by process of diplomacy, shelter a foreigner from the action of one of Her Majesty's subjects who has suffered injury at his hands, I do not see why it might not also give a like privilege of immunity to a number of foreign merchant vessels. The law of this country has indeed incorporated those portions of international law which give immunity and privileges to foreign ships of war and foreign ambassadors, but I do not think that it has therefore given the Crown authority to clothe with this immunity foreign vessels which are really not vessels of war, or foreign persons who are not really ambassadors. Let me say one word more in conclusion. Mr. Bowen in his very able speech dwelt forcibly upon the wrong which would be done to this packet if, being invited to enter the ports of this country with the privileges of a ship of war, she should find them denied to her. I acknowledge the hardship, but the remedy, in my opinion, is not to be found in depriving the British subject with-

out his consent direct or implied of his right of action against a wrong-doer, but by the agency of diplomacy and proper measures of compensation and arrangement between the Governments of Great Britain and Belgium. I must allow the warrant of arrest to issue.

On the application of *Gorst, Q.C.*, for the Crown, a stay of proceedings was granted for a fortnight, in case the Crown decided to appeal, and the question of costs was directed to stand over.

Solicitors for the plaintiff, *Lowless and Co.*

Solicitors for the Treasury, *Hare and Fell*, agents.

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT LINCOLN'S-INN.

Wednesday, March 12.

(Before JESSEL, M.R., BAGGALLAY and BRAMWELL, L.JJ.)

Re ALISON; JOHNSON v. MOUNSEY. (a)

*Statute of Limitations* (3 & 4 Will. 4, c. 27), sects. 25, 28—*Mortgage in form of trust for sale*—*Express trust of surplus purchase-moneys*—*Second mortgage by assignment of surplus purchase-moneys*.

In 1827 S. conveyed certain premises to A. by way of security for 3000*l.* and interest in trust to sell, and out of the purchase-moneys to pay costs, principal, interest, and pay the surplus to S. In 1833 S. conveyed the same hereditaments to M., and assigned to her the surplus purchase-moneys arising from any sale by A. by way of mortgage to secure 300*l.* and interest. A. took possession in 1849, and held it till he died in 1874. In 1876 the trustees of his will sold under the trusts of the mortgage deed. The purchase-money being more than sufficient to pay A.'s principal, interest, and costs, the representatives of M. claimed to have their debt paid out of the surplus.

Held, that the equity of redemption had been barred by the lapse of time, and that A., the first mortgagee, had become absolute owner. No dealings by his devisees or executors could alter the character of that estate, and the representatives of M., the second mortgagee, were not entitled to the surplus.

THIS was an appeal from a decision of Malins, V.C. (reported *ante*, p. 93). The facts were shortly as follows: In 1827 R. Alison advanced 3000*l.* on the security of a mortgage of property at Liverpool. The mortgage was in the form of a conveyance to the mortgagee on trust to sell the property, and out of the proceeds to repay himself, and to pay the residue to the mortgagors and their heirs. The mortgagors made a second mortgage of 500*l.* to E. Mills. The interest fell into arrear, and in 1849 Alison took possession. He died in 1873, and the trustees of his will continued in possession until 1876, when they agreed to sell the mortgaged property to the Corporation of Liverpool for 5460*l.*, and by a deed of the 26th Sept. 1876, purporting to be made in pursuance of the powers of the mortgage deed, the trustees

conveyed the property to the corporation. The purchase-money was more than enough to satisfy the amount which was due on Alison's mortgage, and an action having been brought to administer Alison's estate, the second mortgagee and the representatives of the mortgagors claimed the surplus, on the ground that the mortgage deed created a trust which the conveyance recognised as still in existence. Alison's trustees claimed the surplus on the ground that the mortgagors and their assigns were barred by the possession of the mortgagee for twenty-six years. Malins, V.C. held that the claim of the second mortgagee must be admitted, founding his decision on the form of the conveyance to the purchaser, and upon some expressions in the judgment of James, L.J. in *Locking v. Parker* (27 L. T. Rep. N. S. 635; L. Rep. 8 Ch. App. 30), which, he considered, showed that, though the right of the mortgagor to the mortgaged estate had been barred under the Statute of Limitations, and the first mortgagee had become owner in fee simple before his death, yet there was an express trust of the surplus proceeds of sale within the meaning of sect. 25 of the Act. The *cestuis que trust* under the will of the first mortgagee appealed.

Glassey, Q.C. Snow, and Oswald, for the appellants, cited,

*Locking v. Parker* (*ubi sup.*);

*Lucas v. Dennison*, 2 L. T. Rep. N. S. 186; 13 Sim. 584;

*Batchelor v. Middleton*, 6 Hare, 75;

*Richardson v. Youngs*, 25 L. T. Rep. N. S. 230; L. Rep. 10 Eq. 275; 6 Ch. 478.

Higgins, Q.C. and P. H. Lawrence, for the second mortgagee, contended that the trust for sale was an express trust within sect. 25 of the Statute of Limitations, and that, consequently, the statute did not bar the rights of the mortgagors and persons claiming through them. Further, that there had been an election to sell under the trust for sale. They referred to

*Kirkwood v. Thompson*, 12 L. T. Rep. N. S. 446; 2 H. & M. 392, 400;

*Anon. Madd.* 10;

*Schweitzer v. Mayhew*, 31 Beav. 37;

*Jenkins v. Rowe*, 18 L. T. Rep. N. S. 204; 5 De G. & Sm. 107;

*Sampson v. Pattison*, 1 Hare, 533;

*Re Underwood*, 30 L. T. Rep. N. S. 90; 3 K. & J. 745;

*Brocklehurst v. Jessop*, 7 Sim. 438;

*Stansfield v. Hobson*, 20 L. T. Rep. 106, 301; 16 Beav. 189, 236;

*Adams v. Angell*, 36 L. T. Rep. N. S. 334; L. Rep. 5 Ch. Div. 634.

Bristowe, Q.C. and Warmingt on, for the executors of the first mortgagee.

JESSEL, M.R.—This is an appeal from a decision of Malins, V.C., and it has been argued in a very extraordinary way. The Vice-Chancellor has stated his view of the law, and, for reasons which he gave, has treated this case as an exception from the general rules. Counsel, in supporting the judgment of the learned judge in the court below, have not only thrown over his reasons for the exception, but have argued entirely against his view of the law. In other words they ask us to support the decision upon the ground that the whole of the judgment, with the exception of the last few lines, is entirely erroneous. No doubt it is within the province of counsel to take such a course if they think fit, and I must assume that no other course was reasonably open to them, or

(a) Reported by E. S. BOCKE, Esq., Barrister-at-Law.

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that they would have preferred to support the judgment of the court below for the reasons which the Vice-Chancellor gave. I think the law, as laid down by the Vice-Chancellor as being applicable to this case, was entirely right so far as it has been argued against, and I do not know that I could state it better than he has done. The single point where I have the misfortune of differing from him is in the reason he gave for the exception in this case, as to which I have not heard a single word of argument upon the present occasion, and therefore I must assume that counsel for the respondents thought that point wholly untenable. In this case there was, what is by no means an uncommon form of mortgage now, and what was at the beginning of this century a most common form of mortgage, a conveyance reciting the loan and the intended security; a grant or release to the mortgagee of the land in fee upon trust, when he thought fit, to sell, and a declaration of the trusts of the money, with a further declaration that he might enter if he liked before and take the rent and apply it in keeping down the interest. Now the question which has been argued is whether the Statute of Limitations applies to such a case as this; and it has been argued in utter defiance of the fact that the exact point has already been decided by the Court of Appeal, in the case of *Locking v. Parker*, and that the law is exactly as the Vice-Chancellor laid it down. He laid down the law in terms which so fully express my view that I will read them as part of my own judgment. The Vice-Chancellor said, "I am fully aware of those cases"—referring to some of the cases mentioned—"and I entirely adhere to them, which decide that where the mortgagee has been in possession for more than twenty years, if, after the expiration of the twenty years, he resorts to his power of sale—which is very convenient because, for instance, if he has been in possession twenty-one or twenty-two years without an acknowledgment by the mortgagor, and makes his title by virtue of his ownership, he has to prove what is very difficult to prove, namely, a negative that there never has been any acknowledgment given to the mortgagor—this title is a very difficult one to make out. If, on the other hand, time having expired, he resorts to his power of sale, then, whatever may be the rights between mortgagor and mortgagee, he gets a good title, and one which cannot be questioned. In this case the mortgagee, having been in possession for twenty-seven years, might have said, 'I am owner.' This was a mortgage in 1827, the mortgagee entered into possession in 1849; he has been there ever since; he has never, in any way, recognised the title of the mortgagor. Then he goes on to say that the course adopted was this: 'They,' that is the trustees of the mortgagee, 'had recourse to this trust for sale. As I have said it is not an ordinary mortgage deed, but they had recourse to this trust for sale. Now what is it? The deed of 1827 conveys the property to Mr. Alison to secure his debt and interest, and upon trust for sale—that is, the trust which the authorities show the mortgagor could not have enforced. It is a mere mortgage.' Now I have not a word to say to that. What does it bring us to? It brings us to this, that in 1874 Mr. Alison was the owner in fee simple of the mortgaged estate. He devised it to trustees upon trust for sale, and they sold it. What pos-

sible right had the trustees for sale to alter the rights of the *cestuis que trust* under the will? They could not give away Mr. Alison's property to the prejudice of his legatees, if they had been so minded; and, their title being only as devisees of the fee simple estate, they could not have given away the surplus to the second mortgagee or to anybody else. They were absolute fee-simple owners, with a simple trust for sale, and whatever form of conveyance they chose to adopt, they could not, without committing a breach of trust, set up again an estate which had already been destroyed by the Statute of Limitations. The difference between the statute of William IV. as regards real property, and the statute of James I. as regards personal property, debts and liabilities, is well known. The statute of Will. IV., destroys the title, while the statute of James only bars the remedy, and therefore it is impossible for trustees to set up the old title which is non-existent. This point does not seem to have been brought to the attention of the Vice-Chancellor. He appears to have treated the case as if Mr. Alison had been himself alive, and had remained in possession and exercised the trusts for sale. The trustees would have been guilty of a breach of trust if they had done what the Vice-Chancellor thought they had done. It was said that the 25th section of the Statute of Limitations applied to the case, and that the 28th section did not apply. The exact point was decided in *Locking v. Parker*, by the Court of Appeal, reversing the decision of Lord Romilly, on the very simple ground that a document, similar to that in the present case in all substantial particulars, was a mortgage and nothing more, although it contained also a trust for sale. The following passage from the judgment of James, L.J. in that case, states plainly why he came to the conclusion to which he did come. His Lordship says: "The next point which has been argued before us is, whether the deed of Feb. 1829, standing by itself, is anything more than a mortgage deed with a power or trust for sale. I am of opinion that it is nothing more than a common mortgage security taken by way of a trust for sale, and taken, for very obvious reasons, in the name of a third person. Now if it be a mere mortgage security it appears to me to fall entirely within the language of the late Lord Chancellor, when Vice-Chancellor Wood, in *Kirkwood v. Thompson* (2 H. & M. 392). I see no difference between the case of an ordinary mortgage and that of a trust for sale. It is not such a trust as would enable the mortgagor to file a bill to have the property sold, because the discretion as to selling or not is in the mortgagee alone. On the other hand the mortgagee cannot file a bill to foreclose, but is limited to his remedy by sale. But these distinctions make no substantial difference in his position, which is that of mortgagee. If I may be permitted to say so, I entirely concur not only in those words, but in the spirit of those words, that it is not for a court of equity to be making distinctions between forms, instead of attending to the real substance and essence of the transaction. Whatever form the matter took, I am opinion that this was wholly a mortgage transaction." If I may say so I entirely and cordially concur in those observations. The deed here was a mortgage, and was intended to be a mortgage and was nothing more.

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It differs slightly in form from an ordinary deed of the kind, but the trust is not one enforceable by the mortgagor, and is, therefore, not an express trust within sect. 25 of the Statute of Limitations. The result therefore is that the 28th section of the statute applies; that Mr. Alison had a clear fee simple at the time of his death, and that nothing that his trustees did, or could do, could give any title to the second mortgagee, or to any person claiming under the mortgagor. Consequently the whole proceeds of this sale (derived under what form of conveyance they choose to adopt, is perfectly immaterial to my mind) belong to the testator's estate. The appeal must be allowed, and of course the costs will follow the event.

BAGGALLAY, L.J.—I am of the same opinion, and I have very little to add to what the Master of the Rolls has said. The Vice-Chancellor entirely recognised the law to be as it has just been stated by his lordship, but he founded his decision on certain passages which he found in the judgment of James, L.J. in *Locking v. Parker*, to which reference has been made. The Vice-Chancellor recognised the law as laid down to this extent, that if the trustees had sold by virtue of their ownership, and not professing to exercise the trust for sale made by the original deed, in that case, they could have retained the whole purchase-money, without there being any right to claim any portion of it on the part of the second mortgagee. But the Vice-Chancellor did not advert to the distinction between that case and the present, viz., that in the case of *Locking v. Parker* the power of sale had been exercised before the period of twenty years had elapsed, and therefore before the time had arrived when the right of the mortgagor was barred. What James, L.J. said was this:—"When the mortgaged premises have been sold there is always an express trust to account for the surplus money to the mortgagor. If there had been any allegation in this bill, or any evidence that there was any surplus of the sale moneys, the bill might have been sustained for an account of those surplus moneys. But that is not the frame and intention of the bill." But, dicta and observations of this kind made by a judge in the course of a judgment, must be read with reference to the particular circumstances of the case before him at the time. In that case, had there been any surplus moneys after satisfying the principal money and interest due to the first mortgagees, the trust having arisen before the estate was barred, they would probably have had to account for any surplus money, and therefore the distinction between that case and the present is very great.

BRAMWELL, L.J.—I am of the same opinion.

Solicitors for the appellants, *Crook and Smith*, agents for *W. K. Greenway*, Liverpool.

Solicitors for the trustees of B. Alison's will, *T. H. Lydall*, agent for *Martin*, Liverpool.

Solicitors for the second mortgagees' representatives, *Johnson and Sons*.

Tuesday, Feb. 4.

(Before JESSEL, M.R. and JAMES and BRAMWELL, L.JJ.)

LOWE v. LOWE. (a)

*Practice*—Time for appealing—Finding of facts—Interlocutory order—Action in Chancery Division—Trial by judge without a jury—Rules of Court 1875, Order XXXIX., r. 1a; Order LVIII., r. 15.

In an action in the Chancery Division, tried by a judge without a jury, an appeal may be presented, at any time within a year, from the judge's finding of fact as well as from the judgment on the whole case, unless definite issues of fact have been settled at the commencement of the trial.

But, if definite issues of fact are so settled, the finding of fact, whether delivered separately, or as part of the judgment on the whole case, is an interlocutory order, from which an appeal must be brought within twenty-one days.

*Krehl v. Burrell* (39 L. T. Rep. N. S. 461; L. Rep. 10 Ch. Div. 420) explained.

This was an appeal from a decision of Bacon, V.C.

The plaintiff in his statement of claim alleged that the defendant had entered into a contract for the purchase of certain lands as agent for him, and claimed a declaration that the defendant was a trustee of the land for him.

The action was tried before the Vice-Chancellor on the 19th, 20th, and 21st Feb. 1878.

No definite issues of fact for trial were settled before the commencement of the trial, nor was any arrangement made at the commencement of the trial that the issue of fact should be tried separately.

The Vice-Chancellor began his judgment in these words, "I quite agree that the case is now reduced to a mere question of fact," and, after discussing the evidence, held that the alleged agency had not been proved, and accordingly gave judgment for the defendant.

The judgment, as drawn up by the registrar, was dated the 21st Feb. 1878, and was in this form: "This action coming on for trial on the 19th and 20th Feb. 1878, and this day before this court, in the presence of counsel, &c., and upon reading the exhibits, &c., being letters produced to the defendant on his examination taken orally on the 20th Feb. 1878, and upon hearing the evidence of the defendant upon such examination, and the evidence of, &c., upon their respective examinations taken orally before this court on the said 20th Feb. 1878, &c., this Court doth order that this action do stand dismissed, &c."

On the 27th April 1878 the plaintiff gave notice of appeal from this order.

Sir Henry Jackson, Q.C. and Russell Roberts for the appellant.

Kay, Q.C. and Cecil Russell, for the respondent, raised the preliminary objection that the appeal was too late.—The finding of the judge on the facts is an interlocutory order, from which an appeal must be brought within twenty-one days:

*Krehl v. Burrell* (ubi sup.);

Rules of Court 1875, Order LVIII., r. 15; Order XXXIX., r. 1a.

It is true that in *Krehl v. Burrell* the finding on the facts was delivered on a different day from the judgment on the whole case, but Thesiger, L.J., in

(a) Reported by H. PHAT, Esq., Barrister-at-Law.



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delivering the written judgment of the Court of Appeal, said (39 L. T. Rep. N. S., at p. 465): "We by no means say that, even if the verdict and judgment in another case were to follow one another without any interval of time, that fact would make any difference in the treatment by us of the case, provided only the judge clearly takes upon himself the trial of specific questions of fact, and finds his verdict upon them as a matter separate from the judgment which he gives upon that verdict?" The words at the beginning of the Vice-Chancellor's judgment in the present case, "I quite agree that the case is now reduced to a mere question of fact," show that the judge took upon himself the trial of specific questions of fact. [JAMES, L.J.—That is not the meaning of the passage you have read from the judgment in *Krehi v. Burrell*; that passage refers to a case where, as was done in that case, the judge at the commencement of the trial settles definite issues of fact for trial, and not to a case where the judge begins his judgment by saying that the question in the case is a mere question of fact. JESSAL, M.R.—My practice is always to get counsel to agree at the beginning of the trial what are the issues of fact to be tried. For instance, in a patent case we settle before the trial begins whether the issue is novelty or infringement. JAMES, L.J.—Provided a distinct announcement is made at the beginning of the trial that the issues of fact are to be tried separately, it does not signify whether the verdict on the facts is given on a different day from the judgment on the whole case, or whether both are given together. That is what we meant by the passage which has been read from the judgment in *Krehi v. Burrell*.]

Without calling upon Sir Henry Jackson, Q.C. and Russell Roberts, for the appellant,

Their Lordships overruled the preliminary objection.

The appeal was then heard upon the merits, and was dismissed, with costs.

Solicitors for the appellant, *Chester and Co.*, agents for *Roberts and Dickson*, Chester.

Solicitors for the respondent, *Norris, Allens*, and *Carter*, agents for *Barrow and Cook*, St. Helen's.

Nov. 28 and Dec. 5, 1878.

(Before JAMES, BAGGALLAY, and THESIGER, L.JJ.)

*Ex parte* THE NATIONAL GUARDIAN ASSURANCE COMPANY; *Re* FRANCIS. (a)

*Bill of sale—Construction—Power to take possession on grantor becoming embarrassed in his affairs—Subsequent proviso entitling grantor to retain possession till default in payment—Friendly possession—Order and disposition—Bankruptcy Act 1869, sect. 15.*

*A bill of sale of chattels, made to secure repayment of an advance by instalments, empowered the grantee to take possession after default should be made in payment of any instalment on the appointed day, or in case (amongst other things) the grantor should become embarrassed in his affairs, or in case any action at law or other legal process should be commenced against him. And there was a subsequent proviso in the bill of sale that, until default should be made in payment according to the covenant and proviso therein con-*

*tained, it should be lawful for the grantor to retain possession:*

*Held (reversing the decision of Bacon, C.J.), that the subsequent proviso did not override the clause empowering the grantee to take possession on the happening of one of the specified events, and that, on the grantor becoming embarrassed in his affairs, the grantee was entitled to take possession, although no default in payment had been made by the grantor.*

*A real possession, although friendly and not such as to disturb the apparent possession of the debtor, is sufficient to exclude the operation of the reputed ownership clause of the Bankruptcy Act; but to satisfy the requirements of the Bills of Sale Act 1854, in respect of an unregistered bill of sale, the possession must be apparent as well as real.*

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

The facts of the case were as follows:

On the 20th Aug. 1877, G. D. Francis, the lessee of a theatre at Newcastle-on-Tyne, executed, in consideration of an advance of 600*l.*, a bill of sale of his goods and chattels in his dwelling-house to the National Guardian Assurance Company to secure the payment to them of 680*l.* in three equal instalments, on the 16th Jan., 16th April, and 16th July 1878. He thereby covenanted to pay the instalments on those days, and that, in case default should be made in payment of any of them on the days appointed, the whole of the remaining instalment or instalments should become payable immediately. And he thereby assigned the goods, and all his right and property therein, to the company as their own proper chattels and effects. Provided, nevertheless, that on payment of the 680*l.*, &c., the deed should cease and determine. And he thereby declared that after default should be made in payment according to the covenant thereinbefore contained, or on breach of any covenant on his part therein contained, and after written demand for payment should have been given to or left for him at his last known place of business or abode, sealed by the company, or signed by any person on their behalf, or, in case he should die, or be or become bankrupt, or compound or attempt to compound with his creditors, or become embarrassed in his affairs, or in case any action at law or any other legal process should be commenced against him, or in case any distress or writ of execution should be issued or levied or attempted to be levied upon the said effects or any part thereof, then and on either of the said events happening, it should be lawful for the company to take possession of the goods and to sell them, and out of the proceeds of sale to retain their costs and what should be due to them, and to deliver the surplus, if any, to the borrower. Provided always, that until default was made in payment according to the covenant and proviso therein contained, it should be lawful for the borrower to hold, make use of, and possess the said goods, chattels, and effects.

This bill of sale was duly registered.

The first instalment of the 680*l.* was paid when it became due.

On the 26th Feb. 1878 Mr. Bourne, the manager of the company, having received information that Francis was in embarrassed circumstances, instructed an auctioneer to take possession of the goods comprised in the bill of sale, and on the 5th

(a) Reported by H. FRAY, Esq., Barrister-at-Law.

March a man was put in possession, without any demand for payment having been first made.

At this time several actions had been commenced against Francis, and an execution had been levied on his goods in the theatre.

On the 7th March Francis filed a liquidation petition in the Newcastle County Court.

The goods comprised in the bill of sale were afterwards sold, and the trustee in the liquidation claimed the proceeds of sale.

Francis deposed that at the time when possession was taken he was not in embarrassed circumstances, and that, had any demand been made upon him, and a reasonable time allowed, he could without any difficulty have made arrangements to pay any sum that might have been demanded by the company in respect of any claim by them against him. He also deposed as regards the nature of the possession taken, that it consisted in a man being left in the house, who remained in the back premises, Francis and his family continuing to occupy the house and use the furniture in the same way as they had previously done without any interruption.

The man who was put in possession deposed that he considered the possession a friendly one, Mr. Francis and his family being allowed to continue using the furniture as before.

In a letter written to Mr. Bourne on the 2nd March by one Egerton, who was acting on behalf of Francis, he said, "I think in Mr. Francis' own interest you should not delay being in possession."

And Mr. Bourne deposed that "Mr. Francis concurred in our taking possession."

The County Court Judge held that the trustee in the liquidation was entitled to the proceeds of sale, on the ground that the bill of sale did not authorise the taking of possession unless a written demand for payment was first made by the company. This decision was, on appeal, affirmed by the Chief Judge.

BACON, C.J. delivered judgment as follows:—The bill of sale contemplates a variety of events in which it may be the right of the bill of sale holders to take possession. They lent a sum of money, payable by instalments, and the bill of sale provides that, if default shall be made in payment after demand, there shall be a right to enter; and it gives them a right to take possession in certain other cases. Now, that there was no demand made before possession was taken is a fact about which there is no question. There was no demand made, and, indeed, no money was due. The only question is as to the lawfulness of the possession, and whether any of the other events which entitled them to take possession had happened. Mr. Bourne's evidence is to the effect that from information which reached him, no matter from what source or at what time, he bethought himself that the company's security was in danger, and he went down to the place where the property was, and there employed an auctioneer to take possession. Unless there was default made in payment, unless the instrument authorised him to take possession, he had no right to do so, because the stipulation is that the borrower shall be in undisturbed possession unless he makes default in payment. The deed also provides that the company may enter in case he becomes bankrupt, or upon the happening of other events. But where is the evidence that any of these things had happened? It is said that the debtor was in a state of embarrassment, but

that is a very wide expression. Is a man necessarily embarrassed because actions are brought against him? Those actions may or may not have been rightly brought. I will assume that they were rightly brought, and that he had the money in his pocket at that time. But that is not being in embarrassed circumstances, because he might have elsewhere a sum quite sufficient to cover the amount for which the actions were brought. But that is the only account that we have heard of his embarrassment—that somebody had heard that there were four actions brought against him. That may have been quite true, but I cannot turn a deaf ear to the evidence—which is uncontradicted—of Francis himself, that he was perfectly able to pay all his debts. He had these actions brought against him, but they did not embarrass him, because he had assets of various kinds, by means of which he could pay his debts. There are many people who neglect to pay their debts, but that does not necessarily imply that they are in embarrassed circumstances. The deed gives no authority to take possession of the goods of a man who, having borrowed 680*l.*, had repaid the first instalment, and who would probably have repaid the second, but for the somewhat officious conduct of the manager of the company, who goes down and of his own free will takes possession. And then how does he take possession? He puts a man in friendly possession; the debtor is not turned out of his house; no one exercises any authority over the goods, and the man and his wife and children remain in the house; but there is a blind possession, a friendly formal possession on behalf of the company. I cannot say that the possession was lawful; it was not justified by the bill of sale, or by any of the circumstances. Nor was it a sufficient possession which could deprive the trustee of his title to the goods. I think that the order of the County Court was right.

From this decision the company appealed.

*De Gez*, Q.C. and *E. C. Willis* for the appellants.—It is clear that the debtor was in embarrassed circumstances when we took possession, and that is one of the events in which the bill of sale empowers us to take possession. The general proviso at the end of the deed cannot override the prior special provision empowering us to take possession. Then, as to the nature of our possession, *de facto* possession is sufficient to exclude the operation of the reputed ownership clause, for it puts an end to the consent of the true owner. Apparent possession is not necessary, as in the case of an unregistered bill of sale.

*Winslow*, Q.C. and *Oread* for the respondent.—No default had been made in payment when possession was taken, and the proviso clearly entitled the grantor to hold possession until default should be made in payment. Again, the possession taken was purely colourable, which is not sufficient to exclude the operation of the reputed ownership clause:

*Jackson v. Irvine*, 2 Camp. 48;

*Vicarino v. Hollingsworth*, 20 L. T. Rep. N. S. 362.

The grantor's agent wrote to the grantees' manager that, in the grantor's own interest they should not delay being in possession. That shows that possession was taken in the grantor's interest, and such a transaction cannot be supported:

*Ex parte Arnold*; *Re Wright*, 35 L. T. Rep. N. S. 21

L. Rep. 3 Ch. Div. 70.

No reply.

JAMES, L.J.—The question depends entirely on the construction of the deed, and I find it impossible to arrive at the same conclusion as the Chief Judge. He appears to have assumed that the proviso at the end overrides the previous clause, and that therefore the possession taken by the appellants was unlawful. I think the real effect of the deed, taking it altogether, is this: The mortgagees became the legal owners of the goods, and as such would have the right to take possession of them. Then there is a proviso in the usual form, that the mortgagor shall be entitled to retain possession until default be made by him in payment according to the covenant and proviso contained in the deed; that is to say, the mortgagor had a kind of term in the goods granted to him by way of a charge upon the absolute ownership of the mortgagees. But in the same deed there is an express provision enabling the mortgagees, on the happening of any one of a number of different contingencies, to take possession of the goods and to sell them. It is impossible to conceive that this express provision was intended to be entirely abrogated by the subsequent authority to the borrower to hold possession except in one contingency. There is no magic in the position of the clauses of the deed; every clause is part and parcel of the bargain between the parties. Did, then, any of the things happen which entitled the mortgagees to take possession? There can be no doubt that one of them did. The borrower became "embarrassed in his affairs;" there could be no better evidence of that than the fact that an execution had been levied in his theatre, which was his principal means of getting his living. The manager of the company was informed that he was embarrassed, and the information on which he acted turns out to have been true. He was therefore justified in taking possession. It is said, however, that the possession taken was not a hostile, but a friendly possession. That is often the case. Under the Bills of Sale Act the possession must not be colourable; but under the reputed ownership clause of the Bankruptcy Act it is quite a different matter. The only question is whether possession was taken by the true owner of the goods with the intention of asserting his rights. In the present case, whatever were the motives of kindness of the company's manager towards the debtor, it is clear that his object was to get the goods out of the debtor's order and disposition, so as to avoid the effect of his bankruptcy, which was then imminent. He had heard that the debtor was embarrassed in his affairs, and he thereupon completed his title by taking absolute possession of the goods. It was not a sham, but a real possession, taken for the purpose of giving effect to the security of the company. I am of opinion that the decision of the Chief Judge must be reversed.

BAGGALLAY, L.J.—The case of the respondent is based on two grounds. It is said, first, that the company had no right to take possession at all; and, secondly, that the possession was a friendly one. No doubt the right to take possession must be exercised according to the terms of the deed. But here we have the circumstance, not only that actions at law had been commenced against the borrower, but that the fact of these actions having been commenced gave the right to the company to take possession, and this apart from any question of embarrassment. The proviso at the end of the deed must be read in connection with the rest of

the deed, and not so as to make three-fourths of the previous provisions ineffectual. The question of the nature of the possession seems hardly to have been fully considered by the Chief Judge. I entirely concur in what has been said by the Lord Justice, and I can see no ground for saying that the possession was not such as is ordinarily taken by a bill of sale holder in the exercise of his rights.

THESIGER, L.J.—I am of the same opinion. When the whole of the bill of sale is looked at there can be no reasonable doubt as to its meaning. It contains a distinct provision that, in the event of the debtor becoming embarrassed in his affairs, or of any action being commenced against him, the mortgagees shall be entitled to take possession. It is said that this is subject to the condition that there must have been a previous written demand for payment; but it is clear that that condition only refers to the previous words, "after default shall be made in payment according to the covenant hereinbefore contained, or on breach of any covenant of the borrower herein contained." Then it is said that the power to take possession is controlled by the subsequent proviso that the debtor shall be left in possession until default shall be made in payment. It would, I think, be running counter to all rules of construction to hold that this general proviso is to override the prior special one. On the construction of the deed I have no doubt that the power to take possession arose on the debtor's becoming embarrassed in his affairs, or on the happening of any of the other events mentioned. Then it is said that a sufficient possession was not taken, and that we ought to look at the motives which actuated the company's manager. I agree that we may do this, not for the purpose of altering the character of the possession taken, but in order to arrive at the conclusion whether the possession was a real one or a mere sham. But as soon as we arrive at the conclusion that the possession was real, the motives with which it was taken are immaterial. Here there is abundant evidence of a real possession. The debtor had, as in *Vicarino v. Hollingsworth* (20 L. T. Rep. N. S. 362), the use of the goods, but it was subject to the control of the man who was put into possession, and who was there to see that the use was in accordance with the rights of the bill of sale holders. If we were to hold that this was not a sufficient possession, we should be confusing the possession which is necessary with reference to the question of order and disposition with that which is required under the Bills of Sale Act, to satisfy which the possession must be apparent as well as real.

*Appeal accordingly allowed, with costs.*

Solicitor for the appellants, *A. D. Michael*.

Solicitor for the respondent, *G. B. Wheeler*, agent for *D. E. Stanford*, Newcastle-on-Tyne.

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BRITAIN v. ROSSITER.

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## SITTINGS AT WESTMINSTER.

Tuesday, March 4.

(Before BRETT, COTTON, and THESIGER, L.JJ.)

BRITAIN v. ROSSITER. (a)

*Statute of Frauds* (29 Car. 2, c. 3), sect. 4—Contract not to be performed within a year—Hiring for a year to commence on a future day.

Sect. 4 of the *Statute of Frauds* does not render parol agreements which come within its terms void for all purposes, but only prevents their being enforced by action.

In an action for wrongful dismissal plaintiff proved that defendant agreed verbally to employ him for a year. The agreement was concluded on a Saturday, and the employment was to commence on the following Monday. Plaintiff served for part of the year, and was then dismissed.

Held (affirming the judgment of the Exchequer Division), that the contract was within sect. 4 of the *Statute of Frauds*, that no agreement under which plaintiff would be entitled to reasonable notice of dismissal could be implied, that the case was not taken out of the statute by part performance, and therefore that plaintiff could not recover.

ACTION for wrongful dismissal. The defendant pleaded the *Statute of Frauds*. (b)

At the trial, before Hawkins, J. and a common jury, at Westminster, on the 17th and 18th May 1878, the plaintiff was called as a witness, and stated that in consequence of having seen an advertisement in a newspaper, he entered into communication with the defendant, with a view to entering his service as clerk and book-keeper. The plaintiff further stated that he had three interviews with the defendant on Tuesday the 17th, Thursday the 19th, and Saturday the 21st of April 1877, and that the terms of the hiring were discussed at all the three interviews, and on Saturday, 21st of April, it was arranged that he should enter upon the service, and commence his duties on the following Monday, the service to be for a year certain at the rate of 170*l.* a year for the first six months, and 200*l.* a year for the second six months. The plaintiff accordingly entered the service of the defendant, and remained in the service until the following November, when he was dismissed without notice, but was paid a month's salary beyond that due for the time during which he had served, which sum, however, he refused to accept as in lieu of notice.

Hawkins, J. ruled that the plaintiff's evidence showed a complete contract on Saturday, the 21st April, and that, as the service was to be for a year, and was not to commence until Monday, the 23rd, the case came within the 4th section of the *Statute of Frauds* (29 Car. 2, c. 3), and the plaintiff was not entitled to recover. A verdict was thereupon directed for the defendant, and the Exchequer Division (Kelly, C.B. and Hawkins, J.) refused a rule for a new trial. Upon a motion

(a) Reported by F. B. HUTCHINS, Esq., Barrister-at-Law.

(b) By the *Statute of Frauds* (29 Car. 2, c. 3), sect. 4: No action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

being made in the Court of Appeal, before Brett, Cotton, and Thesiger, L.JJ., the court refused to grant a rule on the ground that the case was not within the *Statute of Frauds*, or on the ground that some discussion which took place on Monday, the 23rd, amounted to a contract made on that day, but granted a rule nisi for a new trial on the ground that there was evidence of part performance of the contract to take it out of the *Statute of Frauds*, and on the ground that there was evidence of a hiring independently of the *Statute of Frauds*.

This rule now came on for argument.

*Lawrance*, Q.C. and P. B. *Hutchins*, for the defendant, showed cause.—The contention of the plaintiff is, first, that the entry of plaintiff upon the service constituted such a part performance of the contract as would take it out of the operation of the *Statute of Frauds*; secondly, that there was a hiring independently of the first contract and not within the statute. As to the first point, the principle of part performance upon which the courts of equity would admit parol evidence of the contract and decree specific performance applied only to contracts relating to land and has never been extended. As to the second point, there is no evidence of a fresh hiring; the whole contract was made on the Saturday, and the entry on the service on the Monday following is no evidence of a new hiring. No contract can be implied different from that proved by the plaintiff's evidence; the statute does not make that contract void for all purposes, but only says that no action shall be brought upon it, and therefore, as the contract for a year in fact existed (although the plaintiff could not recover on it) he cannot be entitled to notice of dismissal under any implied agreement. See *Snelling v. Lord Huntingfield* (1 Crompt. M. & R. 20). They also cited

*Bracegirdle v. Heald*, 1 B. & Ald. 722;

*Giraud v. Richmond*, 2 C. B. 835;

*Banks v. Crossland*, 32 L. T. Rep. N. S. 226; L. Rep. 10 Q. B. 97;

*Leroux v. Brown*, 12 C. B. 801; 22 L. J. 1, C. P.

J. F. B. *Firth*, for the plaintiff, in support of the rule.—There is no real difference in the terms of sects. 4 and 17 of the statute, and the contract in this case made on the Saturday was therefore, by the terms of the statute, absolutely void; and therefore the entering upon the service on the Monday was evidence of another contract of hiring, which was independent of the statute. That the original contract was absolutely void for all purposes is clear from the decisions in

*Carrington v. Roots*, 2 M. & W. 248;

*Reade v. Lambe*, 6 Exch. R. 130; 20 L. J. Ex. 161;

*Inman v. Stamp*, 1 Stark. 12;

*Thomas v. Williams*, 10 B. & C. 664.

*Leroux v. Brown* (*ubi sup.*) is not a conclusive authority to the contrary, and must be limited to the point then in question. As to the question of part performance, it is conceded that the Court of Chancery formerly would not grant specific performance of such a contract as this, but left the plaintiff to his action for damages at law, but since the Judicature Acts that distinction should no longer prevail. By subsect. 7, sect. 24, Judicature Act 1873, this court can now act on the equitable principle that a statute shall not be made the instrument of fraud. It was by the default of the defendant alone that the contract was not reduced to writing, and he

ought not to be allowed to avail himself of his own wrong doing.

BRETT, L.J.—Upon full consideration of the case, I am of opinion that this rule must be discharged. It was proved, beyond the shadow of a doubt, that on Saturday, the 21st of April, a contract was entered into between the plaintiff and the defendant in express terms, upon which the plaintiff was to enter into the service of the defendant for a year, commencing on the following Monday, the 23rd of April. This then was a contract not to be performed within a year from the making thereof, and ought in compliance with the statute to have been in writing, but it was not, and therefore neither party could maintain an action upon it. It was argued on behalf of the plaintiff that inasmuch as he did enter upon the service on the Monday, there is a necessary implication that he did so in performance of some contract, and that that contract must have been made on the Monday, and that, therefore, it was a contract of service for less than a year, and not within the statute. The reason that such a contract was to be implied was stated to be that the contract that was made on the Saturday was not in existence on the Monday, being absolutely void by reason of the non-compliance with the requirements of the statute; but this is a fallacy; it is not true that the contract became absolutely void under the 4th section of the statute. For my own part I see no difference in this respect between the 4th and the 17th sections, upon neither of which does it seem to me that contracts become void; but it is not necessary for me to say anything about sect. 17, we have now only to deal with sect. 4. Now it seems to me to be impossible that a new contract should be implied from the doing of acts which were clearly done in performance of the original contract; they were done as acts in performance of the first contract only, and to infer from them any other contract would be to draw an inference contrary to truth. No contract can be implied, for the first contract was a subsisting one, although it is true that no action could be maintained upon it. The cases of *Carrington v. Roots* (*ubi sup.*) and *Reade v. Lamb* (*ubi sup.*) were relied upon as authorities for holding that such a contract as this is absolutely void—but no such statement was necessary for the decision in either of these cases; what the court did determine was that the plaintiff could not charge the defendant on such a contract directly, nor could he any the more charge him indirectly. There were phrases and dicta in those cases which were relied upon for the plaintiff's contention, but these were considered fully in the case of *Leroux v. Brown* (*ubi sup.*); and it was pointed out by the judges in that case that those cases only decided that the contract was void for the purpose of the question in each action, and held that the contract then before them was not void under sect. 4, but could not be enforced. Now it was necessary to decide this question in that case, because if the contract were void then the statute would have been territorial in its effect and would not have affected a French contract, which would still be enforceable; but if it was a contract that could not be enforced, then the statute would apply to the mode of procedure upon it, and the contract, though made in France, could not be enforced in the courts here. The case of *Snelling v. Lord Huntingfield* (*ubi sup.*) is not overruled, but most

strongly supported by subsequent cases, and is strongly in point; therefore it is clear that the original contract is still subsisting, and that from acts done in performance of it a new contract cannot be implied. Then it was contended that the fact that there was a part performance of this contract made it competent for this court to have regard to the contract notwithstanding the Statute of Frauds, and this on the ground that this court will act upon equitable principles. There are certainly cases in which this principle of part performance has been applied to contracts, which could not be enforced under the statute, being contracts for the sale of lands, but it has never been extended further or applied to such a case as the present. The Courts of Chancery would not decree specific performance of such a contract as this; and in practice they could hardly do so. With regard to those cases where the Courts of Chancery have granted specific performance of contracts for the sale of land on the ground of part performance, although the contracts could not be enforced by reason of the statute, I will only say that I think that those cases were bold decisions, having regard to the statute. But whether that were so or no, that principle was never applied to such a case as this before the passing of the Judicature Acts. Can it be said that the passing of those Acts would make it otherwise now? I think not. Those Acts create no right that did not exist before; they do not enable a man to enforce a right which he could not enforce before, but they only transfer the procedure, so that he may recover in respect of all the rights he may have in the same court. Now, before the passing of these Acts he could not enforce this contract; and if, on some general principle of applying equitable doctrines, we were to hold that he might enforce it now, we should be giving him a new right, namely, to enforce a contract which he could not have enforced either at law or in the Court of Chancery.

COTTON, L.J.—I am of the same opinion. It was argued on the part of the plaintiff that, although the contract made upon the Saturday was a contract that could not be enforced by reason of sect. 4 of the Statute of Frauds, yet the entry upon the service on the Monday was evidence from which must be implied another contract entered into upon the Monday, and therefore independent of the statute; and for the purpose of this argument it was contended that the 4th section made the original contract absolutely void. Now, the words of this section are: "No action shall be brought to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorised;" and it applies to contracts for the sale of land as well as agreements such as that in this case. To hold therefore that such an agreement is absolutely void by reason of a failure to fulfil the requirements of the statute would be to hold directly contrary to the practice of the Courts of Chancery in those cases where, upon part performance being proved of a contract for the sale of land, specific performance has been granted, although the contract was not in writing

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within the meaning of this section. It is true that in the case of *Carrington v. Roots* (*ubi sup.*) there are expressions to the effect that the contract there alleged was void. But that was an action brought by the plaintiff who had contracted to buy a growing crop of grass, and it was an action of trespass against the seller for taking away the horse and cart of the plaintiff which he had brought upon the land for the purpose of removing the grass. Lord Abinger (at p. 255) in giving judgment, said: "Wherever an action is brought on the assumption that the contract is good in law, that seems to me to be in effect an action on the contract." His view was that this was in effect an action for enforcing a contract which could not be enforced, and that therefore, for the purposes of that action, the contract was to be considered void. Parke, B. (at p. 256), also in giving judgment said, "Does the plaintiff mean an agreement in fact operating as a licence only, or a binding contract for the sale of the crop, and for him, the plaintiff, to have a right of entry on the land to gather it? I think the latter is the true construction, and that it means a contract which the one party could enforce against the other as a matter of right." Therefore, when he proceeds to hold that the contract was void, the word void meant that which could not be enforced as a matter of right. The case of *Reade v. Lamb* (*ubi sup.*) helps the argument no further; the contract in that case was void for the purposes of that action only. There is, therefore, no binding authority for holding this contract void, and we must treat it as existing. Then it was contended that although this contract was only a verbal one, yet notwithstanding the statute it ought to be enforced by this court acting upon the principles of equity; and it was said that the Courts of Chancery had granted such a relief as this in cases of verbal contracts which were within the enactment of sect. 4, namely, contracts for the sale of land, the principle upon which the court acted being stated to be that equity will not allow this statute to be a cloak of fraud. But this, in my opinion, was not the principle upon which that class of cases was decided, but it was this, that when under the contract for sale the vendee had entered into possession, the court finding him in possession of land of which he would not have been in possession had it not been for some such contract inferred from this overt act of ownership that some contract existed, and therefore allowed the party to go into evidence to show what the terms of that contract were. But this does not apply to this case, nor has the principle ever been applied to such cases by a court of equity. Sub-sect. 7 of sect. 24 of the Judicature Act 1873 should be read in connection with sub-sect. 4, which declares that the courts shall recognise all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter in the same manner in which the Court of Chancery would have done, while sub-sect. 7 gives the courts "all such remedies whatsoever as any of the parties may appear to be entitled to in respect of any legal or equitable claim," &c., the object of this sub-section being that a party may get all the relief that he is entitled to, whether equitable or legal, in one court—that one court might deal with all rights at once; but it was never intended to give the

party new rights or remedies which did not exist either at common law or in equity before the passing of the Act. The doctrine of part performance in equity has been exclusively confined to actions relating to land; and that being so I do not think that we ought, upon any idea of doing equity, to extend that doctrine so as to give persons a right which they did not possess before the Judicature Acts.

THESIGER, L.J.—There are two questions that arise in this case, namely, can the plaintiff maintain an action upon this contract in a court of law; and if not, can he enforce it in a court of equity? It is with great reluctance that I come to the conclusion that he can do neither. It seems to me to be most unjust that a contract which has been acted upon by the plaintiff of which the defendant has had the benefit, can be at any time put an end to by the defendant, without even giving the plaintiff notice. At any rate it is only fair that the plaintiff should have notice, and I should be glad if there were authority for holding that he is entitled to have it, but this is not the case. It cannot be disputed that all the terms of the contract were settled, and the contract concluded on Saturday; and therefore, as the service was to commence on the Monday, and continue for a year, the contract was within sect. 4 of the Statute of Frauds. Then the question is, is the effect of the statute that this contract, not being in writing, is swept away altogether, so that, it being no longer in existence, does not stand in the way of any other contract being made on the same subject; or is it that this contract is still in existence, although it cannot be enforced? There are, indeed, many dicta that such a contract is null and void; but such dicta were not necessary for the decision of any of the cases in which they occur; and more than this, in all cases where an actual decision on this point was necessary the judgments are all the other way. When one considers the terms of the statute it becomes clear that this must be so, for under this very sect. 4 there is nothing to prevent a contract which has been signed by one party only being enforced by the other party; thus clearly showing that the contract is void against one party, but not against the other, the statute providing that no action can be brought upon it unless it is signed by the party to be charged. The two cases referred to—*Carrington v. Roots* (*ubi sup.*) and *Reade v. Lamb* (*ubi sup.*)—tend to show that substantially there is no difference in this respect between sects. 4 and 17, but it does not follow that sect. 17 makes the contracts under it void. I do not think it does, for under that section a contract may be enforced if there has been part performance, which would not be the case if the contract were void. But there is really no need to go into this question, because the case of *Snelling v. Lord Huntingfield* (*ubi sup.*) is an authority that the contract was an existing one, and that the effect of that is that from acts done in part performance of it a new contract cannot be implied. There is an express contract which the plaintiff cannot enforce, and the existence of that express contract precludes his suing on an implied one. It has been held that although a plaintiff cannot recover on an executory contract which comes within the meaning of one of these sections, and is not in writing, yet, if under such a contract service has been done he can recover in respect of

his service. If the matter were *res integra*, I should doubt whether he could not on the same principle recover damages for being dismissed from the service before the time specified in the contract; but we are precluded from any doubt on this point by the case before referred to (*Snelling v. Lord Huntingfield*) in which Lord Lyndhurst treats it as established that he can recover for services but not for being dismissed from the service. Then we are asked to apply the equitable doctrine of part performance to this contract. It has been held in the courts of equity, notwithstanding the words of the Statute of Frauds, that when a purchaser has entered into possession of land in pursuance of a contract, which was not in writing, that is to say where there has been a part performance of the contract, the court may then look into the contract and admit evidence to show what the terms of it were. I cannot, upon principle, see why the court should not treat an entry upon service in the same manner, and apply in this case the principle which it will apply in the case of a contract for the sale of land. But the courts never have done this, and we ought not to extend these doctrines, and now go any further than equity has gone before. *Rule discharged.*

Solicitor for the plaintiff, Wm. Tanner.

Solicitors for the defendant, Pike and Son.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Tuesday, Feb. 11.

(Before JESSEL, M.R.)

SYKES v. BEADON. (a)

*Trust investment association—Unregistered company—Trust deed—Redemption by drawings—Lottery Acts—Action to administer trusts—Demurrer—Companies Act 1862, sect. 4.*

In an action by a member of a trust association, composed of more than twenty members, but not registered, to have the trusts of the deed regulating the trust administered and the affairs of the association wound-up by the court, and to render the trustees of the deed liable for alleged breaches of trust, one of the defendants, a retired trustee, demurred for want of equity:

Held, allowing the demurrer, that the association was an association for gain within the 4th section of the Companies Act 1862, and not having been registered the trust deed was an illegal contract which the court would not enforce or carry into effect.

Seem, that a provision in the trust deed of a trust association for repayment of the subscriptions by annual drawings, together with a bonus varying in amount according to the date of repayment is illegal within the Lottery Acts.

This was an action by Sir Frederick Henry Sykes, one of the subscribers to the Government and Guaranteed Securities Trust, against the present and past trustees, asking for administration by the court of the trusts of the trust deed, and to render the trustees of the deed liable for certain alleged breaches of trust. One of the defendants, John Horatio Lloyd, a retired trustee, put in a general demurrer for want of equity, and this raised the question whether, as the trust had not been regis-

tered under the Companies Act 1862, the association was an illegal one.

The facts of the case fully appear from the judgment.

*Macnaghten* for the demurrer.

*Chitty, Q.C.* and *Nalder* for the plaintiff.

JESSEL, M.R.—This is an action seeking to carry into effect under the direction of the court, what are called the trusts of an indenture, dated the 20th Sept. 1872. The claim is to have those trusts administered under the direction of the court, “and if, and so far as may be proper, to have such trust and the affairs of the trust wound-up and closed, and the assets realised and distributed amongst the plaintiff and the other persons entitled thereto, and to have the rights and interests of the plaintiff and all such other persons ascertained and declared.” Then, secondly, “to have it declared by the court that the defendants, other than the defendant Graham, are liable to make good the losses occasioned to the trust by and in consequence of the before-mentioned breaches of trust,” to which I will refer presently. Then the claim asks to have a receiver appointed of what belongs to the trust, and then it asks for general relief. The defendant, John Horatio Lloyd, has put in a general demurrer for want of equity; and the contention before me is that what is called the trust is, in fact, an illegal contract prohibited by statute, and which, therefore, cannot be enforced in any court of law or equity. It appears partly by the statement of claim and partly by admissions made at the bar, that Mr. Lloyd was originally a trustee, but that some years ago—five years I am told, he retired from the trust and has since had nothing to do with the matter at all. It is not so clearly stated in the statement of claim as it might be, but any deficiency of allegation in that respect has been cured by the admissions at the bar, and I will treat it in that way, that Mr. Lloyd has no more to do with the matter at the present moment than any stranger. Therefore, as against him, it is certainly a claim to make him liable for breach of trust, or of duty, in not carrying out the provisions of the contract alleged to be illegal, or to put it in plain language, if the contract is illegal, it is in the nature of an action for damages for breach of an illegal contract. I shall have to go more into detail as to the nature of the contract and as to the allegations against Mr. Lloyd before I give my reasons for thinking, as I do, that the contract is really an illegal contract. Now, the objection which was argued before me was to the effect that the contract was between persons more than twenty in number (indeed, the statement of claim alleged that they are 400 in number) to make an association for the purpose of gain. The Act says, “No company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act for the purpose of carrying on any other business than that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the stannaries.” I am not about to add anything to the judgment which I delivered in

(a) Reported by G. WELBY KING, Esq., Barrister-at-Law.



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April 1875, in the case of *The Arthur Average Association* (L. Rep. 10 Ch. App. 545; 32 L. T. Rep. N. S. 525), as to what the proper construction of that section of the Act is. The only point I have to consider is whether this association or company was formed for the purpose of gain either by the association or by the individual members thereof; and I have no doubt whatever that it was for both purposes, that is, that it was formed for the purpose of gain by the association and also by the individual members. A second point, which was not argued, but which struck me during the argument, is whether the contract is not also illegal as being within the prohibition of the Lottery Acts. Upon that second point I will not give a final opinion, because it has not been argued, but I will give my impression and the reasons for that impression. As regards the first point, it is necessary to consider what the nature of the association was. Now, in this respect, the statement of claim is as explicit as you could have it, because it states how the association was originated, and how it was carried out. It first states the prospectus of the association, and then the deed executed in pursuance of the prospectus. Mr. Chitty, in argument, wished me to look at the deed only; but that is not the correct way of viewing the matter. In order to ascertain what the association is for, you must begin with the prospectus, on the faith of which the plaintiff subscribed, and then if you have ascertained it to be illegal, the mere fact that by a deed they endeavoured to cover the illegality would not save the parties to the transaction from the consequences of such illegality, even if they had succeeded in covering it, which I do not think they have. The prospectus was issued in the month of June 1872, and it was issued and advertised by some other company or association in this way: "Government and Guaranteed Securities Permanent Trust, 1872. In certificates of 100*l.* each to be issued at 94*l.* Rate of interest 6*l.* per cent." Then, there are nine trustees; then, "Deposits will be received at the Union Bank of London on behalf of the trustees of this fund on account of subscriptions for the above scrip certificates of 100*l.* each to the nominal amount of 1,000,000*l.* Coupons for interest payable half-yearly on the 1st June and 1st Dec., and coupons for bonus will be attached to each certificate payable at the Union Bank of London. In the present combination" (that word is used, and not "association," but I am not aware of any difference between them) "the method of average investment introduced by the Foreign and Colonial Government Trust is extended in its application with a view to greater security. The principles of the Government and Guaranteed Securities Permanent Trust are moreover distinctive, and are designed to obviate the existing and inconvenient methods of dealing with profits in reversion, and to reconcile the equities of drawn and undrawn certificate holders." Then it says, "These principles accordingly embrace the permanent maintenance of the fund in its entirety, provision for reserve, the immediate distribution of each year's realised profit as bonuses in cash upon drawing, and the progressive increase of such bonuses to compensate for delay in being drawn." Then it says, "The subscriptions will be invested in carefully selected Government and guaranteed securities only, viz., in stocks, or obligations of

governments, states, and municipalities, and guaranteed or subsidised stocks, shares, and obligations of railways and public works. The capital of such of the several investments as become realised by the operation of their sinking funds or otherwise will be similarly re-invested. The trustees are bound by no existing arrangements for purchase of securities." Then it says, "While adopting the method of existing trusts of restricting any single investment to a maximum of one-tenth of the fund, the present trust will fortify the security thus obtained by setting aside one-half per cent. to annual reserve. The security of average will further be permanently maintained by providing that the drawings shall not entrench upon capital. The annual drawings, accordingly, which are fixed at 5 per cent. of the fund, will be drawings for the distribution of profits in bonuses and redemptions, and the certificates when drawn will be converted into preference dividend bonds of 100*l.* each, bearing 5 per cent. interest." Then it says, "The mode of supplying the annual bonuses is as follows: The annual working expenses and the reserve fund having been provided, all net revenue up to 7½ per cent. on the nominal capital after deducting 6 per cent. for fixed interest, will be distributed to the holders of certificates drawn in the annual drawing. One-twentieth of the certificates issued will be annually drawn, and the bonus will therefore be twenty times 1*l.* 5*s.* per cent., or 25*l.* per certificate." Then it says, "After the first drawing, addition to bonuses will also be made by adding thereto at each drawing the year's difference of interest between that payable on the bonds and that payable on the certificates. The bonuses will consequently increase 1 per cent. every year, and compensation will thus be afforded for delay in being drawn. At the 20th or last drawing of the series, the cash bonus upon the same estimate of revenue will therefore be 45*l.*" Then it says, "All further available profit will be devoted to the extinction of bonds in the order of their issue at the rates of 200*l.* for each 100*l.* bond." Then it says, "An investor in the present trust will, on the above calculations receive interest at 6*l.* 7*s.* 8*d.* per cent. until his certificate is drawn; he will receive first a cash bonus of 25*l.* to 45*l.* according to the year of drawing; secondly, a preference dividend bond of 100*l.* bearing interest at the rate of 5*l.* per cent., which, taking into account the cash bonus returned, is equivalent to a rate of interest varying from 7*l.* 4*s.* 11*d.* per cent. to 10*l.* per cent. on the amount remaining of his original investment. Moreover, the holder of every certificate will, if not paid off at the rate of 200*l.* for every 94*l.* invested, hold an increased proportion of the entire fund." And then it says, "It will be readily seen that at the end of twenty years the whole issue will have been drawn, and the entire profits which in other trusts accrue mainly in reversions will have been paid in cash, and those holders of bonds who have not been further paid off at 200*l.* per cent. will own the entire funds with its renewed reversion right unincumbered." Then there is something about the working expenses of the trust which I need not read. Then it says, "That a general meeting will be convened within three months to nominate a committee of certificate holders and appoint auditors; and, further, that a draft of the trust deed can be seen at the

offices of the solicitors." I may mention that it is not plain on the prospectus alone, although it is perfectly plain on looking at the deed of trust, that it is intended that the investments may be changed by sale, and converted into other investments from time to time. Now I stop for the moment at the prospectus, without looking at the details of the deed of trust, because that is the association to which the plaintiff says he subscribed a very large sum upon the faith of that prospectus. Now is that an association for the purpose of gain by a collection of individuals? It is so in the most express and explicit terms. They tell us they are going to make a profit, and how? By investing the money in the purchase of various stocks, and, as I said before, by the terms of the trust deed, which I shall refer to, they can sell again at a profit, if they wish, or they can keep them until they are paid at a higher price than the purchase-money, by the Government or the person who is liable to pay the higher rate; and out of the money they receive either from the dividend, or from the redemption, or from the sale moneys, they divide what would be, if the prospectus had been carried out, certainly a very large profit indeed, amongst the subscribers. The people who issued this prospectus made no mistake as to what they intended to do. They talk of profits as profits from beginning to end, and tell you how they are going to divide the profits. There is no concealment, and there is no pretence of the company being founded for any philanthropic or charitable purpose, or for the promotion of science or art, or anything save and except the obtaining of large profit for the association by the means aforesaid. I should have thought the question was absolutely unarguable had it been stated without any declaration. Then I was referred to the deed. It was supposed that the deed would, in some way or other, help the plaintiff's case. I find nothing in the deed to contradict the terms of the prospectus. In fact it carries it out more fully. It recites that the trustees had already received a very large sum of money in stocks and shares, and that they intend to issue the certificates and so forth; and it then declares that the trustees shall hold the trust fund on the trusts of these presents, and it says that the "trust funds and securities shall be applied in payment in the first instance of a per centage of  $1\frac{1}{2}$  per centum upon the nominal amount of the said trust funds and securities, and of any increase thereof from time to time, under a contract which the trustees have entered into for the discharge of all the preliminary expenses attendant upon the formation of the trust (inclusive of any commission on the original purchases), stamps, advertisements, legal expenses, and all other charges, and, subject thereto, by and in the discretion of the trustees in the purchase of securities of the same or like kind and description as those mentioned in the first schedule hereto, provided that not more than one-tenth part of the whole capital fund for the time being subject to the trusts hereof shall at one time be invested in or upon the same securities." Now I am going to read the descriptions of stock, for it is as well to know, with reference to this alleged breach of trust, what the stocks are. [His Lordship read the list, which consisted of Egyptian, Turkish, Spanish, and various South American govern-

ment loans and mortgage bonds of certain North American railways, and similar investments.] I have read every one of them, because it is useful to recollect what they are when one comes to consider the construction of another section, which I was told merely referred to securities something like Exchequer Bonds. The trustees are to invest the moneys in the purchase of securities "of the same or the like kind and description." I think that is not quite an ordinary trust for investment, such as we should expect to find in a settlement, as was suggested to me by Mr. Chitty in argument. Then paragraph 3 of the trust deed states: "The annual produce of the said trust fund and securities, and all moneys arising in respect of any of such trust funds and securities, or any trust funds or securities for the time being shall be applied in manner following: First, in payment of brokerage or commission on the purchase and sale of securities from time to time, and then in payment of any sum or sums not exceeding the amount of half per centum upon the nominal amount of capital from time to time subscribed in manner aforesaid, and, subject to the trusts of these presents, in discharge of all expenses of the arrangement of the trust during the preceding year, including all remuneration to the trustees, committee, actuaries, and auditors, salaries, rent of offices, &c., and the banker's commission for payments of dividends and redemptions; secondly, in setting apart as a reserve or guarantee fund to be applied for the purposes hereinafter mentioned, a sum equal to half per centum upon the amount of the nominal capital for the time being subject to the trusts; thirdly, when and so soon as any certificates shall have been drawn and converted into preference dividend bonds, in payment of interest to the holders of such bonds at the rate of 2l. per centum per annum half-yearly as herein mentioned; fourthly, in payment of interest at the rate of 6l. per centum per annum on the amount of the outstanding certificates for the time being, to the holders thereof for the time being, half yearly as herein mentioned; fifthly, in payment by way of bonus to the holders of such and so many of the said certificates as shall be drawn each year for conversion into preference dividend bonds, of the surplus profit (if any) of the year which shall remain after making the payments aforesaid up to but not exceeding  $8\frac{1}{2}$  per centum upon the said nominal capital for the time being; sixthly, in payment by way of further bonus to the holders of such and so many of the said certificates as shall be drawn for conversion into preference dividend bonds each year of the difference of interest upon the preference dividend bonds, and in the outstanding certificates; seventhly, in the redemption in the order of their date and issue of the preference dividend bonds out of surplus profits in excess of  $8\frac{1}{2}$  per centum (if any) at the rate of 200l. for every 100l. bonds, so as to extinguish the same for the benefit of the holders of the remaining bonds and certificates (if any)." Now, I pause there for a moment, because I want to see what the position of the holders of the certificates is, and what their rights are. It is clear, as I read it, and as I shall show presently, that they are entitled to have the certificates drawn. Now how? Clause 8 is this: "The certificates to be converted into preference dividend bonds in each year shall be selected by lot in the presence of a notary public,

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and the preference dividend bonds issued in lieu thereof shall be numbered in the order in which the certificates in respect of which they shall be issued were drawn. The selection shall be made in the month of December of each year at twelve o'clock at noon on such day and at such place as the trustees shall appoint, notice thereof being given in three London daily papers at least one week previously, and any holder of a certificate may attend and the first selection shall be made in Dec. 1873. The trustees or trustee present on each such selection shall superintend the selection by lot, and the result of such meeting for selection shall be recorded in a book kept for that purpose, which shall be open for the inspection of the holders of certificates, and shall also be advertised in the three London daily papers not later than two days after the actual selection (if not a Sunday), and for three days in the following week. Ninthly, if any holder of a certificate shall so require, the notary public present at such selection shall make a statutory declaration of the result of such selection by lot." And then the certificate is to cease to bear interest, and the holder is to get a bond and a bonus as well. As I said before, not intending to decide the point because it has not been argued, but stating my opinion so far as I ought to state it, that is a lottery, and illegal under the Lottery Act. The holders of certificates are persons who subscribe money to be invested in funds which are to be divided amongst them by lots, and divided unequally—that is, the persons who get the benefit of the drawings get a bond bearing interest and a bonus which gives them different advantages from the persons whose bonds are not drawn, and it depends upon chance which gets the greater or the least advantage. It is, therefore, a subscription by a number of persons to a fund for the purpose of dividing that fund by chance unequally amongst them. If that is not a lottery, it is very difficult, at all events, to understand what a lottery is. It is called a division by lot, and that is to be done in the ordinary way by chance, and the benefits, as I said before, are unequal; and if that is so, the scheme is illegal on that ground as well as on the ground which has been argued. Then there is a provision in clause 7, which is probably one that was wanted to provide for some of these funds failing. The subscribers to that scheme, although evidently of a sanguine temperament, were not so sanguine as not to see that some or other of these governments might omit the ceremony of paying their dividends, and consequently in the 7th clause we find this, "If in any year the annual produce of the trust funds and securities and all profits arising from the sale, payment, or redemption of any such securities shall, after payment of all expenses as aforesaid, be insufficient for payment of interest at 5 per cent. per annum as aforesaid on the nominal amount of the said preference dividend bonds for the time being, the trustees may apply in or towards making good the deficiency the whole or such part as they may think fit of any reserve fund then existing, and the moneys which are or shall so become available shall be divided amongst the holders of such preference dividends bonds *pari passu*, and the deficiency, if any, which shall then exist for payment of the said 5 per centum interest shall remain as a first charge upon and to be paid out of the

future income or profit of the said trust fund." And then there is a further provision as to outstanding securities which I need not read. Then there is the 12th clause as to what is to become of the reserve fund, which states this, "The reserve fund and all annual produce and all moneys arising from the profits arising from the sale, payment, or redemption of any of the trust funds and securities may, if the trustee shall so think fit, until the same shall be required as cash for the purposes of these presents, be invested in the purchase of Government or India stocks or funds, Exchequer bills, or any other easily convertible securities, or be placed at a deposit account in the names of the trustees for the time being in the Bank of England, or at some other bank, and any interest arising from such interim investment shall be dealt with as part of the annual produce of the trust fund and securities." It was argued before me on that clause, that they were only entitled under the words "or any other easily convertible securities," to invest in something like Government or India stock or Exchequer bills. Now, the word "government" there does not necessarily mean the British Government. These people dealt with all sorts of governments except the British Government—they dealt with the Government of Egypt and the Government of Spain. It does not by any means follow that they meant by "government" anything more than they said—the securities of some government; and in the next place I am satisfied that "or any other easily convertible securities" cannot be restricted, and was not intended to be restricted. It meant what it said; and everybody knew that those securities mentioned in the first schedule, as regards the great bulk of them, are very easily convertible indeed; in fact, the more depreciated a security is the more easily convertible it is, generally speaking, although of course it is sold for a much smaller sum. Then the 16th clause says: "None of the securities on which the trust funds shall be, from time to time, invested, shall be sold or otherwise converted into money except by means of their payment or redemption, unless by the resolution of two-thirds of the trustees present at a meeting of the trustees and confirmed at a special meeting of the trustees called with express notice of the object, at which there are present not less than three trustees, by a resolution passed by a similar majority present at such meeting." Then the 17th clause is this: "The produce of every such conversion as aforesaid, and the deposits (if any) forfeited for non-payment of the amounts to be paid on allotment shall be applied in the same manner as capital or moneys arising from the payment or redemption of any of the trust funds or securities, save that any profit realised on such sale or conversion may be treated as part of the nominal profits." I think that is all I need read of the trust deed. I now come to the allegations affecting Mr. Lloyd. Mr. Lloyd, as I said before, retired from the trust about five years ago, and what he is alleged to have done is this: that he and the other trustees invested the reserve fund and profits in speculative securities, and were, in consequence, obliged to sell out some of the capital securities of the trust in order to pay the coupons, and that there has been a loss on such investments. As I said before, I cannot see any breach of trust alleged there. There is nothing to prohibit speculative securities. All that is required is, that they

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should be easily convertible; and it is not alleged that these were not easily convertible. Then it is also stated that as a result of these sales and conversions there has been a loss to the trust of about 24,000*l.* Now, the observation I made upon that during the argument, and which I repeat is, that there is no clear allegation of breach of trust. That loss may have arisen by dealings—that is, by bad investments; but it by no means follows that they were made by sales under the 16th clause; they may have been investments made within the exception. I do not want to imagine as a fact that they were; but the allegation does not come within the prohibition of the deed. I should guess they were within the exception; but on demurrer the court must not guess. The plaintiff must make an allegation which is clear. That is a narrow ground to take; but I notice it because, as I may give leave to amend, I ought to point out that the plaintiff's allegations are not such as on demurrer would entitle him to complain of anybody, least of all of a person who is no longer a trustee. Now that being so, of course I ought to allow the demurrer, unless the plaintiff is entitled to some relief against Mr. Lloyd, assuming, as I do now, that the contract is illegal either on one or both the grounds I have mentioned. It is said that even in that case the plaintiff can have some relief; I do not think he can. Mr. Lloyd has no longer any part of the trust fund in his possession. It is admitted that he has retired. He is not alleged to be a certificate holder, or to have anything to do with them, or with distributing the actual remaining trust funds. He is not wanted for any such purpose. All he is wanted for is to make him liable for a supposed breach of trust in dealing with the trust fund—that is, to make him liable for not having invested moneys under an illegal contract, and kept them intact when invested. His answer is very simple. The claim is in substance to make him liable in damages for breach of the illegal contract; and that cannot be done. It was tried in argument to put it as if the trust funds which had been sold out had been the actual trust funds of the plaintiff and transferred to Mr. Lloyd; but that is not so. All the plaintiff subscribed was money, and the trust fund arose out of the illegal contract. Part of the illegal contract was to invest the money in this very trust fund, so that it is neither more nor less than what I have stated, namely, an attempt to make a man liable in damages for breach of an illegal contract, which cannot be done. Now I must refer to several authorities to show that the claim cannot be maintained. It may be maintained against persons other than Mr. Lloyd; but that I do not care about. I suggest, for the consideration of the plaintiff's advisers, that if they think of maintaining it against any other person, they must very materially alter the frame of their statement of claim. According to my opinion, it cannot be maintained in this shape, that is, to have the trusts of the deed administered. Whether or not it would be maintained on the assumption that the trusts are not to be carried on, but that the defendants are to be enjoined from carrying on any further trusts, or so-called trusts, and ordered to divide what remains of the property among the subscribers, I do not say; but if it could be maintained at all, it could only be maintained upon

some such ground as that. Now, the authorities on the subject seem to be quite plain, when you come to examine them. They are really to this effect, that you cannot ask the aid of a court of justice to carry out an illegal contract; but where the contract is actually at an end, or is put at an end to, the court will interfere to prevent those who have obtained money belonging to other persons under the contract on the representation that the contract was legal, from keeping that money. Now, in the cases that were referred to, the first to be noticed is a decision of Sir W. Grant: (*Thomson v. Thomson*, 7 Vesey, p. 470.) He says, "The defence is very dishonest, but in all illegal contracts it is against good faith as between the individuals to take advantage of that. A man procures smuggled goods and keeps them, but refuses to pay for them. So in the underwriter's case, an insurance contrary to the Act of Parliament, the brokers had received the money, and refused to pay it over, and it could not be recovered. No matter who complains of it, the thing is illegal. You have no claim to this money, except through the medium of an illegal agreement, which, according to the decisions, you cannot support." Now, I apply that exactly here. You have no claim against Mr. Lloyd to compel him to make good the loss, except through the medium of the illegal agreement, the contract which was alleged to be entered into to dispose of the fund in some other manner. There is a distinction drawn and illustrated by two cases, viz.: *Tenant v. Elliott* (1 Bos. & Puller, 3), and *Farmer v. Russell* (Ibid. 296) both of which cases are of a totally different character. That distinction arises where the illegal contract is at an end; but although the party could not have been forced to pay under the illegal contract, he actually paid it to a third person—and that third person could not set up the illegality of the contract, having received the money for the use of the plaintiff: that is *Tenant v. Elliott*. The case of *Farmer v. Russell* was a similar case. The case was a very odd one. The contract was alleged to be an illegal one, because the goods carried were said to be known to the carriers to be counterfeit halfpence, and therefore the whole thing they said was on the contract to carry; but it was decided against that contention because the money had been paid over at Portsmouth for the carriage, and it was held that the defendant could not retain the money, on the ground that it was upon the same principle as *Tenant v. Elliott*. A similar point came before Lord Cottenham in *Sharp v. Taylor* (2 Phill. 801); there was a question as to whether certain sums of money earned contrary to the English Navigation Laws could be kept by the defendant. He says (p. 817), "But the answer to the objection appears to me to be this, that the plaintiff does not ask to enforce any agreement adverse to the provision of the Act of Parliament. He is not seeking compensation and payment for an illegal voyage; that matter was disposed of when Taylor received the money; and the plaintiff is now only seeking for payment of his share of the realised profit. The violation of law suggested was not any fraud upon the revenue or omission to pay what might be due; but at most an invasion of a parliamentary provision supposed to be beneficial to the shipowners of this country; an evil, if any, which must remain the same, whether the freight be divided between Sharp and Taylor according to their shares or remain

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altogether in the hands of Taylor." Of course, that observation does not apply where you seek to enforce a transaction which is illegal. Then he goes on to say, "As between these two, can this supposed evasion of the law be set up as a defence by one against the otherwise clear title of the other? In this particular suit, can one tenant in common dispute the title common to both? Can one of the two partners possess himself of the property of the firm and be permitted to retain it if he can show that in realising it, some provision in some Act of Parliament has been violated or neglected? Can one of two partners in any import trade, defeat the other by showing that there was some irregularity in passing the goods through the Custom-house? The answer to this, as to the former case, will be that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do, as between the parties." I must say, speaking with some hesitation, as I always do of any judgment of Lord Cottenham's, that that reasoning, to my mind, is inconclusive and unsatisfactory. The notion that, because a transaction is closed, therefore a court of equity is to interfere in dividing the proceeds of the illegal transaction, is not only opposed to principle, but to authority; and to authority in the well-known case of the highwayman, where a robbery had been effected, and one highwayman sued for a division of the proceeds of the robbery. There, of course, it would be answered that the transaction was complete. So in the case he puts, of one of two partners engaged in merchant trade; as I read it, he meant smuggling goods. If two persons go partners as smugglers, can one maintain a bill against the other to have an account of the smuggling transaction? I should say, certainly not. It is not sufficient to say that the transaction is concluded. If the partnership was for the purpose of smuggling, that is an illegal contract; the court cannot maintain it, and will not lend its aid at all to it. The reason given is not sufficient, and I should answer it, not as Lord Cottenham does, in the affirmative, but in the negative. I do not say that that at all affects the authority of *Sharp v. Taylor* as it stands; but I think it does affect very much the dicta which I have read, and that is the reason I have read them. It is no part of the duty of a court of justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract between the parties to that illegal contract. In my opinion, no action can be maintained for the one purpose more than for the other. I gave an illustration which occurred in my own practice in early life. One partner in a gaming house sued the other partner for an account of profits. It did not come on for hearing, because the plaintiff thought better of it; and I am satisfied that if it had come on, the bill could not have been maintained. Still the assertion of the bill was that the gaming-house had been closed, and the plaintiff asked for an account on that footing. Lord Cottenham goes on to say: "Do the authorities negative this view of the case? The difference between enforcing illegal contracts and asserting title to money which has arisen from them, is distinctly taken in *Tenant v. Elliott* and *Farmer v. Russell*, and recognised and approved by Sir William Grant in *Thomson v. Thomson*." Yes, but not in that way; I have already explained what those

cases were. They were not cases in which one of the two parties to the illegal contract sought to recover from the other a share of the proceeds of the illegal contract. Then he goes on to distinguish that case; and probably that will distinguish it from cases which would be open to exception on the ground of criminality. Those are all the authorities to which I think it is necessary to refer. I think the principle is clear that you cannot directly enforce the contract, and you cannot ask the court to assist you in carrying it out. Neither can you enforce it indirectly; that is, by getting damages or compensation for the breach of it, or compensation from the persons taking the profits realised from it. It does not follow that you cannot in some cases recover money paid over to third persons by means of the contract, or that you cannot in other cases obtain even from the parties to the contract moneys which they have become possessed of by representations that the contract was legal, and which belonged to the persons who seek to recover them; but I think there is no pretence for saying that the contract will in any way be enforced or aided by a court of law or equity, and therefore I feel bound to allow this demurrer.

Solicitors: *Hargrove and Co.; Faithful and Owen.*

Thursday, Feb. 27.

(Before BACON, V.C.)

BROWNING v. BALDWIN. (a)

*Guarantee—Continuing security—Appropriation—Liability of guarantor's estate—Bank books—Current account.*

*In May and Oct. 1868 two guarantees for 1000l. each were signed by the testator in the action and other persons, directors of a company, requesting a bank to accept their agent's bills to that amount. The bills drawn by the company's agent were accordingly accepted, and the money so advanced was debited to the account of the company. Payments in and drawings out were from time to time made by the company, and in Aug. 1870, when the testator died, there was a balance of over 1600l. due to the bank. No accounts, other than the bank books, had been rendered. The company went into liquidation, and the testator's co-guarantors were unable to pay. Upon an application by the bank to prove against the testator's estate for the 1600l., on the security of the guarantees,*

*Held, that the guarantees were a continuing security, and that the bank were entitled to prove against the testator's estate for the balance due to them at his death with interest at 4 per cent. from that time.*

*The City Discount Company v. McLean* (30 L. T. Rep. N. S. 883; L. Rep. 9 C. P. 692) followed. *Kinnaird v. Webster* (39 L. T. Rep. N. S. 494; L. Rep. 10 Ch. Div. 139) observed upon.

ADJOURNED SUMMONS.

This was an application on behalf of Messrs. Cunliffe, Brooks, and Co., bankers, for leave to come in and prove as creditors against the estate of one Edward Booth, the testator in the cause, for the sum of 1605l. 18s. 6d. with interest thereon from the 18th Aug. 1870, being the date of the testator's death, at 5l. per cent. per annum.

(a) Reported by W. COWELL DAVIES, Esq., Barrister-at-Law.

This claim was based upon two guarantees, the first of which was dated the 15th May 1868, and was as follows:

Gentlemen,—We request you to accept the drafts of Mr. William Perfect Lockwood in your London house of Brookes and Co. at sixty days sight to the extent of 1000*l.*, and we undertake to provide you with funds to meet such acceptances before maturity.

This was addressed to Messrs. Cunliffes, Brooks, and Co., and was signed by the testator Edward Booth and three other persons. The second guarantee was also addressed to Messrs. Cunliffes, Brooks, and Co., and was signed by the testator and two other persons; it was dated the 18th Aug. 1868, and was as follows:

Dear Sirs,—In consideration of your accepting the drafts of Mr. W. P. Lockwood on yourselves to the extent of 1000*l.* further, we undertake to provide you with funds to meet such acceptances before maturity.

Mr. W. P. Lockwood was the agent of the Canadian and North-West Land Mining Company, (Limited), and the testator and his co-guarantors were directors of this company, and the above guarantees were admittedly given in connection with, and for the purposes of, the company. On the faith of these guarantees Messrs. Cunliffes, Brooks and Co. accepted Lockwood's drafts, and debited the amounts so paid by them from time to time to the account of the company, who also banked with them. At the end of the year 1868 the balance due to Messrs. Cunliffes, Brooks and Co. on the company's account was 1775*l.* 4*s.* 5*d.* This balance fluctuated from time to time in consequence of the payments in and drawings out by or on behalf of the company, and on the 18th of Aug. 1870, the time of the testator's death, there was a balance of 1605*l.* 18*s.* 6*d.* owing to Messrs. Cunliffes and Co. No account, other than the passbook, had ever been rendered, and the only evidence as to the dealings in question and the fluctuations of the balance were the bank books. The facts, however, were admitted. The company being now in liquidation, and the testator's co-guarantors being unable to pay, the present application for leave to prove against the testator's estate for the balance owing at his death was now made on behalf of Messrs. Cunliffe, Brooks and Co.

*Everitt* for the summons.—The two guarantees constitute a continuing security. The presumption arising from the rule in *Clayton's case* (1 Mer. 605) may be rebutted by circumstances; and there has been nothing amounting to an appropriation in these transactions. *The City Discount Company (Limited) v. McLean* (30 L. T. Rep. N. S. 883; L. Rep. 9 C. P. 692) is a distinct authority in our favour, and under that we are entitled to prove against the estate of the testator on these letters which were continuing guarantees at his death.

*Swanston, Q.C.* and *F. C. J. Millar* for the infant plaintiffs and the executors.—These guarantees were given only to secure the moneys advanced on Lockwood's bills. The entries in the bank books since the payment of these bills must be taken to show that funds of the guarantors in the hands of the bankers have been appropriated to meet these payments. The rule in *Clayton's case* is applicable here. The guarantee, too, was not intended to be a continuing guarantee. In *Re Medew's Trusts* (26 Beav. 588) the words of the guarantee appear more like a continuing security than the present, and yet they were held not to

create a continuing security for the floating balance. *Kinnaird v. Webster* (39 L. T. Rep. N. S. 494; L. Rep. 10 Ch. Div. 139) and *Melville v. Hoden* (3 B. & Ald. 593) are in favour of this guarantee being satisfied by appropriation. *The City Discount Company v. McLean (supra)* is not applicable—it was decided upon very special circumstances. The guarantee in that case was a covering guarantee that was to remain in operation for two years; here the guarantee was first a simple guarantee for 1000*l.* and then another guarantee is given for a further sum of 1000*l.*, and upon those acceptances being paid there is an end of the guarantees.

*E. S. Ford* for creditors who were plaintiffs.

BACON, V.C.—I have heard no satisfactory distinction drawn between this case and the case of *The City Discount Company Limited v. McLean* (30 L. T. Rep. N. S. 883; L. Rep. 9 C. P. 692). The terms of these guarantees which were given to the bankers are distinct enough. Lockwood had certain relations with the company, which, however, it is not necessary to take into consideration now, and had occasion to draw from time to time upon the company's bankers, apparently sometimes in his individual capacity, but as it is admitted always as agent of the company; as a security for these drawings, the guarantees were given; and there is no valid distinction between such a transaction as this and what was done in *The City Discount Company v. McLean (supra)*, where a mortgage was given. The matter must be considered as distinct as if Lockwood had never had any transactions with the Canadian Company but only with the bankers. All the advances made by the bankers, and all the payments into the bank, whether on behalf of the company or not, are carried in the bank books into one general account, but that of itself is no appropriation. The words in the second guarantee, "to the extent of 1000*l.* further," are an indication that the guarantee was a continuing security, and I am satisfied from the manner in which the account was kept that, as in the *City Discount Company v. McLean (supra)* it was not the intention of the parties that the advances under the guarantee should be considered as satisfied by the items of credit in the account, and that therefore the rule in *Clayton's case (ubi sup.)* does not apply. The case of *Kinnaird v. Webster* (39 L. T. Rep. N. S. 494; L. Rep. 10 Ch. Div. 139), which has been referred to, was of a totally different kind; there, upon the terms of the contract fairly read and interpreted, I came to the conclusion that the intention of the parties was that only if enough money was not paid in by the principal debtor was the guarantor to be looked to for payment; and enough money did come in. In that case I decided upon the terms of the letter of guarantee which were peculiar. I am of opinion that the bankers in this case are entitled to come in and prove for the amount now claimed; and, as it is a commercial debt, it must carry interest at 4 per cent. from the death of the testator.

Solicitors: *W. H. Tattam; Rowley, Page, and Rowley.*



CHAN. DIV.]

SPRATT'S PATENT v. WARD AND CO.

[CHAN. DIV.]

Thursday, Feb. 27.

(Before BACON, V.C.)

SPRATT'S PATENT v. WARD AND CO. (a)

*Practice—Mode of trial—Judge or judge and jury—Issue of fact and questions of law—Rules of Court 1875—Order XXXVI., rr. 3 and 26.*

*Action commenced in the Chancery Division to restrain the sale of goods under any title, intimating that the articles sold by the defendants were manufactured under the plaintiff's patent, and for an account and damages; one instance of an alleged improper sale given; issue joined, and notice of trial before a judge alone given by the plaintiffs; the defendants then gave notice under Order XXXVI., r. 3, that they desired the action tried before a judge and special jury. On a summons by the plaintiffs for a trial of the action before the judge notwithstanding the defendants' notice,*

*Held, that as there were questions of law to be decided beyond the one simple issue of fact to be submitted to a jury, it was desirable to direct a trial without a jury, and that the defendants were therefore not entitled to prevent the action from being tried in the mode selected by the plaintiffs.*

## ADJOURNED SUMMONS.

The action was for the purpose of restraining the defendants from selling dog biscuits under the title of "Fibrine Dog Cakes," or under any other title tending to make the public believe that the biscuits sold by the defendants were manufactured under Spratt's patent, of which the plaintiffs were the registered proprietors, and also claimed further relief in the way of account and damages. One instance was specified by the plaintiffs of an alleged sale by the defendants of dog biscuits in imitation of, or under the name of, the plaintiff's biscuits.

A statement of defence had been delivered and issue joined, but notice having been given by the defendants under the Rules of Court 1875, Order XXXVI., r. 3, that they desired to have the action tried before a judge and a special jury, the plaintiffs, who had set down the action for trial before the Vice-Chancellor, took out a summons to have this action tried before the judge before whom it had been set down, notwithstanding the notice by the defendants that they desired the action to be tried before a judge and special jury.

Sir H. M. Jackson, Q.C. and Daumey, for the plaintiffs.—There is only one issue of fact raised on these pleadings, which can be tried just as well before a judge as before a jury. In *West v. White* (36 L. T. Rep. N. S.; L. Rep. 4 Ch. Div. 631), the only case in which the wishes of the defendant have been acceded to as against the wish of the plaintiff, there were four distinct issues raised, and issues of a nature which a jury were the most competent to deal with; so that in that case the defendant had manifestly chosen the best method of trial. In our case there is only the one simple issue, but there are other questions which must be submitted to the court which a jury cannot decide. Under Order XXXVI., r. 26, the mode of trial is in the discretion of the judge; we submit that under the circumstances it is desirable that this action be tried without a jury in the court in which it has been set down by us. They referred to

(a) Reported by W. COWELL DAVIES, Esq., Barrister-at-Law.

*Swindell v. Birmingham Syndicate*, 35 L. T. Rep. N. S. 111; L. Rep. 3 Ch. Div. 127;  
*Pilly v. Baylis*, 36 L. T. Rep. N. S. 296; L. Rep. 5 Ch. Div. 241;  
*Sykes v. Firth*, W. N. Feb. 17, 1877;  
*Jarling v. Royds*, W. N. Dec. 16, 1876;  
*Dent v. Sovereign Life Assurance Company*, W. N. Feb. 22, 1879.

*Romer*, for the defendants.—Order XXXVI., r. 3, says that a defendant, if he gives notice in time, "is entitled to have" the action tried before a judge and jury, subject of course to the provisions of the subsequent rules. Rule 26 in the same order says a judge "may, if it shall appear desirable," &c.; therefore the onus is on the plaintiff to show some special reason why the defendant is not to be entitled. I rely upon *West v. White* (*supra*). The position of a plaintiff who can select his own forum, and that of a defendant who is brought by force to the plaintiff's forum, is very different; and as the defendants cannot help coming here, there ought to be some substantial and special reasons shown before they can be deprived of their *prima facie* right to a jury. There are no special reasons given here; there is only one material allegation against us, and that allegation is supported only by one instance of an alleged improper sale: all must turn on what took place on that sale, and questions as to the credibility and demeanour of the witnesses are most properly settled by a jury. The jury will decide the issue of fact which is between us, and after their finding the other questions will be argued and determined by the judge. This application ought not to be acceded to.

BACON, V.C.—No doubt the clauses in the Act which have been referred to have created considerable difficulty, and it is possible that some verbal critics might think they could be more distinctly expressed; but such as they are we have to deal with them, and the courts have been required to deal with them on various occasions. Mr. *Romer's* argument is that the statute has conferred upon his client a right to have this case tried before a jury. The statute has not said that, either in words or in meaning. What the statute says is, that the defendant may, upon giving notice within four days from the time of the service of the notice of trial, or within such extended time as a court or a judge may allow, to the effect that he desires to have the issues of fact tried before a judge and jury, be entitled to have the same so tried. That is not what he has done. He has given notice that he requires to have this action tried before a judge and jury, and that is the thing which the plaintiff desires to interfere with. The notice is a notice requiring that this action be tried by a judge and a special jury. Mr. *Romer* has convinced me, if I did not know it before, that there is only one fact that could by possibility be tried by a judge and jury—that is, the question whether on the day mentioned, or on some other day, biscuits were sold by the defendant in imitation of, or under the name of, the plaintiff's. That is the single fact. But that is not all that the action comprehends. The plaintiffs allege that, having obtained a patent, or having established a trade of a particular kind, and designated commodities by a particular name and description, they find that right which they have acquired by that usage interfered with by the defendant. Am I going to send that to be tried by a jury? Is that fit to go to a



jury? On the contrary, it is eminently fit to be tried here. I quite agree with Mr. Romer that the court should not deal with this without reasons, nor would I deal with this case or any other case without reasons—reasons at all events satisfactory to myself. But I see plainly on this record that there are questions besides that one question of fact that must be submitted to the judgment of the court, and must be the subject of proof and argument by counsel. I think under the 26th rule cause is shown to me why the case should retain its place in this court and not go to another court. What the defendant desires is to have the action tried, but the only thing the statute gives him is the right to have the issues of fact tried, subject to the subsequent provisions of the statute. There is only one question of fact which the defendant could allege (which would last ten minutes or a quarter of an hour) to be tried here, and I am asked to send this case, which is not a very important one in itself, to be tried before a judge and jury, because the defendant thinks he would like that best. There is no ground for it whatever in my opinion. If I did so I should fall into the error and vice which the statute intended to prevent, namely, a party being banded about—which is the phrase generally used—from one court to another. That is to say, when he is ready to have his case decided, to send him down to Westminster or somewhere else with a great number of witnesses, causing great delay and expense which the court ought to prevent.

The plaintiffs' costs to be costs in the action; no order as to the defendant's costs.

Solicitors: *Beetham, Batchelor; Foss, and Legg, for J. K. Bartrum, Bath.*

Feb. 26 and March 4.

(Before FRY, J.)

TAITE v. GOSLING. (a)

*Covenant by purchaser—Assign—Lessee of covenantor.*

*The defendant's predecessor in title purchased certain land, and covenanted for himself, his heirs, executors, administrators, and assigns, with the vendors and their assigns, and with the owners of adjoining lots, their heirs and assigns, not to carry on a certain trade.*

*The plaintiff was lessee of one of such owners, and brought this action for an injunction to restrain the defendant from committing a breach of the covenant.*

*Held, that the plaintiff was an "assign" within the meaning of the covenant, and was entitled to the injunction.*

This was an action for an injunction to restrain the defendant from committing a breach of a covenant not to carry on a certain trade.

The British Land Company (Limited) sold a portion of a large estate at Peckham, known as the "Dulwich" estate, to William Harris. The conveyance was dated the 19th July 1873, and contained the following recital and covenant:

And whereas the premises were sold to the purchaser, subject to the stipulations specified in the second schedule which refer to the said lithographed plan, now, therefore, the vendors (as to so much of the land to which the said stipulations relate as remains vested in them) for

themselves and their assigns, and the purchaser (as to the land hereby conveyed) for himself, his heirs, executors, administrators, and assigns, do respectively covenant and grant with and to each other; and as to the purchaser, also with and to the owners or owner of any other land to which the benefit of the said stipulations is attached, and their his or her respective heirs and assigns that the covenantors respectively, and their respective heirs and assigns will henceforth observe, perform, and comply with the said stipulations, so far as the same relate either to the rights or to the duties of the purchaser, his heirs, or assigns, in respect of the land hereby conveyed; and that nothing shall ever be erected, fenced, placed, or done upon the land as to which they respectively covenant, in breach, or violation, or contrary to the fair meaning of the said stipulations; but this covenant is not to be held personally binding upon either the vendors, or the purchaser, or any other person, except in respect of breaches committed, or continued during their his or her joint or sole seisin of or title to the land upon or in respect of which such breaches shall have been committed.

The second schedule referred to contained the following stipulation:

3. Trades.—The trade of an innkeeper, victualler, or retailer of wine, spirits, or beer is not to be carried on upon any lot.

The defendant, J. Gosling, afterwards became owner of a part of the land sold to Harris.

The British Land Company (Limited) sold another part of the estate to a Mrs. Hard, and the conveyance to her contained identical covenants and stipulations by and between the vendors and purchaser as those in the conveyance to Harris. Mrs. Hard afterwards demised a part of her land to the plaintiff, F. Taite, for ninety years from the 29th Sept. 1877.

Houses were built on the plots of land, and the defendant opened one on his land as a shop where he carried on business as a grocer, and retailer of wine, spirits, and beer.

The plaintiff now claimed an injunction to restrain him from doing so.

The defence, among other things, was that the plaintiff was "not an owner for the time being within the meaning of the said deed of covenant."

*North, Q.C. and Fellows, for the plaintiff, referred to*

*Johnstone v. Hall*, 2 K. & J. 414; 27 L. T. Rep. 230; *German v. Chapman*, 37 L. T. Rep. N. S. 685;

*L. Rep. Ch. Div. 271*;

*Wright v. Burroughes*, 3 Com. B. 685;

*Wilson v. Hart*, 14 L. T. Rep. N. S. 499; 2 H. & M.

551; *L. Rep. 1 Ch. App. 468*;

*Fielden v. Slater*, 20 L. T. Rep. N. S. 112; *L. Rep.*

*7 Eq. 523*;

*Spencer's case*, 1 Sm. L. Cas. 60 (7th ed.);

*Coke's 1st Institute*, 215a.

*Cookson, Q.C. and Oszens Hardy for the defendant.*—The plaintiff is not an owner within the meaning of the covenant. He is only the lessee of an owner, and cannot sue for a breach of it. A lessee is not an assign within the meaning of the covenant. If "assign" is held to include a lessee, it must also include an under-lessee, an occupier, and any person who has a chattel interest. An "assign" is a person who takes land for the entire estate, or has at least a freehold interest in it. *Tulk v. Moxhay* (2 Phil., 774) does not apply to this case. They referred to

*Crusoe v. Bugby*, 2 W. Bl. 766;

*Thomas v. Hayward*, 20 L. T. Rep. N. S. 814; *L. Rep. 4 Ex. 311*;

*Fairclough v. Marshall*, 39 L. T. Rep. N. S. 369; *L. Rep. 4 Ex. Div. 37*.

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HOYLE (app.) v. HITCHMAN (resp.)

[Q.B. Div.]

March 4.—FRY, J., after stating the facts, continued:—The only defence which has been urged and which I have to consider is this: It is said that the plaintiff being a lessee for ninety years is not an "assign" of the vendor from whom the purchaser purchased and with whom he covenanted. At the time of the argument I expressed a strong opinion that the plaintiff was an assign, but I reserved judgment for the purpose of seeing if I could find any authority more clearly and absolutely decisive on the point than anything that was cited before me during the argument. I have not done so. At the same time I have no hesitation in expressing my opinion that the plaintiff is clearly an assign within the meaning of the words there used. In the first place, according to my judgment, the word "assign," as used in such covenants, does include the plaintiff according to the ordinary use of legal language. That is my understanding of the meaning of the word "assign." It was argued that the assign must be the person who took the entire estate, or, if not the entire estate, at any rate a freehold interest in the land. Now it appears to me the authorities go a long way against that conclusion. So far back as the reign of Edward VI. it was determined under the statute of Henry VIII., which gave the benefit of covenants to the persons who claimed under the covenantees, that a person who takes a life interest in the reversion is an assign within the meaning of that Act. That was determined in *Kidwelly's* case (Plowd. 69), although the point does not appear to have been argued. The law is clearly laid down by Lord Coke in his First Institutes at p. 215a, in this way—That an assign of part of the state of the reversion may take advantage of the condition. That appears to me to be a judicial decision, that a person taking a part of the interest is an assign for the purposes of that statute. Now I cannot imagine two cases more *in pari materia* than that case arising upon that statute and the case now arising before me. In both cases the question is whether the assign is to have the benefit of the covenant. Then a later case, of *Wright v. Burroughes* (*ubi sup.*), has decided that that rule of law, that meaning of the word "assign," which in the reign of Edward VI. was held to include a life interest in the reversion, applied to a term for years in the reversion. It was urged, no doubt, that in covenants against an assignment, the covenant has been held not to have been broken by an underlease, but it appears to me that that fact has very little to do with the present case. An assignment is undoubtedly a mode of parting with the entire interest of a lessee, but an assign of freehold estate, never in the ordinary way claims under an assignment. I do not think that the word "assign," as used in a covenant by the freeholder, means persons claiming under an assignment, strictly so called. My judgment, therefore, concludes the case in favour of the plaintiff. The result is, there must be the injunction which is sought for, and that the defendant must pay the costs of the action.

The injunction was suspended for two months in order that the defendant might get rid of the stock then upon the premises.

Solicitors for the plaintiff, *Ravenscroft, Hills, and Woodward.*

Solicitors for the defendant, *Digby and Tabor.*

## QUEEN'S BENCH DIVISION.

March 26, 27, and 28.

(Before MELLOR and LUSH, JJ.)

HOYLE (app.) v. HITCHMAN (resp.). (a)

*Adulteration—Quality—Prejudice of purchaser—Sale to inspector—38 & 39 Vict. c. 63, s. 6.*

*The offence created by sect. 6 of the Sale of Food and Drugs Act 1875, viz., the sale of an article which is not of the nature, substance, and quality of the article demanded by the purchaser, does not depend upon any pecuniary or personal prejudice to the purchaser, but is committed in the case of a sale to an inspector appointed under sect. 13 to carry out the provisions of the Act, if an ordinary customer would have been prejudiced by such a sale to him.*

THIS was a case stated by a metropolitan stipendiary magistrate for the opinion of the court under 21 & 22 Vict. c. 43.

The respondent Hitchman was summoned on the complaint of Hoyle, an inspector, under the Sale of Food Act 1875 (38 & 39 Vict. c. 63), for that he "on the 13th Sept. 1878, within the metropolitan police district, did sell, to the prejudice of the said John Hoyle, a certain article of food—to wit, milk, which was not of the nature, substance, and quality of the article demanded by the said John Hoyle, contrary to the statute 38 & 39 Vict. c. 63."

On the 4th Oct. last the case was heard by Sir James Ingham, the chief magistrate of the police-courts of the metropolis.

The appellant was the inspector of nuisances of the Board of Works for the St. Giles's district, in the county of Middlesex, and was also the inspector duly appointed under the 13th section of the Sale of Food and Drugs Act 1875. He went on the 13th Sept. last to the respondent's shop and asked for half a pint of milk, and upon being told that the price was 1½d. he paid that sum out of money belonging to the said board, for which he had to account, and took possession of the milk. Directly after the purchase was completed he told the respondent's shopman that he was an inspector of nuisances and an inspector under the Sale of Food and Drugs Act 1875, and that it was his intention to have the milk analysed by the public analyst, whom he named. He then offered to divide the milk into three parts, and did, in fact, so divide it, and sealed up such parts, as required by the Act. One part he delivered to the shopman, and the remaining two parts he took away with him, and delivered one of them to Dr. Redwood, the public analyst, and produced the third part on the hearing of the case. The milk so purchased was found by the public analyst to contain 76 parts milk and 24 parts water, which water had been added to the milk after it came from the cow. On cross-examination by the respondent the appellant stated that he was not prejudiced, and that no injury had been done to him personally.

The respondent submitted that no offence had been established under the 6th section of the Act, as the milk sold was not sold to the prejudice of the purchaser. The magistrate found that the appellant demanded milk; that the article sold was not of the nature, substance, and quality of

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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the article demanded, as it was, in fact, milk and water, and not milk; that the appellant at the time when he purchased the milk had no knowledge as to whether the milk which the respondent sold to him was adulterated or not; that no notice of any kind was given to him that the article sold was milk and water and not milk. Had the purchase in this case been by one of the ordinary customers of the respondent, the offence mentioned in the Act would, in the magistrate's judgment, have been committed. He, however, dismissed the summons, because he thought that, although the appellant did not get the article he paid for, the sale was not, in the circumstances mentioned, a sale to the prejudice of the purchaser within the meaning of the Act, as the milk was purchased by an inspector for the purpose of analysis only.

The question for the opinion of the court was, whether the magistrate was right in point of law in dismissing the summons.

By the sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 3, the mixing of ingredients injurious to health in any article of food with intent to sell the same, and the sale of the same, are made offences.

Sect. 4 deals in the same way with the mixing of ingredients, so as to affect the quality or potency of drugs.

Sect. 5 exempts from conviction under the two previous sections, when absence of knowledge is proved.

By sect. 6:

No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser.

The provisoes do not apply to this case.

By sect. 13:

Any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police constable under the direction, and at the cost of the local authority appointing such officer, inspector, or constable, or charged with the execution of this Act, may procure any sample of food or drugs, and if he suspect the same to have been sold to him contrary to any provision of this Act, shall submit the same to be analysed by the analyst of the district or place for which he acts; or if there be no such analyst then acting for such place, to the analyst of another place; and such analyst shall, upon receiving payment as is provided in the last section, with all convenient speed analyse the same and give a certificate to such officer, wherein he shall specify the result of the analysis.

By sect. 14:

The person purchasing any article with the intention of submitting the same to analysis, shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article, his intention to have the same analysed by the public analyst, and shall offer to divide the article into three parts, to be then and there separated, and each part to be marked and sealed, or fastened up in such manner as its nature will permit; and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller, or his agent.

By sect. 17:

If any such officer, inspector, or constable, as above described, shall apply to purchase any article of food or any drug exposed to sale, or on sale by retail on any premises or in any shop or stores, and shall tender the price for the quantity which he shall require for the purpose of analysis, not being more than shall be reasonably requisite; and the person exposing the same for sale shall refuse to sell the same to such officer, inspector, or constable, such person shall be liable to a penalty not exceeding 10l.

*March 26.—Poland for the appellant.*—The question here raised involves the whole object of the statute. If the magistrate's decision is upheld the legislation on this subject must be a dead letter. The words "to the prejudice of the purchaser" were inserted, as clearly appears from the various sections, merely to protect a tradesman who sells an article different in nature, substance, or quality from that demanded, but of equal or greater value, so as not to prejudice the purchaser. [LUSH, J.—Sects. 13, 14, and 17 expressly provide for sales to an inspector. MELLOR, J.—Let us hear what can be said on the other side.]

*Morton Smith for the respondent.*—This case was stated in deference to a remark ascribed to the Lord Chief Justice during the argument of a case concerning the adulteration of whisky, which, although it appears in some of the daily and weekly papers, is not contained in either of the legal reports of the case (*Sandys v. Small*, L. Rep. 3 Q. B. Div. 449; 39 L. T. Rep. N.S. 118); and the magistrate's decision is supported by the majority of five out of seven judges of the Scotch Court of Justiciary in a case of alleged adulteration of cream (*Davidson v. McLeod*, Cases decided in the Court of Justiciary 1877-8, 4th series, vol. 5, part 22; also reported in the Justice of the Peace of 19th Jan. 1878), in which, although other points are discussed, two at least of the judges based their decisions on the ground of the impossibility of an inspector being prejudiced by such a sale. They were of opinion that the sections relating to sales to inspectors applied only to sales under sects. 3 and 4 of articles injurious to health. [LUSH, J.—It surely cannot be that sect. 17 applies only to sales under those two sections. The words are "to purchase any article of food or any drug exposed to sale."] These words "to the prejudice of the purchaser" appear here for the first time in the legislation on this subject; and this same Act for the first time compels sales to inspectors; it may be therefore that it was intended to enable an inspector to procure a conviction only for the sale of deleterious compounds. [LUSH, J.—Your contention must extend to the purchase of an article, not injurious to health, by an ordinary customer, for a charitable or any other than a personal purpose.] Possibly: but the words "to the prejudice of the purchaser" do not convey the meaning suggested by the appellant, and some weight should be given to them. [LUSH, J.—Without these words, it might be said it was an offence to sell a superior article to that demanded.] A *bona fide* purchaser might be prejudiced even then, if he got an article of a nature he did not want.

*March 27.—Poland in reply.*—The decision of this court in *Sandys v. Small* does not involve this point, and there is nothing in the judgments relating to it. There is another case of *Sandys v. Markham* (41 J. P. 52) in which an adulteration of mustard was discussed before Mellor and Lush, JJ. The case was remitted to the justices on another point, but the prejudice to the inspector was there assumed. So it was in a case of lard, before Kelly, C.B. and Pollock, B. (*Rook v. Hopley*, L. Rep. 3 Ex. Div. 209). The effect of *Davidson v. McLeod* is merely that the tradesman, having sold cream when cream was demanded of him, could not be convicted under this section, because his cream was not the richest kind of cream. The

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majority of the judges, although they overrule the conviction, were opposed to the contention that an inspector could not be prejudiced under this section. *Cur. adv. vult.*

March 28.—MELLOR, J.—In the special case stated by Sir James Ingham, which has been argued on the last two days, concerning a question as to what is an offence within the 6th section of the Sale of Food and Drugs Act 1875, we are now prepared to deliver our judgment. The question for us is a very narrow one, for it is found expressly in the case that, had the purchaser of the milk therein described been by one of the ordinary customers of the respondent, the offence created by this section would have been committed. The magistrate also finds that the purchaser was duly constituted as the inspector under the 13th section for the purpose of carrying out the provisions of the Act; but he dismissed the summons because he thought that, the milk having been purchased by the inspector for the purpose of analysis only, the respondent did not sell it to the prejudice of the purchaser within the meaning of the section. Therefore, it seems that the only ground on which the magistrate had dismissed the complaint was, that the purchaser was not "prejudiced" by the sale of the milk to him. That gives rise to the question whether the "prejudice" contemplated by the 6th section is a pecuniary prejudice. Such a view of the Act would, in my judgment, absolutely nullify its beneficial effect. For if the meaning of the enactment is that the offence cannot be complete without its being "to the prejudice of the purchaser," it is hardly possible that the offence should be brought home to anyone. And this observation, in my view, goes far to show that this construction cannot be the right one. So far as authority is concerned, there is no direct decision in favour of such a view; and indeed, in the English courts, there is hardly any authority upon the point. For, in the first of the two cases in this court referred to, the mustard case (*Sandys v. Markham*), my brother Lush distinctly said that, in his view, if the article were adulterated, it must be presumed that it was "to the prejudice of the purchaser," and I could not have dissented from that opinion or I should not have concurred in sending the case down to be re-stated on the other point. And as to the other case (*Sandys v. Small*), no doubt in the course of the argument the Lord Chief Justice made some such remark, but not by way of a decided *dictum*, and rather by way of query or suggestion, and the decision went upon the other point, so that there is no authority in the English courts in favour of the view now presented. There is, however, the decision of the Court of Session in Scotland (*Davidson v. McLeod*), and if the judges had concurred in that view we should have been reluctant to give a decision contrary to their judgment. But, out of seven judges, two of them dissented from the decision altogether, and two more appear to have declined to adopt this view, so that the majority of the Court do not appear to have entertained the view now presented to us, and (if I may presume to say so) I am not prepared to hold that their actual decision upon the case before them was erroneous; indeed, the inclination of my mind is to go along with the majority of the Scotch judges in the conclusions they arrived at. But two, at least, even of the majority who concurred in the decision, appear to have dis-

sented from the view that pecuniary prejudice to the purchaser is essential to constitute the offence, and one of them said that such a view would nullify the operation of the Act. Therefore, in this diversity of opinion as to the meaning of the words "to the prejudice of the purchaser," it cannot be said that the weight of judicial authority is against, and I rather think it is in favour of, the view which we have arrived at after the best consideration we can give to the question as to the true construction of the enactment. It is quite general in its terms, and its terms are very large, nor is there anything to limit them—"if any one shall sell, to the prejudice of the purchaser, any article of food not of the nature, substance, or quality of the article demanded by the purchaser." There is nothing to limit the application of the enactment (as some of the Scotch judges seem to have supposed) to articles deleterious in their nature. And in several of the sections (13 to 17) provisions are made for purchases by public officers for the purposes of analysis and prosecution, assuming that if the article is found to be adulterated the offence will have been committed. It would be strange indeed if all these provisions were to be made nugatory by a construction which would, in effect, come to this—that proceedings could only be taken by private individuals. Here the purchase was made by the inspector under those sections; but surely the case must be treated as though the purchase had been by a private individual. Now, in the case of a private individual no one could dispute that in such a case as this the offence would have been completed; and the magistrate has so found in fact. That being so, what difference can it make as to the nature of the offence that the purchase was by an officer on behalf of the public and furnished with public money for the purpose? If the purchaser asks for a certain article and gets an article which by reason of some admixture of a foreign article is not of the nature or quality of the article he asks for, he is necessarily "prejudiced;" and how can the fact that the purchase is not with his own money at all affect the question of the commission of the offence? The offence intended to be prevented by the Act was the fraudulent sale of articles adulterated by the admixture of foreign substances which would necessarily be to the "prejudice of the purchaser;" and those words were inserted only to require that such an adulteration should be shown to have been made. Taking all these matters into consideration, I cannot bring my mind to the conclusion that in such a case as this the offence is less complete merely because the money with which the purchase was made was not the money of the purchaser, which must be wholly immaterial to the seller, and cannot affect the offence he has committed. I come, therefore, to the conclusion that the magistrate was wrong in dismissing the case on that ground, and therefore, that the case must be remitted to him to be determined on the evidence as to the offence alleged to have been committed.

LUSH, J.—The 6th section of this Act has given rise to a judicial difference, which has materially crippled the effect of this useful law. The magistrate had high authority for his decision in the judgments of the Justiciary Court in Scotland in the case referred to, although the only dictum in the English courts suggested in its favour is that

of the Lord Chief Justice, which does not appear in the Reports. What appears in my Lord's judgment in *Sandys v. Small* I entirely concur in. He says: "The provisions of the Act were intended to apply to adulterations of a clandestine character, which operate to the prejudice of the purchaser. The provisions of the 6th section seem to me to apply to cases where a seller professes to sell to the purchaser an article as being of a certain denomination, whereas the article has been altered by an admixture of some other ingredients, and it seems that when the article is so altered, this must be considered to have been done to the prejudice of the purchaser, unless it is duly and sufficiently brought to his knowledge." This does not at all imply that an inspector could not under any circumstances be prejudiced. In *Sandys v. Markham*, I seem to have expressed an opinion that it is a matter of no consequence with what object an article is purchased, and unless we entertained that opinion we should scarcely have sent the case back to the justices. I have carefully studied the Scotch case, and I think myself that the majority of the judges arrived at a correct conclusion, but I must differ from many of the reasons they give. The cream sold in that case was poor, but it was really cream; here milk was demanded, and the article sold was milk and water. This of itself is sufficient reason for our not deciding this case as that was decided. But some of the judges thought that this 6th section could not apply to a purchase by a public officer, and in this I cannot concur. The object of the Act is to prevent adulteration, and for that purpose a machinery is provided for the detection of offences. Sects. 13, 14, and 17 relate to an official buyer, who is to act in the interest of the public; he is to go to tradesmen's shops as a buyer, and is to take proceedings for an offence. Now, what is the offence for which he is to proceed? Why, the sale of the article to this very man; yet it is said that such a sale is not an offence. To my mind, it is unquestionably clear that the words "to the prejudice of the purchaser" cannot exclude from the operation of the Act a sale to an inspector. It is stated by one of the judges in the Scotch case, that these sections as to a public buyer apply only to Sects. 3 and 4; but there are no words so to limit them, and I cannot think it was intended to do so. The words "to the prejudice of the purchaser," or some others like them, were necessary here to protect a seller from committing an offence who gave a purchaser something better than that demanded of him. The offence under the 6th section consists not in selling something different from that which is asked for, but in fraudulently handing over to the buyer something to his prejudice; and it matters not who the buyer is, nor what is his object. This is, in my opinion, the clear effect of the Act, and we must remit the case to the magistrate for his further consideration.

*Judgment for appellant.*

Solicitor for appellant, *J. Henry Jones.*

Solicitor for respondent, *W. T. Lickells.*

Monday, March 31.

(Before COCKBURN, C.J. and MELLOR, J.)

REG. v. VICAR AND CHURCHWARDENS OF TOTTENHAM. (a)

*Vestry meeting—Summoning authority—Hour of meeting—Right of parishioner.*

*The vicar and churchwardens of a parish declined to enter upon the notice paper of a vestry meeting a notice of motion by a parishioner that future meetings should be held in the evening.*

*Held, upon a rule for a mandamus to compel them to do so, that the summoning authority had power to fix the time of each vestry meeting; and that there was no duty to allow notice of a motion which could not have any effect.*

THIS was a rule nisi obtained at the instance of Mr. Edward Maitland, a resident and ratepayer of the parish of Tottenham, Middlesex, calling upon the Rev. A. Wilson, the vicar of the said parish, and the churchwardens to show cause why a writ of mandamus should not issue, directed to them, commanding them or such of them to whom the same should of right belong to cause notice of the following motion to be inserted in the notice paper of the next vestry meeting of the said parish, that is to say, "To be moved by Mr. Edward Maitland, that the hour for holding the meetings of the vestry of the parish of Tottenham be 7 o'clock in the evening."

It appeared from the affidavit of the applicant that it had been usual to hold the vestry meetings in this parish at seven o'clock in the evening until the 8th Nov. 1877, on which occasion there was a disturbance, and the vicar, who occupied the chair, adjourned the vestry. The adjourned meeting was held on the 22nd Nov., at eleven o'clock in the morning.

In answer to a letter from the applicant, asking to have the vestry meetings held as before at seven in the evening, the vicar wrote on the 28th Feb. 1878 that he had come practically to the conclusion that morning vestry meetings were much more conducive to order and despatch of business than the latter.

Subsequently, at a meeting of the ratepayers, it was resolved that it was desirable all future vestry meetings should be held at seven o'clock in the evening; and a deputation was appointed to wait upon the vicar and churchwardens.

On the 23rd March 1878 the vicar declined to receive the deputation, on the ground that the speakers at the meeting seemed to have prejudged the question of the proper authority for calling vestries and regulating their proceedings.

A requisition was afterwards made to the churchwardens by the ratepayers to summon a vestry meeting to consider the question, but no notice was taken of it.

On the 20th July 1878 a formal request was made to the vestry clerk by several ratepayers to insert in the notice paper for the next vestry meeting a notice of motion in the words mentioned in the rule; to which the vestry clerk answered that the request had been submitted to the vicar for insertion, and rejected by him.

On the 7th Dec. 1878 the applicant wrote to the two churchwardens asking why this notice of motion was not included in the notice paper for the vestry meeting held on the 26th Sept., or for

(a Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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that to be held on the 12th Dec. In answer to these letters, one of the churchwardens referred the applicant to the vicar; and the other said the vicar claimed the right of framing the notices of vestry, and therefore he (the churchwarden) had no voice in the matter.

After some further correspondence, on the 19th Dec. 1878, the vicar wrote a letter to the applicant's solicitors, in which he said: "I claim as of right to name the day and hour for holding vestries, and determining agenda: Mr. Maitland claims that the right belongs to the parishioners. This is the issue." He also mentioned in this letter that he had received a memorial signed by a very large number of influential parishioners requesting him to accede to the request for evening vestry meetings.

Phillimore, on behalf of the vicar and churchwardens, showed cause.—The 1st section of 58 Geo. 3, c. 69, requires three days' notice on the church door of the place and hour of holding a meeting of the inhabitants in vestry, of or for any parish, and of the special purpose thereof; and the 2nd section recognises the right of the rector or vicar to preside. By 7 Will. 4 & 1 Vict. c. 45, s. 3, "no such notice of holding a vestry shall be affixed to the principal door of such church or chapel, unless the same shall previously have been signed by a churchwarden of the church or chapel, or by the rector, vicar, or perpetual curate of such parish, or by an overseer of the poor of such parish." The case of *Re v. Archdeacon of Chester* (1 A. & E. 342), is an authority that a chairman of a vestry meeting may appoint a convenient place for taking a poll; and Lord Denman said, at p. 345, "But those who summon a meeting of this kind must necessarily lay down some order for the proceedings." In another case, *Reg. v. D'Oyly* (12 A. & E. 139, 158), Lord Denman said: "Stat. 58 Geo. 3, c. 69, s. 1, requires notice of the vestry to be given, but does not say who is to give it. We are of opinion that the rector is the fit person; he is at the head of the parish for this purpose." These statutes and authorities go far to show that the persons who have a right to summon a vestry meeting must be competent to fix the time for its assembling; and although it may be that a parishioner is entitled to have a notice of motion in the agenda paper, the vicar and churchwardens are competent to disallow notice of any proposed resolution which would, if passed, be of no effect.

Charles, Q.C. and Cunynghame supported the rule.—The question raised by the rule is whether a majority of a vestry meeting may not fix the hour for a future meeting; and this right, if it exists, can only be exercised upon notice of motion. It may be admitted that no single parishioner can claim to fix the time of a vestry meeting, but when assembled, he can introduce a discussion as to future meetings. [COCKBURN, C. J.—Is it not a fallacy, upon which such a contention must be based? A vestry is not in continuous existence, it is summoned by the act of the vicar or churchwardens. How can one vestry determine at what time another vestry shall meet? The stat. 58 Geo. 3, c. 69, s. 1, relates to a "vestry or meeting of the inhabitants in any vestry or for any parish," which seems to assume the continuous existence of the body which is to meet at a vestry. According to *Dawe v. Williams* (2 Add.

130), vestries are to be called by the churchwardens with the consent of the minister; and in *Butt v. Fellowes* (3 Curt. 680) on referring to *Dawe v. Williams*, it was said at p. 696, that it "does not establish that if any other person calls a vestry, it is not a legal meeting." In the argument of *Reg. v. D'Oyly*, at p. 148, it was said that a chairman had no right to order the adjournment against the declared wishes of the meeting itself. "*Stoughton v. Reynolds* (2 Str. 1045) has never been overruled; the best report is in *Fortescue* (p. 168), and there it is said, 'At the common law anciently, the sheriff could not adjourn the county court; for the suitors, not he, were judges of it, though now the law has put that power in him. But in this case, the law has not placed it in anyone, wherefore we have not the power to take it from those who have it to place it in those who have it not. And even supposing the vicar had a power of presiding, it does not follow that he has the power of adjourning.'" In the same way, the discretion which *prima facie* exists in the vicar and churchwardens as to the time of meeting may be limited by a direction of the inhabitants as to their future meetings.

COCKBURN, C.J.—It seems to me this rule must be discharged. It is necessary that a vestry meeting should be duly summoned; but whether by the incumbent alone or by the churchwardens alone, or by both together, it is not material for us now to consider. I think we ought not to grant a *mandamus* for the purpose asked, because the summoning power must, as it seems to me, include the right to fix the time for meeting. It may well be, when once assembled, that it is within the competence of the vestry to adjourn to any hour fixed by the majority, even in opposition to another hour proposed by the vicar and churchwardens; but we are asked to compel the vicar to give notice of a resolution which would distinctly deprive the summoning authority of the power which they must possess, and would abrogate their legal right.

MELLOR, J.—I am of the same opinion. Mr. Charles admits that a vestry must be summoned every time it assembles; and this must be by the same persons. In my opinion this admission is enough to preclude the applicant from obtaining this rule. We cannot compel notice of a resolution which, if passed, could not be carried out.

*Rule discharged.*

Solicitors for applicant, Brooks, Tanner, and Jenkins.

Solicitors for respondent, Peckham, Maitland, and Peckham.

## COMMON PLEAS DIVISION.

Tuesday, Dec. 17, 1878.

(Before DENMAN and LOPES, JJ.)

SMITH, GALE, AND FRENCH v. RICHARDSON. (a)

*Practice*—Statement of claim—Embarrassing—Action under Bills of Exchange Act—Joinder of parties—Joinder of causes of action—Judicature Act 1875, Order XXVII., r. 1; Order XVI., r. 1; Order XVII., r. 1.

A statement of claim alleged that the plaintiff, F., had sold goods to the defendant, for part of the price of which a bill of exchange was drawn by

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

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*F.*, accepted by the defendant, and indorsed to the plaintiffs, S. and G.; that the bill had become due, and that the defendant had not paid it, nor had he paid for the goods, for the price of which the bill was drawn and accepted.

*Held*, that the statement of claim was embarrassing and must be struck out.

After the issue of the writ, *F.* had been joined as a plaintiff, by leave of a master, under Order XVI., r. 1:

*Semble*, that such leave should not have been given.

This was a motion, by way of appeal, from Field, J., at chambers.

The writ in the action was specially indorsed under the Bills of Exchange Act (18 & 19 Vict. c. 67), with a claim of 59*l.* 18*s.* 3*d.* principal and interest due on a bill of exchange drawn by French on, and accepted by, the defendant. The writ originally was issued in the names of the plaintiffs, Smith and Gale only, who were indorsees of the bill, but was amended under a master's order, by adding the name of the plaintiff French.

The plaintiffs then delivered a statement of claim, which alleged that the plaintiff French had sold goods to the defendant, in respect of which 90*l.* was due on the 3rd Jan.; that on that day French drew, and the defendant accepted, a bill of exchange for 53*l.* 14*s.*, which was indorsed to the other plaintiffs, Smith and Gale, and subsequently dishonoured, and that another similar bill was given by the defendant for the same sum, with the addition of expenses, and indorsed to the plaintiffs, Smith and Gale; that this bill became due on Aug. 17, 1878, but the defendant had not paid it, and had not paid for the goods in respect of the price of which the bills were drawn and accepted; and the plaintiffs claimed 60*l.* 0*s.* 4*d.*

An order made by a master that the claim should be struck out on the grounds that it was embarrassing, and did not correspond with the claim on the writ, and that the plaintiffs were not entitled to join the claim for goods sold with the claim on the bill, was affirmed by the learned judge.

*A. G. McIntyre*, for the plaintiffs, appealed from this order.—*Oger v. Bradnum* (L. Rep. 1 C. P. Div. 334; 34 L. T. Rep. N. S. 578), and *Norris v. Beazley* (L. Rep. 2 C. P. Div. 80; 36 L. T. Rep. N. S. 409), decide that the orders and rules of the Judicature Acts apply, after appearance, to actions commenced under the Bills of Exchange Acts. By rule 1, Order XVI., Judicature Act 1875, "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found entitled to relief, for such relief as he may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief, unless the court in disposing of the action shall otherwise direct." He cited

*Anon. Cass*, Bitt. Pr. Cas., No. 223; W. N. 1876, p. 23;

*National Bank of England v. Bradley*, Ib., No. 285; p. 66;

*Child v. Stenning*, L. Rep. 5 Ch. Div. 695; 36 L. T. Rep. N. S. 426.

*Dickens*, for the defendant, in support of the order.—The statement of claim is bad on the face of it: no cause of action by French is shown. He

took the bill in payment for the goods, and then indorsed it away. The note to Order XVII., r. 1, in Wilson's Judicature Acts (2nd ed., p. 187) is as follows: "The reasoning may be thus summed up. Order XVI., dealing with parties, assumes an ascertained subject-matter. Order XVII., dealing with subject-matters, assumes ascertained parties. There must, therefore, either be identity of subject-matter, in which case Order XVI. gives ample liberty in the choice of parties; or, identity of parties, in which case Order XVII. gives a like liberty in the choice of subject-matters." The other side are in this difficulty, that they want to come in under both orders; that they cannot do. Here the plaintiff French is suing for the price of the goods, not on the bill; the plaintiffs, Smith and Gale are suing as indorsees of the bill. It is a mere chance that the goods formed the consideration for the bill. There is here, therefore, neither identity of parties, nor of subject-matter. We cannot set up part payment for the goods, nor pay money into court in respect of them; that would be no answer to the indorsees of the bill. The claim made here in respect of the goods and the bill is not even clearly in the alternative. In *The Honduras Inter-Oceanic Railway Company v. Lefevre and Tucker* (L. Rep. 2 Ex. Div. 301, 305; 36 L. T. Rep. N. S. 46), Cockburn, C.J., says: "I must be understood as limiting my opinion to such circumstances as exist here. I do not say that in every case in which a plaintiff may have a cause of action against A. or B. in the alternative, he would be entitled to join them as defendants. I think it very doubtful whether, if the redress claimed against them differed in substance, he would be entitled to join them. On that, however, I pronounce no opinion. But here we have a claim for redress against two persons arising out of a common transaction, to which both of them are alleged to have been parties—against the one as principal, if the agent had authority to bind him, against the other who professed to be an agent, if he acted without authority. What the plaintiffs complain of is, the non-performance of a contract. If their claim is against Lefevre, it is because the contract is broken; if it is against Tucker, it is also because the contract has failed, and remains unfulfilled. The only difference is that, although the redress claimed is the same, if there had been separate actions, the process would have been different in the two actions. In the one it would have been on the contract; in the other on the special ground that the defendant professed to have authority, which he had not, and so the contract failed. But whatever course was pursued, the redress would, in both cases, have been for damages arising out of non-performance of the contract. Therefore I think that the case is within Order XVI., r. 6." Here there is no "common transaction" out of which the two claims arise. Then, as to the Bills of Exchange Act. [He was stopped by the Court.]

*McIntyre*, in reply. [DENMAN, J.—We are much struck by the argument as to the inconvenient position the defendant would be in, were this claim to stand. What do you say as to that?] The defendant can plead separately to the two claims. [LOPES, J.—Then he might be made liable to pay both.] If the bill was accepted by the defendant, and the jury find that to be so, he cannot be liable in respect of the goods. It was necessary to join French as a plaintiff in respect of the price of the



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goods, because there was no privity between the other two plaintiffs and the defendant. Rule 1 of Order XVII. is: "Subject to the following rules, the plaintiff may unite in the same action and in the same statement of claim several causes of action, but if it appear to the court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the court or judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof." In *Child v. Stenning* (*ubi sup.*) the Master of the Rolls says that by this rule the difficulty arising from different causes of action is provided for, as it enables the court to order separate trials. If we are to bring our action on the bill alone, then there must be another subsequent action; and it is one of the chief objects of the Judicature Acts to do away with multiplicity of actions.

DENMAN, J.—I think this appeal must be dismissed. One of the grounds on which the learned judge affirmed the master's decision, and ordered that the claim should be struck out was that it was embarrassing. Looking at all the circumstances I think it is. The action was originally commenced under the Bills of Exchange Act by the plaintiffs Smith and Gale only, as indorsees of a bill of exchange, drawn by one French on, and accepted by, the defendant. An order was obtained to add French as a third plaintiff, who, on his claim, now says he is entitled to the price of goods which he sold to the defendant, and which the defendant has not paid for. It is contended that when an action under the Bills of Exchange Act is once commenced, then all the rules of the Judicature Acts apply; and the case of *Norris v. Beasley* (*ubi sup.*) is cited in support of that contention. I do not wish now to recede from what I said in that case, nor, on the other hand, to say that I might not alter my opinion on consideration. I thought in the opinion that I expressed in that case I was following *Oger v. Bradnum* (*ubi sup.*), and I may have been right or wrong in so thinking. But it is going further to say that third parties may be joined as plaintiffs after the action has begun who could not have been parties to the action in its inception; and I should desire to leave myself free to decide that point when it is necessary. It is not necessary to decide it now; nor is it necessary to decide whether, apart from the Bills of Exchange Act, under the powers given by Orders XVI. and XVII. of the Judicature Act 1875, the plaintiff French was rightly joined as a party to this action. But it certainly is very difficult to see how the drawer of a bill of exchange suing the acceptor has any connection with a subsequent indorsee for a different consideration, who is also suing the acceptor. The causes of action in the two cases seem to me to be quite different. But, even if such plaintiffs could in some cases be joined, I am of opinion that here it would be embarrassing to the defendant, and ought not to be allowed. It would be very puzzling to him to know how to apportion his defence. There is the possibility of all sorts of questions arising at the trial, such as whether the goods were equal to sample, and others of a like kind, altogether beside the question between the original plaintiffs and the defendant, which was whether the defendant had accepted the bill or not. Therefore, on the whole, whether or not the Judicature Acts apply to actions under the Bills of

Exchange Act, and whether or not, under any circumstances, such parties could be joined as have been here, I think that this statement of claim should be struck out. It is true that at an earlier stage the defendant might have resisted French being joined as a plaintiff; but his not having done so does not, in my opinion, estop him from objecting to this statement of claim as embarrassing.

LOPES, J.—It is unnecessary for me to express an opinion on the many important questions that have been raised in this case, as I am of opinion that the statement of claim is embarrassing, and must be struck out on that ground. I will only add that I think there is here no identity of parties and no identity of subject-matter, and if I had had to decide that question, I should have held that the case did not come within Orders XVI. and XVII. of the Judicature Act.

*Appeal dismissed, with costs.*

Solicitor for the plaintiffs, *J. G. Shearman.*  
Solicitor for the defendant, *C. Robinson.*

Friday, Feb. 28.

(Before Lord COLERIDGE, C.J., and DENMAN, J.)

GADNEY (app.) v. ROUGH (resp.). (a)

*Thames navigation—Construction of conservators' bye-laws—Vessels towed by steam—"Six vessels and no more . . . in a single line"—Bye-laws of July 1877, Nos. 2, 3, 4.*

No. 4 of the Bye-laws of the Thames Conservators July 1877, is as follows: "Above and to the westward of Albert Bridge at Chelsea, six vessels and no more may be towed together in a single line at one time, and the distance between any two of the vessels shall not exceed fifty feet."

*Held, that the towing of eight barges by a steam-tug, the first four being in a single line, and the last four two abreast, but lashed closely together, was an infringement of the bye-law.*

#### SPECIAL CASE.

This is a case stated for the opinion of this honourable court, by John Paget, Esq., sitting magistrate at the Hammersmith police court, under and by virtue of the statute made and passed in the twenty-first year of the reign of Her Majesty Queen Victoria (cap. 43), being an Act to improve the administration of the law so far as respects summary proceedings before justices of the peace.

1. The appellant in this case is the master of the steam-tug *Vizen*, belonging to the Thames Steam-tug and Lighterage Company (Limited), and he resides at Ealing-lane, and the respondent is a river-keeper of the Conservators of the River Thames, duly appointed under and by virtue of the Thames Conservancy Acts (1857 and 1864).

2. The appellant was summoned by the respondent for an alleged breach of the 4th bye-law, duly made in pursuance of the Thames Conservancy Acts, and the Thames Navigation Acts, and allowed by Order in Council dated the 11th July 1877.

The following is a copy of the summons:

Metropolitan Police District, to wit.—Hammersmith police court. To George Gadney, master of the steam-tug *Vizen*.

Whereas complaint this day has been made before the undersigned, one of the magistrates of the police courts of the metropolis, sitting at the police court, Hammersmith, in the county of Middlesex, and within the

(a) Reported by A. H. BIRTLESTON, Esq., Barrister-at-Law.

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metropolitan police court, by George John Rough, for that you, on the 28th June, A.D. 1878, on the river Thames, in the parish of Fulham, in the county of Middlesex, and within the said district, did, being the master of a steam-tug called the *Vizen*, tow by steam more than six vessels at one time, contrary to the 4th bye-law of the Conservators of the River Thames, dated 11th July 1877.

These are therefore to command you, in Her Majesty's name, to be and appear on Monday next, at eleven o'clock in the forenoon, at the police court aforesaid, before me, or before such other magistrate of the said police courts as may then be there, to answer to the said complaint, and to be further dealt with according to law.

Given under my hand and seal this 15th day of July, in the year of our Lord one thousand eight hundred and seventy-eight, at the police court aforesaid.

JOHN PAGET. (L.S.)

3. The summons was heard before me on the 22nd July 1878, and on the hearing it was admitted that on the 28th June 1878 the steam-tug *Vizen*, belonging to the said Steam-tug and Lighterage Company (Limited), and in charge of the appellant, a duly licensed waterman, as master, was towing eight barges astern of the said tug down the river, in the manner as shown in the sketch annexed hereto and marked A., but above and to the westward of the Albert Bridge at Chelsea, the barges at the time being all lashed firmly together.

4. On the 5th Feb. 1872 an Order in Council allowed certain bye-laws, one of which, No. 14, was as follows:

All vessels navigating the river between London Bridge and Bugsby's Hole shall singly and separately pass along the same except vessels in tow of steam-tugs, skiffs, wherries, or ships' boats fastened together or towed at the stern of any vessel and vessels not exceeding six in number, two only abreast and towed by steam.

5. The following are the bye-laws allowed by Order in Council on the 11th July 1877.

(1.) Bye-law No. 14 of the bye-laws for 1872, for the regulation of the navigation of the river Thames, allowed by order of Her Majesty in Council on the 5th Feb. 1872, shall after these present bye-laws shall have been allowed by order of Her Majesty in Council be, and the same is hereby repealed, and in lieu thereof,

(2.) All vessels navigating the river between the Albert Bridge at Chelsea and Charlton Pier, shall be navigated singly and separately, except small boats fastened together, or towed alongside or astern of other vessels except vessels towed by steam.

(3.) Vessels towed by steam shall be placed two abreast if more than four in number, and not more than six shall be towed together at one time.

(4.) Above and to the westward of Albert Bridge at Chelsea, six vessels and no more may be towed together in a single line at one time, and the distance between any two of the vessels so towed shall not exceed fifty feet.

(7.) Any person committing any breach of, or in any way infringing any of these bye-laws shall be liable to a penalty of and shall forfeit a sum not exceeding five pounds, which said penalty shall be recovered, enforced, and applied according to the provisions of the Thames Conservancy Acts 1857 and 1864.

6. It was admitted that Bugsby's Hole is to the east of Albert Bridge, and that before and except the bye-laws in question there was no bye-law or provision preventing vessels being towed as the masters pleased to the westward of Albert Bridge. It was also admitted that from the Albert Bridge at Chelsea westward to Putney Bridge there is no tow path or other means of towing save by steam.

7. It was contended on behalf of the appellant that the 2nd and 3rd bye-laws were to be read together, and that the 3rd did not apply in any way to the 4th; that, therefore, there was no breach

of the 4th bye-law so long as not more than six vessels were towed in one line, and that there was no restriction as to there being a double line nor as to the number to be towed, and that it was an open question whether the 4th bye-law had affected vessels towed by steam, inasmuch as steam was not mentioned; and further that, as prior to the 11th July 1877 there had been no bye-laws affecting the navigation of vessels to the westward of London Bridge, the bye-law should state specially that it was intended to apply to steam, otherwise there could be no conviction, as it was void from uncertainty, and in support of this contention the appellant relied upon the decision of the Court of Appeal on the 4th May 1878 in a case stated by Mr. Bridge between the same parties as in the present case.

8. It was contended on behalf of the respondent that, even if the 3rd bye-law does not apply in any way to the 4th, there would nevertheless be a breach of the 4th bye-law if more than six vessels were towed together at one time in a single line or otherwise, and as there is no tow path between the Albert Bridge at Chelsea westward to Putney Bridge, or means of towing save by steam, there is no uncertainty in the said bye-law so as to render it void.

9. I was of opinion that, under the facts hereinbefore stated and admitted, the appellant had been guilty of an offence under the said 4th bye-law, and I convicted him accordingly, and sentenced him to pay a fine of 5s., and 2s. for costs in that behalf.

The appellant having applied to me to state a case for the opinion of the Court of Appeal, I state this case in compliance with such application.

10. The question for the opinion of the court is whether I was right in convicting under the above circumstances.

11. If the court should be of opinion in the affirmative, the said conviction is to be affirmed, and the appellant is to pay to the respondent the costs of the said appeal; but if the court should be of a contrary opinion, the said conviction is to be quashed, and the summons dismissed, and the respondent is to pay to the appellant the costs of the said appeal.

JOHN PAGET.

In a sketch annexed to the case, and marked "A" a steam-tug was represented as towing eight barges, the first four being in a single line, and the last four two abreast, but lashed closely together.

*Webster*, Q.C. for the appellant.—We have been already summoned under the 3rd bye-law for the same offence, and the Queen's Bench Division quashed the conviction. The judgments in that case are not reported, but they are conclusive of this case. The 2nd and 3rd bye-laws apply only to the river between Albert Bridge and Charlton Pier; the 4th bye-law applies only to the river above Charlton Pier. The Queen's Bench Division pointed out that that must be so, because otherwise there would be inconsistent laws for the same part of the river. It must be borne in mind that at the time they are legislating for the river westward of Albert Bridge, they have before them the legislation for the river eastward of Albert Bridge. It is submitted that the 4th bye-law applies only to the length of the tail. The vice that the bye-law was aimed at was not the towing of more than six barges—if it had been, the bye-law might

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easily have said so—but the towing of more than six barges *in a line*. The 3rd bye-law, which deals with the river eastward of Albert Bridge, does expressly limit the number that may be towed together at one time.

*Grantham, Q.C.* for the respondent.—The 2nd bye-law provides for all vessels navigating the river between the Albert Bridge at Chelsea and Charlton Pier. The 4th bye-law provides for vessels above and to the westward of Albert Bridge at Chelsea. The 3rd bye-law is only an exception as to vessels towed by steam, applicable to both the 2nd and 4th. That is the construction of these bye-laws that it is submitted is the correct one, although the Queen's Bench Division construed them differently. But, assuming the decision of the Queen's Bench Division to be right, and reading the 3rd bye-law as not applying to the west of Albert Bridge, the 4th bye-law, rightly construed, prevents more than six vessels being towed at one time. If not so construed, then, provided they are not in a single line, any number may be towed at the same time, which cannot have been intended.

*Webster, Q.C.* in reply.—As to the argument *ab inconvenienti*, there is a practical limit to the number of vessels that can be towed abreast.

*Lord COLERIDGE, C.J.*—I think this decision should be affirmed. There is a good deal to be said for the view Mr. Webster has presented as to the construction of these rules. What this 4th bye-law was intended to do I have, of course, no means of knowing; but I think, according to its true construction, it was intended to apply to all vessels being towed above Albert Bridge, whether by steam or otherwise. I was struck by Mr. Grantham's argument that the 2nd and 4th bye-laws should be first read together, excluding the 3rd. The 2nd says, "All vessels navigating the river between the Albert Bridge at Chelsea and Charlton Pier shall be navigated singly and separately, except small boats fastened together, or towed alongside or astern of other vessels, except vessels towed by steam." The 4th says, "Above and to the westward of Albert Bridge at Chelsea six vessels and no more may be towed together in a single line at one time, and the distance between any two of the vessels so towed shall not exceed fifty feet." Then he says the 3rd should be read as an exception engrafted on both of them, viz., that when vessels are towed by steam, they shall be placed two abreast, if more than four in number, and not more than six shall be towed together at one time. Now it is not material to decide in the present case whether the 3rd and 4th bye-laws are to be read together. If they are, then no more than six barges can be towed together at one time by steam, and if more than four then they must be two abreast, both above and below Albert Bridge. If they are not, then that applies only below Albert Bridge, and, above Albert Bridge six vessels and no more may be towed together in a single line at one time, by steam or otherwise. According to either view, in my opinion, it is equally prohibited to tow eight barges by steam above Albert Bridge. According to the last-mentioned construction of the rules, which is that contended for by the appellant, the provision is that "six vessels and no more may be towed together," and in this case more than six vessels were being towed. It is said that the

words that follow "in a single line" are the governing words, and that more than six may be towed provided they are not in a single line. But I think that to adopt that view would be to defeat the intention of the clause. If that was what was meant, the clause should have run: "If vessels are towed in a single line, not more than six shall be towed together at one time." If that is what was meant, it is not what has been said. The 4th bye-law further says that the distance between any two of the vessels "so towed" shall not exceed fifty feet. Now, if the fifty feet here mentioned applies only longitudinally, as it clearly does, the bye-law obviously contemplates as the only possible distance between any two of the vessels towed in accordance with its provisions a longitudinal distance; that is, that there shall only be a single line of such vessels. I am therefore of opinion that this conviction was right, and should be affirmed.

*DENMAN, J.*—I am of the same opinion. I am inclined to think that the 3rd bye-law does not apply to the westward of Chelsea Bridge, if it were necessary to come to any decision on that point in this case. I think so for this reason, that the 2nd bye-law concludes with the words "except vessels towed by steam," and then the 3rd bye-law takes up the words, and begins "vessels towed by steam shall," &c., as if the 3rd bye-law was intended merely as supplementary of the 2nd. That appears to have been the decision of the Queen's Bench Division when the matter was before them. But it is not necessary for us to consider that question now. The 4th bye-law is applicable to vessels above Albert Bridge. There is an unfortunate looseness in the language in which part of the clause is expressed. I think, however, that "six vessels and no more in a single line" must mean six vessels in a string. It is, perhaps, open to argument that this was a *casus omissus*, there being no express provision as to vessels towed by steam, and that the bye-law does not apply to such a case. It is contended that it was not proved here that there were more than six vessels in a single line. I think the bye-law is intended to apply to all cases where there are more than six vessels, whether towed by steam or not. The construction suggested by my Lord seems to me to be the reasonable one, viz., that "six vessels and no more may be towed together." If we construed the bye-law otherwise, it would be productive of great inconvenience. Then come the words "in a single line;" but I think those words do not alter the restriction conveyed in the former ones, but impose an additional obligation. That is a way in which this bye-law may be read, and I think, therefore, ought to be read. The magistrate has so read it, and I am consequently of opinion that the conviction should be affirmed.

*Webster, Q.C.* asked for leave to appeal, which was refused.

Solicitors for the appellant, *J. A. and H. E. Farnfield.*

Solicitor for the conservators, *J. F. Elmslie.*

Thursday, Dec. 19, 1878.

(Before GROVE and LOPES, JJ.)

SMITH v. BAKER, SON, AND DEATH. (a)

*Vendor and purchaser—Sale of meat—Implied warranty—Latent defect—Opportunity of inspection—Caveat emptor.*

*A salesman who sells in a public market meat which has no defect discoverable by an ordinary inspection, but which is afterwards found to be unfit for human food, to a purchaser who selects it himself, does not impliedly warrant that the meat is good, and is not liable to refund the price to the purchaser.*

*Emmertton v. Matthews (7 H. & N. 586; 5 L. T. Rep. N. S. 681) followed.*

In this case a rule nisi had been obtained by the defendants calling upon the plaintiff to show cause why the judgment entered for him at the trial before the deputy judge of the City of London Court should not be set aside, and judgment be entered for the defendants on the ground that on the facts as stated in the judge's notes the defendants were entitled to judgment.

From the judge's notes it appeared that the plaintiff was a retail butcher, and that the defendants were meat salesmen, carrying on business at the Central Meat Market, in the City of London. A butcher named Tippler consigned to the defendants 38st. 2lb. of Scotch beef, with directions to sell the same on his account; and on the same day the defendants sold the whole of it to the plaintiff. The meat was selected and purchased by the plaintiff in the market where it was exposed for sale, and a fair market price was given for it. The meat was removed to the plaintiff's shop, and when cut up into joints was found to be unfit for human food, and was therefore returned to the defendants. After it was returned to the defendants, it was, at the request of the plaintiff and the defendants, examined by the inspector of the Meat Market, who pronounced the meat to be fit for food, though unusual in colour. The medical officer and inspector of St. Pancras pronounced it to be unfit for food, being white in colour, and presenting the symptoms of fatty degeneration. The plaintiff refused to accept the meat, and the defendants re-sold it at a reduced price. The plaintiff then commenced this action against the defendants to recover the price that he had paid for the meat; and the defendants paid into court the amount which they had received for it on the re-sale. The deputy-judge found as a fact that the meat was unfit for human food, and entered judgment for the plaintiff on the ground that there was an implied warranty when the meat was sold that it was good and fit for food. The judge of the City of London Court affirmed this ruling, in order that the appeal might be brought to the High Court.

A rule having accordingly been obtained as above,

*Morton Smith* showed cause.—This case is not within *Emmertton v. Matthews* (7 H. & N. 586; 5 L. T. Rep. N. S. 681), the Lord Chief Baron in that case proceeding expressly upon the ground that nothing was said at the time of the sale, and the seller had no means of knowing, or reason to suspect, that the meat was other than good and wholesome meat. It is not found in this case

that the defendants had no means of knowing what the condition of the meat was. There has been in this case a total failure of the consideration for which this money was paid, and the plaintiff is therefore entitled to its return. He also cited

*Randall v. Newson*, L. Rep. 2 Q. B. Div. 102; 36 L. T. Rep. N. S. 164;

*Beer v. Walker*, 17 L. T. Rep. N. S. 278.

*McCall* (with him *McIntyre*, Q.C.) in support of the rule.—This is a sale of a specific article. The case of *Emmertton v. Matthews* (*ubi sup.*) is expressly in point. *Randall v. Newson* (*ubi sup.*) was the case of a carriage pole, of which the defendant was the manufacturer, and it is therefore distinguishable. In *Smith v. Hughes* (L. Rep. 6 Q. B. 597, 603; 25 L. T. Rep. N. S. 329), Cockburn, L.C.J., says: "I take the true rule to be, that where a specific article is offered for sale, without express warranty, or without circumstances from which the law will imply a warranty—as where, for instance, an article is ordered for a specific purpose—and the buyer has full opportunity of inspecting and forming his own judgment, if he chooses to act on his own judgment, the rule *caveat emptor* applies. If he gets the article he contracted to buy, and that article corresponds with what it was sold as, he gets all he is entitled to, and is bound by the contract." Where the goods are selected by the purchaser, the vendor relies upon that as freeing him from responsibility. No defect in the meat could have been discovered by the vendor in this case, seeing that an inspector of meat could not discover any unfitness for human food in it, even after it was cut up into joints. He also cited

*Jones v. Just*, L. Rep. 3 Q. B. 197.

GROVE, J.—I am of opinion that the rule must be made absolute in this case. The case seems to have been framed for the purpose of ascertaining whether the deputy-judge was right in holding either that the case of *Emmertton v. Matthews* was wrongly decided, or that the facts of this case were distinguishable from it. The commissioner followed the ruling of his deputy, in order that the case might come before this court. The question, therefore, for us to determine is whether there is anything in the facts of this case sufficient to distinguish it from the case of *Emmertton v. Matthews*, and a long roll of cases, of which, perhaps, the most important is *Parkinson v. Lee* (2 East, 314). Those cases establish the principle that where goods are sold to the order of the purchaser, there is an implied warranty that the goods shall be merchantable; but that where a specific article is sold, and the purchaser has had an opportunity of inspection, there is, as a general rule, no implied warranty. If this case comes within *Emmertton v. Matthews* that decision is binding upon us. Now *Emmertton v. Matthews* decides that a salesman who sells in a public market meat, which is afterwards found to be unfit for human food, but which he had no means of knowing, or reason to suspect, was other than good and wholesome meat, is not liable to an action upon an implied warranty or for money had and received. It is argued that in that case the decision proceeded on the fact that the seller had no means of knowing that the meat was other than wholesome, and here there is no such finding. But we think

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

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that it must be taken that what the court meant in that case was, no means of knowing on an ordinary outward inspection, and the same inference of fact arises on the findings here. Pollock, C.B. says: "We are of opinion that there is no case that at all governs the present. None of the cases cited at the bar decide this case, though in *Burnby v. Bollett* (16 M. & W. 644) all the law is collected, and the matter was much discussed; and that a salesman offering for sale a carcase with a defect, of which he is not only ignorant, but has not any means of knowledge (the defect being latent), is not liable to any penalty, and does not, as a matter of law, impliedly warrant that the carcase is fit for human food, and is not bound to refund the price should it turn out to be so; and we think the count suggested would be bad on demurrer." There the words "has not any means of knowledge, the defect being latent" must mean any external means of knowledge. Now the facts show that the seller in this case had no means of knowing, upon an ordinary inspection of the meat, that it was defective; because not only was there nothing to show the purchaser, when he took the meat away, that it was defective, or he would not have bought it; but there is the further fact that the defendants are salesmen, that is, persons who do not sell on their own account, but receive meat from consignors and sell for them; and this meat having been sent to them, their only dealing with it was to expose it in the market for sale, and sell it at a fair market price. Then, as the judge's note goes on to say, the meat was removed to the plaintiff's shop, and when cut up into joints was found to be unfit for human food. There is an inevitable implication that, until the meat was cut up into joints, its unfitness for human food was not discoverable. It was therefore returned to the defendants. After it was returned to the defendants, it was, at the request of plaintiff and defendants, examined by the inspector of the meat market, who pronounced the meat to be fit for food, though unusual in colour. So that even after it was cut up the first inspector pronounced the meat to be fit for food, and did not discover any defects in it. Other inspectors did; but that was all after the meat had been cut up into joints. I think, therefore, that it is a fair inference that nothing could be discovered before the meat was cut up. Then the case comes within *Emmerton v. Matthews*, *Parkinson v. Lee*, *Jones v. Just*, *Randall v. Newson*, and, possibly, *Beer v. Walker*. That last was a case, decided by my brother Lopes and myself, as to a sale of rabbits. The real point before the court to be decided was the question of whether the implied warranty in that case was an implied warranty which applied to the time when the goods were delivered at the station at the commencement of their conveyance, or whether it applied to the time when the goods arrived at the end of the journey. That being the point before the court, I should not consider that as being an authority to any great extent on the question involved in this case. My own judgment at present goes with the decision in *Emmerton v. Matthews*; but if it did not, that case is binding upon me, and I should follow it. The case which inspired me with some doubt was that of *Mody v. Gregson* (L. Rep. 4 Ex. 49; 19 L. T. Rep. N. S. 458). That case was as follows: The defendants, manufacturers, contracted to supply to the plaintiffs a

quantity of grey shirtings according to sample, each piece to weigh 7lb. Goods were delivered and accepted according to sample and of the agreed weight; but it was afterwards discovered that the weight was made up by introducing into the fabric 15 per cent. of china clay, which rendered the goods unmerchantable. The presence of the china clay could not be discovered by an ordinary examination of the sample. In an action against the defendants for breach of an implied warranty of merchantable quality: Held, that, in the absence of a sample, a warranty of merchantable quality would have been implied; that the selling by sample excluded that implied warranty only with respect to such matters as could be judged of by the sample, and that the action was, therefore, maintainable. That case seemed to me at first not reconcilable with *Emmerton v. Matthews*. But Mr. Justice Willes, in giving judgment, does draw a distinction which would apply to *Emmerton v. Matthews*. He says: "The question, therefore, is whether the facts of the case showed that the contract was for merchantable grey shirting; and this must depend upon the fair inference to be drawn from the contract itself, and the circumstances under which it was made, so far as they are relevant to explain it. The goods were not specified, nor ascertained, nor inspected. They were bought by a sample which did not disclose any defect. That sample was made by the seller to represent the article, and, as we must assume against the seller, to represent it fairly to the buyer. It did, in fact, represent to the buyer a merchantable article." As a matter of fact, I, who was present at the trial, should have said that it did not represent a merchantable article, because the sample, as well as the bulk, of the goods seemed to be so filled with china clay that they filled the whole court with dust by merely putting the hand upon them. The argument, however, proceeded on the assumption that the sample did not show the defects which existed, but that it required a scientific examination to discover them. "The article itself was stipulated for in terms 'each piece to be of 7lb. weight,' which, if properly complied with, and no foreign material introduced, would have ensured a merchantable article." That is, if the weight had been made up of the material itself, then it would have been a merchantable article; but the weight was not made up of the material itself, but by means of an artificial commodity; and this was not discoverable from the sample. "The superadded stipulation for each piece to weigh 7lb. was descriptive of the goods, and asserted their essential character for commercial purposes. Agreement with the sample as to quality would not satisfy this term of the contract. If the pieces delivered had weighed but 6lb., though they had agreed with the sample, the contract would have been broken. It was the feigned and colourable performance, not real fulfilment, of the stipulation as to weight that caused the goods to be unmerchantable. These were the circumstances in which the learned judge ruled that there was a warranty of merchantableness as to matters which could not be judged of from the sample. For the reasons already given, we think that direction was right, upon the ground that the contract, if truly fulfilled, would have given the buyer a merchantable article, and we need not consider whether it might

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not also be sustained upon the ground that the seller himself made the sample, and must be taken to have warranted that it was one which, so far as his (the seller's) knowledge went, the buyer might safely act upon." There the ground of the judgment is, therefore, that the purchaser had not seen the real article, but only a sample, that there was a defect in the article which he could not discover by inspection of the sample, and that the contract supposed that the weight was to be the real weight of the genuine article, whereas the weight was really made up by an adulteration inserted in the article. It only goes on the ground that the sale was not really of a specific article, and therefore does not vary the law as laid down in *Emmerton v. Matthews*, *Parkinson v. Lee*, and the other cases. The purchaser was misled by the sample in that case, it being a true sample of the bulk, but not true to the sense, leading, as it did, the purchaser to suppose that each piece of the article would of itself weigh 7lb. In this case, if the butcher had not gone and selected his meat, but had ordered it, there would have been, no doubt, an implied warranty on the part of the butcher that it was of merchantable quality. But the purchaser here went into the market and inspected the meat; there was nothing to show to the butcher who was selling, or to the butcher who was buying, that the meat was not merchantable; and I am therefore of opinion that this case comes within the case of *Emmerton v. Matthews*, and that the rule must be made absolute.

LOPEZ, J.—I also think that the rule must be made absolute. The only question in the case is whether, on the sale of meat, there is an implied warranty that that meat must be fit for human food. The defendant in this case was a commission agent, and he sold the meat in question in the market. The plaintiff was a retail butcher, and he bought the meat in the market. There was, therefore, the fullest opportunity of inspection and personal examination of the meat, if the plaintiff desired it. The plaintiff selected the meat for himself; it was not the defendant who selected it for him; he relied on his own judgment. It appears to me that the well-understood rule of law, that where a specific article is sold, in the absence of fraud, where the purchaser has an opportunity of inspection, and the seller is not the manufacturer, the maxim *caveat emptor* applies. In the case of *Parkinson v. Lee* Lawrence, J. says: "It is not pretended that the defendant has been guilty of any fraud or imposition in the sale, and I must suppose that each party was equally well acquainted with the commodity bargained for. There was no representation made by the defendant to the plaintiff as to the goodness of the hops, to induce him to make the purchase. But here was a commodity offered for sale, which might or might not have a latent defect. This was well known in the trade, and the plaintiff might, if he pleased, have provided against the risk by requiring a special warranty. Instead of which, a sample was fairly taken from the bulk, and he exercised his own judgment upon it; and knowing, as he must have known, as a dealer in the commodity, that it was subject to a latent defect which afterwards appeared, he bought it at his own risk. I know of no authority which makes a seller liable for a latent defect

where there is no fraud; and no representation was made by him on the subject to induce the buyer to take the thing." I think the law so laid down is right (a); and, therefore, that this rule should be made absolute.

*Rule absolute, without costs.*

Solicitors for the defendant, *Nash and Field*.

### CROWN CASES RESERVED.

*Saturday, March 22.*

(Before Lord COLERIDGE, C.J., LUSH, J., POLLOCK, B., and HUDDLESTON, B., and FITZJAMES STEPHEN, J.)

REG. v. HERMANN. (b)

*Coining—Uttering false and counterfeit coin—Sovereign reduced in weight by filing off the milling—Making a new milling—24 & 25 Vict. c. 99, s. 9.*

*The prisoner was convicted of uttering two false and counterfeit sovereigns, with guilty knowledge. The two sovereigns were originally genuine, but had been reduced in weight by filing off nearly all the original milling. New millings were then made to them fraudulently, so as to make them resemble genuine sovereigns.*

*Held, that the two sovereigns when passed in that state were false and counterfeit coins, within sect. 9 of 24 & 25 Vict. c. 99, per Lord Coleridge, C.J., Pollock and Huddleston, BB. (Lush and Fitzjames Stephens, JJ., dissenting).*

CASE reserved for the opinion of this Court by the Recorder of Liverpool.

The prisoner, Robert Hermann, was convicted before me at a sessions held on the 7th Jan. 1879, on an indictment under sect. 9 of the Act 24 & 25 Vict. c. 99—"An Act to consolidate and amend the Statute Law of the United Kingdom against offences relating to the Coin," for uttering and putting off two false and counterfeit sovereigns, knowing them to be false and counterfeit.

The evidence of uttering, and of guilty knowledge, was complete; but I desire to submit to the Court the question whether the coins which were uttered could properly be held to be false and counterfeit coins within the meaning of the statute in question.

They were, or had been, real sovereigns, coined at the Mint.

They were both of Her Majesty's reign—one dated 1872, and the other 1875.

They had been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part. The effect of the filing was to remove the milling entirely, or almost entirely.

In order to restore the appearance of the coins, a new milling had been made on each coin with tools.

It appeared to me that this was a counterfeit milling, and that a coin upon which any part of the impression was counterfeit, was a counterfeit coin.

The jury convicted the prisoner.

I remanded the prisoner to Her Majesty's gaol

(a) See, however, *Randall v. Newson* (L. Rep. 2 Q. B. Div. 102; 36 L. T. Rep. N. S. 164), where Bratt, L.J. says: "It is sufficient to say of *Parkinson v. Lee*, that, either it does not determine the extent of a seller's liability on the contract, or it has been overruled."

(b) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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at Walton, near Liverpool, without sentencing him until this case shall have been decided.

It may be desirable to add that the prisoner had first been tried under the 4th section of the same Act, and acquitted for want of evidence that the act of lightening or diminishing had been done by himself.

(Signed), JOHN B. ASPINALL,  
Recorder of Liverpool.

No counsel appeared for the prisoner.

*Eyre Lloyd* for the prosecution.—The prisoner was guilty of uttering or putting off false and counterfeit coins, resembling, or apparently intended to resemble the Queen's current gold coin, within sect. 9 of the 24 & 25 Vict. c. 99. If it is a question of fact for the jury whether the coin uttered by the prisoner was counterfeit, the case is concluded by the verdict of guilty. But if it is a matter of law, it is contended that the filing off the original millings of the sovereigns, and the making of the new milling with the intention that they should pass for genuine sovereigns makes them counterfeit coins within the Act. The intent in making of the new milling was that they might imitate genuine sovereigns. [HUDDLESTON, B.—Your difficulty arises on the meaning of the words, "false or counterfeit coin" in the interpretation clause, sect. 1.] If there had not been a new milling put on, there would have been greater difficulty in contending that the coins became counterfeit, but the new milling was an act of imitation, and gave them a spurious character [POLLOCK, B.—In construing the words, "resemble, or apparently intended to resemble," does it matter that the coin was once a genuine one?] No. By removing the original milling, the sovereign lost one of its essential attributes—weight; and if of less than the authorised weight it ceases to be a legal tender, and any person may cut, break, or deface it if tendered to him in payment, and the person tendering shall bear the loss (33 Vict. c. 10, s. 7). [Lord COLERIDGE, C.J.—What does "counterfeit" mean?] A thing made in imitation of another, and intended to pass for the original.

The Judges differing in opinion, the junior judge first delivered his judgment.

FITZJAMES STEPHEN, J.—I am unable to arrive at the conclusion that there was in this case the uttering of a counterfeit coin within the meaning of the Act. The interpretation clause, sect. 1, enacts that "the Queen's current coin shall include any coin coined in any of Her Majesty's mints, or lawfully current by virtue of any proclamation, &c." Now this piece of coin was certainly a gold coin coined in one of Her Majesty's mints, and not a thing made to imitate such a coin. Therefore, it seems to me that we start with this fact that it was a genuine coin; and then the next thing that appears is that it had been lightened in weight by filing off the edges, and so removing the milling, which constitutes an offence under another section (sect. 4) of the Act. And sect. 5 makes it an offence for anyone to have in his possession any filings or clippings of any gold or silver bullion, &c., which shall have been produced or obtained by impairing, diminishing, or lightening any of the Queen's current gold or silver coin. But I do not find any provision in the Act which seems to me to make a genuine coin which has been fraudulently lightened become a

counterfeit coin, or to make a person who passes such a coin guilty of the offence of passing a counterfeit coin. If a man had passed a coin, knowing that it had been fraudulently lightened, he would not have committed the offence of passing a counterfeit coin. Then, would a person by putting on a fresh milling to conceal the fact that it had been so lightened, and to pretend that the coin was of full weight, be guilty of passing a counterfeit coin? The whole question is, does it thereby become a counterfeit coin within the meaning of the Act? I think that it does not. It seems to me that this was a genuine coin fraudulently lightened in such a manner as to conceal the fact that it had been fraudulently lightened, and that it was not a counterfeit coin within the meaning of the Act. It is very difficult to describe the statutory meaning of a "counterfeit coin."

HUDDLESTON, B.—I think that this conviction ought to be supported. The conviction was under the 24 & 25 Vict. c. 99, s. 9, which makes it a misdemeanour to put off any false or counterfeit coin resembling, or apparently intended to resemble, or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit. What the prisoner has been found guilty of is putting off a false and counterfeit coin resembling, or apparently intended to resemble, a sovereign. The evidence was that almost the whole of the milling had been fraudulently removed from a gold coin, and when the milling had been removed that was a coin which no one was bound to take, and in my opinion it then was no longer the Queen's current gold coin. And then in order to make that coin pass for a current coin another milling was put on, so as to make it apparently resemble the Queen's current gold coin. That was an act done to make it resemble, or apparently to resemble, the Queen's current coin, and so it was a counterfeit.

POLLOCK, B.—I think that the prisoner was properly convicted. In dealing with the expression false or counterfeit coin in sect. 9, I think the interpretation clause, in clear and affirmative language, so defines it as to include this case. I agree with my brother Huddleston that when the original milling was taken off for the purpose of deteriorating the coin, the coin ceased to be a current coin; and taking that basis as a starting point, it seems to follow that it becomes something else; and then the putting on a new milling so as to make it pass for a genuine sovereign appears to me to make it a counterfeit sovereign. A person having machinery might take off the milling from a great number of sovereigns and make a new milling so as to make them pass for the current gold coin of the realm. I have no doubt that that would be substantially putting off false or counterfeit coin, apparently intended to resemble the Queen's current gold coin, within the spirit and intention of the Act.

LUSH, J.—I cannot agree with the majority of the Court. In my opinion it would be straining the words "false and counterfeit coin" beyond their legitimate meaning to hold that the prisoner was guilty of uttering false and counterfeit coin within sect. 9 of the Act. Had there been nothing more done to the coins than filing off the original milling, and then passing them in that state the prisoner could not have been guilty of uttering false and counterfeit coin, for they would



still have been the Queen's current coin, though deficient in weight. The expression, "false and counterfeit coin" involves the idea of spurious imitation, and the interpretation clause defines that "it shall include any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered so as to resemble, or be apparently intended to resemble, or pass for any of the Queen's current coin of a higher denomination. If a farthing had been gilt over so as to be apparently intended to resemble a sovereign, it would have been counterfeit coin within the meaning of that clause. But I think the word "counterfeit" alone is not sufficient to include the present case. The prisoner was tried and acquitted for the offence under sect. 4, of impairing, diminishing, lightening coin with intent that it might pass for the Queen's current gold coin. Another section (sect. 5) makes it an offence to have possession of any filings or clippings obtained by impairing, or diminishing, or lightening any of the Queen's current gold or silver coin, but there is no section which makes the attempt to pass off clipped or lightened coin an offence where it is intended to pass for coin of the same denomination. I think that the mere cutting off of the original milling and putting on a new milling, as in the present case, is not sufficient to turn the coin into false and counterfeit coin within the meaning of the Act.

LORD COLERIDGE, C.J.—I am clearly of opinion that this case is within the meaning of the Act, and am content to rest my judgment on either of the two views. First, I say that the prisoner was guilty of passing a counterfeit sovereign. What he did was this: he filed off the milling from a genuine sovereign, and that being done, the sovereign, reduced below the proper weight, in my opinion, ceased to be a genuine current sovereign; he then made a new milling to it, and in that state passed it as a genuine sovereign. That, in my judgment, was putting off a counterfeit, resembling, or apparently intended to resemble, a genuine sovereign. That view may be wrong, however, and if so, I will rest my judgment on the ordinary sense of the word "counterfeit," that is, imitation. By the act of the prisoner in removing the original milling, and making the new milling, the coin, which by the removal of the milling ceased to be a current coin or sovereign, was made by the new milling to resemble and pass for a current sovereign, that is in my view a counterfeit sovereign. The interpretation clause adds strength to this view; it says in plain language that the expression "false and counterfeit coin resembling, or apparently intended to resemble, or pass for any of the Queen's current gold or silver coin, shall include any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered so as to resemble, or be apparently intended to resemble, or pass for any of the Queen's current coin of a higher denomination." That is an inclusive, but by no means an exclusive definition. It is said only to include such cases as where a farthing is gilt or silvered so as to resemble, or be apparently intended to resemble, the Queen's current coin of a higher denomination. It cannot be limited to mean really imitating a sovereign or coin of higher denomination, because the counterfeit in fact does not imitate them; there are differences in the

inscriptions, and other parts of the coins. I think the term counterfeit applies where anyone does anything which shall have the effect of making a coin which is no longer a genuine current coin pass for a genuine current coin. On either of the above views I think the conviction may be supported. *Conviction affirmed.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT LINCOLN'S INN.

Jan. 21, 24, 27, and March 25.

(Before JAMES, BAGGALLAY, and BRAMWELL, L.JJ.)

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY COMPANY. (a)

*Railway company—Statutory powers—Ultra vires—Letting of rolling stock—Public injury—Duty of Attorney-General—Railways Clauses Consolidation Act 1845, s. 87.*

A line of railway, called the Tilbury line, was constructed by contractors, to whom the line was leased, the traffic being worked by means of the locomotives and rolling stock of the Eastern Counties Railway Company, by whose line and that of the Blackwall Company alone the Tilbury line had access to London. In 1863 an Act was passed to authorise arrangements between the Tilbury Company and the lessees of its undertaking, and the Eastern Counties (then and now called the Great Eastern) and the Blackwall Companies, with reference to the lease and working of the Tilbury line, and for other purposes. This Act empowered the two last-named companies, jointly or severally, to take a lease or a transfer of the existing lease of the Tilbury line; and it also empowered them to enter into agreements with respect to the working of the Tilbury line, and with respect to the apportionment of the traffic and the tolls, &c. Neither company took a lease, but the Great Eastern Company continued to work the Tilbury line till the expiration of the contractors' lease, whereupon it entered into an agreement with the Tilbury Company to supply locomotive power and rolling stock for the working of the Tilbury line upon certain terms. The Attorney-General brought an action at the relation of certain persons representing the body of manufacturers and dealers in locomotive engines and rolling stock to restrain the Great Eastern Company from letting for hire any locomotive engines or other rolling stock except for the traffic of another railway in extraordinary emergencies:

Held, by James and Bramwell, L.JJ. (reversing the decision of Jessel, M.R.), Baggallay, L.J. dissenting, that the defendant company had power under the Act of 1863, and also under the 87th section of the Railways Clauses Consolidation Act 1845, to enter into the agreement to supply the Tilbury Company with locomotive power and rolling stock, and that the plaintiff was not entitled to the injunction claimed.

Per James and Bramwell, L.JJ.: Some plain public mischief must be shown to warrant a suit on behalf of the public to restrain an incorporated company from exceeding its powers, and where

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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*a railway company engages in a trade, which is neither expressly authorised nor prohibited by its Act, the Attorney-General ought not to interfere at the instance of a rival trader, in the absence of any substantial injury to the public.*

*Attorney-General v. Great Northern Railway Company (2 L. T. Rep. N. S. 653; 1 Dr. & Sm. 154) distinguished.*

*Per Baggallay, L.J.: When a railway company exceeds its statutory powers, it is the duty of the Attorney-General to take steps to restrain it from so doing, as it is the interest of the public that the law should be respected, and the law is transgressed by the company exceeding its statutory powers.*

This was an appeal from a decision of the Master of the Rolls.

The action was brought at the relation of Ephraim Hutchinsons, on behalf of the Locomotive Manufacturers' Association and the Railway Carriage and Waggon Builders' Association, who considered themselves aggrieved by an arrangement by which the Great Eastern Railway Company had agreed with the Tilbury and Southend Railway Company to supply them at a certain rate with locomotive engines and other rolling stock so far as might be necessary for the traffic of the London, Tilbury, and Southend line, thus depriving the Locomotive Manufacturers' Association and the Railway Carriage and Waggon Builders' Association of the profits which might otherwise have accrued to them by supplying the London, Tilbury, and Southend Railway Company with locomotive engines and railway carriages and waggons of their manufacture.

The statement of claim alleged that neither the Great Eastern Railway Act 1862, whereby the defendant company were incorporated, nor the Acts therein recited or therewith incorporated, nor any other Act, authorised or empowered the Great Eastern Railway Company to let for hire locomotive engines or other rolling stock, or to manufacture rolling stock for any such purpose; that the Great Eastern Railway Company had lately commenced to let on hire locomotive engines and other rolling stock to divers companies and persons, and among others to the London, Tilbury, and Southend Railway Company (hereinafter called the Tilbury Company), and to manufacture rolling stock for the purpose of letting the same on hire; that in the session of 1876 the Tilbury Company, with the concurrence of the Great Eastern Railway Company, promoted a Bill in Parliament intended to confirm an agreement, dated the 1st June 1876, and made between the Great Eastern Railway Company of the one part, and the Tilbury Company of the other part, and whereby the former company agreed to let on hire locomotive engines and other rolling stock to the latter company on certain terms; that the said Bill was withdrawn in March 1877; that notwithstanding the withdrawal of the said Bill the Great Eastern Railway Company continued to let on hire locomotive engines and other rolling stock to the Tilbury Company.

The plaintiff charged that the letting for hire of locomotive engines and other rolling stock, and the manufacture of rolling stock for the purpose of such letting, were not within the powers of the Great Eastern Railway Company, and claimed that the Great Eastern Railway Company, their

directors, servants, and agents, might be restrained by injunction from letting for hire any locomotive engines or other rolling stock, except for the purposes of the traffic on another railway in extraordinary emergencies, and from manufacturing locomotive engines or other rolling stock for the purpose of letting the same on hire, or for any other purpose except for the purpose of being used by the Great Eastern Railway Company upon a railway worked by them, or some part thereof.

The case made by the statement of defence was as follows:—The undertaking of the Tilbury Company consisted of a railway from the Ilford junction of the Great Eastern line to Southend, with several railways or branches therefrom, including a railway to the railway of the London and Blackwall Railway Company, and all the railways comprised in the said undertaking were made or purchased by the Eastern Counties Railway Company and the London and Blackwall Railway Company jointly by means of capital by a separate class of shares in each of the said companies called the London, Tilbury, and Southend Extension Shares, and under the powers of certain local and personal Acts of Parliament, namely, the 15 Vict. c. 84, the 17 & 18 Vict. c. 133, the 19 Vict. c. 15, and the 19 & 20 Vict. c. 76. By these Acts the affairs of the undertaking were placed under the management of a joint committee consisting of eight directors, four of whom were appointed by the Eastern Counties Railway Company and four by the London and Blackwall Railway Company. Under powers conferred by the above-mentioned Acts the railways comprised in the said undertaking were leased to Messrs. Peto, Betts, and Brassey for the terms of twenty-one years from the 3rd July 1854, and by an indenture dated the 25th March 1854 and made between the Eastern Counties Railway Company of the one part, and Messrs. Peto, Betts, and Brassey of the other part, it was among other things provided that the Eastern Counties Railway Company should during the continuance of the lease, at their own cost, provide and maintain and from time to time replace in good repair and condition and efficient working order all such rolling stock and locomotive power as should be necessary for working the traffic of the railway. By an Act of the 25 Vict. c. 8, intituled, the London, Tilbury, and Southend Railway Act 1862, passed with the consent of and by arrangement with the Eastern Counties Railway Company and the London and Blackwall Railway Company, the holders of the Southend extension shares in each of the said companies were incorporated in a company called the London, Tilbury, and Southend Railway Company, and the said undertaking was vested in that company, and it was enacted that the number of directors should not exceed nine, of whom three should be appointed by that company, three by the directors of the Eastern Counties Railway Company, and three by the directors of the London and Blackwall Railway Company, and it was also enacted that further or otherwise than in that Act expressly enacted nothing therein contained should prejudice or affect any of the rights, powers, or privileges vested in the Eastern Counties Railway Company or in the London and Blackwall Railway Company.

By the 34th section of the last-mentioned Act it was enacted that nothing in that Act contained should prejudice, affect, or alter the contract for the lease of the undertaking entered into with

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the lessees, or the lease thereof, nor any contract or agreement entered into between the lessees and the Eastern Counties Railway Company and the London and Blackwall Railway Company, or either of them, or with any other company or party.

The Eastern Counties Railway Company were the lessees of the London and Blackwall Railway under a lease which is still subsisting, and the lastly hereinbefore mentioned Act, although incorporating the holders of the Southend extension shares into a separate company, practically retained the management of the undertaking in the hands of the Eastern Counties Railway Company by the provisions contained in that Act for the appointment of directors.

The London and Blackwall Railway and the railway of the Eastern Counties Railway Company from the junctions therewith of the Southend Extension Railway were and are used for the traffic of the London, Tilbury, and Southend Railway, and the last-mentioned railway has no passenger or goods station at any of such junctions, nor any stations in or near London, except such as belong to and are worked by the defendants, who have consequently a direct interest in the proper, efficient, and continuous working of the London, Tilbury, and Southend Railway.

The Eastern Counties Railway Company and certain other railway companies were dissolved, and the defendants were incorporated by the Great Eastern Railway Act 1862, whereby all the properties, rights, privileges, and liabilities of the Eastern Counties Railway Company became and are vested in the defendants.

Under and by virtue of the several Acts of Parliament hereinbefore mentioned the defendants had and have an interest in and control over the railways of the London, Tilbury, and Southend Railway Company, and the said railways have always been worked as parts of their system, and in pursuance of the provisions of the said indenture of the 25th March 1854, and during the term therein mentioned the Eastern Counties Railway Company until they were dissolved, and afterwards the defendants, provided and maintained and kept in good repair and condition and efficient working order all such rolling stock and locomotive power as were necessary for working the traffic of the said London, Tilbury, and Southend railway.

By an Act of the 26 & 27 Vict. c. 69, intituled an Act to authorise arrangements between the London, Tilbury, and Southend Railway Company, and the lessees of their undertaking, and the Eastern Counties (meaning thereby the defendants) and the London and Blackwall Railway Companies, with reference to the lease and working of the London, Tilbury, and Southend Railway, and for other purposes; after referring to the said lease to Messrs. Peto, Betts, and Brassey, and reciting, amongst other things, that by arrangements between the defendants and the lessees the traffic on the London, Tilbury, and Southend Railway was worked by the defendants, and reciting that it was expedient that the London, Tilbury, and Southend Railway Company, the lessees, and the defendants, and the London and Blackwall Railway Company (in the Act called the two companies) respectively should be enabled to agree upon such alterations in the terms of the lease, and in the arrangements for working the said railway as by that Act authorised, and that the defendants and the London and Blackwall

Railway Company, jointly or separately, should be empowered to take a lease or transfer of the existing lease of the London, Tilbury, and Southend Railway upon such terms and conditions as by that Act authorised, it was by the 14th section of the said Act enacted that the two companies might enter into arrangements with respect to the working, maintenance, and management of the extension railway, or any part thereof, and of the railways of the two companies connected therewith; and by the 15th section it was enacted that the directors of the Tilbury Company and the directors of the two companies respectively might, subject to such sanction of shareholders as by that Act prescribed, enter into any contracts or agreements for effecting all or any of the purposes of the Act, or any objects incidental to the execution thereof; and that every such contract or agreement might contain such covenants, &c., as might be mutually agreed upon between the parties thereto.

After the passing of the last-mentioned Act, the defendants continued during the continuance of the lease to provide and maintain and keep in good repair and condition all such rolling stock and locomotive power as were necessary for working the traffic of the London, Tilbury, and Southend Railway.

The lease to Messrs. Peto, Betts, and Brassey expired on the 3rd July 1875.

By an indenture dated the 1st June 1876, and made between the defendants of the one part, and the London, Tilbury, and Southend Railway Company of the other part (being a deed of arrangement for the working of the London, Tilbury, and Southend Railway), it was provided by article 18 that the defendants should supply the Tilbury Company with locomotive power on certain terms and conditions therein mentioned, and by articles 25 and 26 it was provided that the defendants should supply the Tilbury Company with certain carriages, waggons, and break vans, and by article 27 it was provided that the provisions contained in articles 25 and 26 should continue in force for two years from the 1st July 1875.

The defendants submitted that under and by virtue of the powers and provisions contained in the said Act of the 26 & 27 Vict. c. 69, or otherwise, they were authorised and empowered to let for hire to the London, Tilbury, and Southend Railway Company rolling stock and locomotive power, and for that purpose to enter into the agreement contained in the said indenture of the 1st June 1876.

The defendants have, since the 1st July 1875, let for hire to the Tilbury Company locomotive power upon the terms and conditions contained in article 18 of the said indenture of the 1st June 1876, and they continue so to do, but on the 1st July 1877 they ceased to let for hire or supply to the Tilbury Company any carriages, waggons, break vans, or other rolling stock, except locomotive power, and they have never since that date let for hire or supplied to the Tilbury Company any such carriages or other rolling stock, except upon the special occasions and upon the terms upon which it is customary for one railway company to lend rolling stock to another railway company.

The action was tried before the Master of the Rolls in Jan. 1878.

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JESSEL, M.R. delivered judgment as follows:—The point I have to decide is really one of very great simplicity, if the Act of Parliament, upon which so much argument has been raised was drawn as clearly as it might be. The first point is this: The defendants say that they are entitled to let to the London, Tilbury, and Southend Railway Company engines, carriages, waggons, coaches, and so forth, the whole of the rolling stock of a railway company. That is what they assert, and that is what I am going to try. They say they have power to let to the Tilbury Company rolling stock and locomotive power, and for that purpose to enter into an agreement—the agreement of June 1876. Now, that is not a question of general law, but is simply a question upon the construction of the Act of Parliament, which I am far from saying is clear, and far from saying that other persons might not take a different view of the provisions thereof. But it does appear to me, upon reading the whole of that Act of Parliament—and I have read it through more than once during the argument, and have had the benefit of an elaborate argument on both sides—that that Act of Parliament did not authorise anything of the sort. The contention on the part of the defendants is, in substance, that the Act of Parliament authorised the Great Eastern Railway Company to enter into a working agreement with the London, Tilbury, and Southend Railway Company. That is the substance of their contention. Now, on spelling out the Act of Parliament, I do not think it did. The recital refers to arrangements then existing, which were in substance these: Messrs. Peto, Betts, and Brassey were the lessees for the remainder of a term of twenty-one years of the London, Tilbury, and Southend Railway at that time, and the firm of Peto and Co. had a separate working agreement with the Eastern Counties Railway Company, since absorbed into the Great Eastern Company. Now, the arrangement which is referred to is the arrangement for working the traffic under that agreement. Then there is a recital that it is expedient that the London, Tilbury, and Southend Railway Company, the lessees, the Great Eastern Railway Company, and the London and Blackwall Railway Company should be enabled to agree upon such alterations in the terms of the lease, in the arrangements for working the railway, and in the apportionment of the receipts and expenses, as by this Act authorised. Consequently, we get by the recital only to what is by this Act authorised—alterations in the arrangements for working. The arrangements for working were arrangements specially authorised by Act of Parliament during the continuance of the lease. Those are the things to be altered. Then we have the 4th section empowering the company and the lessees to enter into any contract or agreement for all or any of the following purposes: The first is the alteration of the terms of the lease; the second is the transfer to the company, or the surrender to the Southend Company of the existing lease; and the third is the granting and acceptance by the two companies, jointly or severally, of a new lease. Then we come to the 10th section, which says that “no alteration in the existing lease, and no new lease, shall have any operation until it shall be approved by the Board of Trade.” Then the 12th section provides that none of the powers and provisions shall have any effect unless they are

assented to by a certain proportion of the proprietors of the two companies, that is, of the London and Blackwall Company (which has also since been absorbed into the Great Eastern by a perpetual lease) and the Eastern Counties Company. Then the 14th section, as I read it, refers to an arrangement between the London and Blackwall Railway Company and the Eastern Counties Company, *inter se*, as to how they will arrange for the working of the Southend line, if they come to an arrangement at all with the Southend Company, and not, as I read it, any independent power to make a new working agreement quite irrespective of the lease altogether. Then comes the 15th section. It is very difficult to understand why it was put in, because, as I understand, the 4th section effects the same purpose in substance. It says, “The directors of the Southend Company, and the directors of the two companies respectively may, subject to such sanction of shareholders as by this Act prescribed, enter into any contracts or agreements for effecting all or any of the purposes of this Act, or any objects incidental to the execution thereof, and every such contract or agreement may contain such covenants, clauses, powers, provisions, and conditions as may be mutually agreed upon between the parties thereto.” Now, first of all, it was said that the purposes of the Act included working agreements generally. I have dealt with that. In fact we know that where there are powers to enter into working agreements in modern Acts of Parliament, there are specific agreements. Then, if that were so, it is said that “objects incidental to the execution” means something more. I am utterly at a loss to follow that argument. I admit that there are more words, but, beyond that, I think they mean nothing. The objects incidental to the execution of the purposes of the Act, if they are incidental, are purposes of the Act. If they are not incidental, then, of course, they are not within the objects incidental. It seems to me that it does not carry the case any further. It cannot be an incident unless the purpose exists, and even if the word “incidental” meant something more than “purpose,” this being a case where a purpose had been accomplished, the lease having expired, and no new lease having been granted, I do not see how there can be any object incidental to that which is non-existent. It appears to me, therefore, that that argument ought not to prevail. It was not pretended that the latter words, which looked very general and very wide, carry the case any further. It seems to me, therefore, that there is no special power conferred upon this company to enter into any agreement which any other company would not have the right to enter into. Now the second point is this: It was said that every railway company might do this under the 87th section of the Railway Clauses Consolidation Act. The company in this particular instance is situated in a very peculiar condition, because the Great Eastern Railway forms the access to London of the Southend Railway, and I am told as a fact that every train of the latter really runs on a portion of the Great Eastern line, and that it must do so for working the traffic, so that it is exactly within, not only the words, but also the purview and meaning of the 87th section, namely, an arrangement of traffic between two railway companies whose lines join, and where the trains are to run over both lines. But then all the Act authorises is this:

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it authorises any arrangement by which, if I may say so, the tolls or fares are divided where the trains of the one company or carriages of the one company run over the line of the other—for it is not confined to trains; it may be far more convenient to detach some of the carriages at the point of junction, and to send them on by a train of the other company, and we know as a fact that that is the common practice of railway companies. All the Act authorises is the making of an arrangement for the division of the tolls or fares. I do not mean to say that that arrangement may not be made in a compendious form, or that it must be a division of the tolls taken for every carriage or every train. Of course a lump sum may be taken, even if it is a contract with reference to the payment of toll, because it would still be a toll. A lump sum would be as much a toll as a separate sum taken on the passage of every carriage. But still that is all the Act authorises. Now the form of the contract in the present case is not according to the Act, nor is it the actual substance of it, for the contract is that the Great Eastern Company shall provide haulage for all the trains of the Southend Company, whether they go over the Great Eastern line or not. The contract is absolute, and under that contract, if they had no locomotive engines of their own which were available for the purpose, they must construct or hire new ones for the purpose of performing the contract. It seems to me, therefore, that neither literally nor in substance is it within the terms of that section. I am not prepared to say, and it is no business of mine to say, whether or not what is in effect the same thing may not be effected by some modification of the contract. Then the next point which has been argued—and a very important point it is—is whether there is any injury to the public which entitles the Attorney-General to interfere. Now, I am not prepared to say that there is, if the company had not contended for more than the Attorney-General is willing to allow. But they have contended for a great deal more. The case is brought before me as a general claim by the company, as I understand, to let for hire, and of course for that purpose to manufacture; for by their statement of defence they submit that they are authorised and empowered to let for hire to the Tilbury and Southend Company rolling stock and locomotive power, and for that purpose to enter into an agreement—the agreement of the 1st June 1876—that they will let such rolling stock and locomotive power, which of course imposes on them the obligation of obtaining, either by manufacturing or purchasing, or in some way or other, more rolling stock than they want for their own line. It seems to me that this is against the public interest, because it is a contract by a railway company to let for hire not only its own rolling stock which it has in possession, and which it would otherwise purchase or manufacture for itself for its own purposes, when not wanted for those purposes, but any quantity of rolling stock which may be required for working the traffic on the Southend Railway; that is carrying on the business of letting rolling stock, and it may be also making rolling stock, which the Legislature has not considered in the public weal should be carried on by railway companies, except for the purpose of being carriers on their own line, or for the limited purpose of running over adjoining or other lines of railway. That being so, it seems to

me that on the present pleadings I am bound to decide against the defendants. But, as I said before, what they are doing is obviously not mischievous, because what they are actually doing is only, as I understand, to use stock not manufactured for this purpose; that is, stock not manufactured for any purpose beyond the ordinary requirements of the Great Eastern Railway, including in those requirements the requirements of the Southend Company whilst the lease existed. They are under an agreement sanctioned by Parliament, and therefore it would not increase their rolling-stock, and the Attorney-General is quite willing to limit his objection so as not to extend to the user on the London and Tilbury line of the locomotives now belonging to the Great Eastern Company, upon their undertaking not to manufacture any locomotives for the purpose of being used on the line, or for the purpose of being used on the Great Eastern line to replace those used on the other line. They must not manufacture any more, and they must not let for hire any locomotives hereafter to be manufactured. Now, I have one word to say about the London, Tilbury, and Southend Railway Company. It was said at the beginning of the argument that it was not intended to interfere with the supply under that agreement which is now in existence, that is, the Great Eastern Company is to be at liberty to perform that agreement with the Tilbury Company for the two and a half years it has yet to run. Of course to that extent the Tilbury Company only is interested, and with that limitation it is not necessary to have that company party to this suit. If that had not been assented to, I should have felt great difficulty in dealing with the case at all. Then there only remains the important question of costs. My view is that the successful party obtains costs, although I think if the relators had understood that the company would be content not to do more than they are now willing to say they will do, they would not have come with this information at all.

A perpetual injunction was accordingly awarded against the Great Eastern Railway Company to restrain them, their directors, servants, and agents, from letting for hire any locomotive engines or other rolling stock, except for the purposes of the traffic on another railway in extraordinary emergencies, and from manufacturing locomotive engines or other rolling stock for the purpose of letting the same on hire, or for any other purpose, except for the purpose of being used by the Great Eastern Railway Company upon a railway worked by them or some part thereof, the injunction not extending to prevent the supply of locomotive engines by the defendants to the Tilbury and Southend Railway Company, under the agreement of the 1st June 1876, during the remainder of the term (expiring 1st July 1880), provided that no locomotive engine or other rolling stock manufactured by the Great Eastern Railway Company after the date of this order (14th Jan. 1878) should be supplied, under the agreement, to the Tilbury and Southend Railway Company.

From this order the Great Eastern Railway Company appealed.

*Chitty, Q.C.* and *Smart* for the appellants.—Our first contention is, that we are entitled by the special powers conferred upon us by our Act to do

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what we have done. The preamble of the Act of 1863 (26 & 27 Vict. c. 69) states one of the objects of the Act to be to enable alterations to be made in the arrangement for working the Tilbury line, and that indicates an intention to confer powers upon the three companies to make any arrangements they might think fit for working the Tilbury line as well after the expiration of the lease as during its continuance, without it being necessary for either of the two companies to accept a new lease. The 14th section of the Act provides that "the two companies (the Great Eastern and the Blackwall) may enter into agreements with respect to the working, maintenance, and management of the Extension Railway, or any part thereof, and of the railways of the two companies connected therewith, and with respect to the apportionment of the traffic on the Extension Railway." The marginal note to the section is "contracts between the two companies," but there is nothing in the section itself to confine it to contracts between the two companies *inter se*. [BRAMWELL, L.J.—I thought you could not properly look at the marginal note of an Act of Parliament?] The Master of the Rolls says you can; that there has been an alteration in that respect, and that they are now on the roll itself and form part of the Act. [JAMES, L.J.—What authority has the Master of the Rolls for saying that the courts do look at the marginal notes?] The ground for saying so is that they are on the roll. The 14th section of the Act, it is to be observed, is not limited in point of time. Then the 15th section provides that "the directors of the Southend Company and the directors of the two companies respectively, may, subject to such sanction of the shareholders as by this Act prescribed, enter into any contract or agreement for effecting all or any of the purposes of this Act, or any object incidental to the execution thereof; and every such contract or agreement may contain such covenants, clauses, powers, provisions, and conditions, as may be mutually agreed upon between the parties thereto." It was contended in the court below that the purposes of the Act are to be found in the 4th section only. We say this is not so, but that they are to be found in the 14th section also. The agreement of June 1876 is authorised by the combined effect of the 14th and 15th sections of the Act. Under those sections we are entitled to do whatever is fairly within the working of the line, and nothing more. Supplying locomotives for the working of the line is within our powers. We do not claim to be entitled to manufacture locomotives for general purposes, but only for the purpose of supplying the Tilbury Company. *Simpson v. The Westminster Palace Hotel Company* (8 H. of L. Cas. 712) shows that the court will not be astute to find that we have been exceeding our powers. [BRAMWELL, L.J.—Supposing at any particular time of the year the company had more locomotives than they wanted, would they be at liberty to let them for hire for six months?] A very similar state of things happened in *Forrest v. The Manchester, Sheffield, and Lincoln Railway Company* (30 Beav. 40), where a railway company had authority to keep steam vessels for the purposes of a ferry, and it was held by Romilly, M.R. that such steam vessels, when otherwise unemployed, might be used by the company for excursion trips to the sea. [BAGGALLAY, L.J.—On appeal in that case, a different view was taken by

Lord Westbury (4 L. T. Rep. N. S. 666; 4 De G. F. & J. 126).] We are not setting up a trade, but merely doing what is for the benefit of our real trade. [BRAMWELL, L.J.—I have often wondered whether this famous doctrine of *ultra vires* would apply to the case of a railway company having receiving houses and collecting parcels in the streets, as many of them do.] It is sometimes proposed to carry the doctrine to a startling length. The court will not restrain what is fairly within the proper carrying on of the company's trade. Our second contention is that we are doing no more than any railway company is empowered to do by the 87th section of the Railways Clauses Consolidation Act 1845, which provides that "it shall be lawful for the company from time to time to enter into any contract with any other company, being the owners or lessees, or in possession of any other railway, for the passage over or along the railway, by the special Act authorised to be made, of any engines, coaches, waggons, or other carriages of any other company, or which shall pass over any other line of railway, or for the passage over any other line of railway of any engines, coaches, waggons, or other carriages of the company, or which shall pass over their line of railway, upon the payment of such tolls, and under such conditions and restrictions as may be mutually agreed upon; and for the purposes aforesaid it shall be lawful for the respective parties to enter into any contract for the division or apportionment of the tolls to be taken upon their respective railways." It was not contended in the court below that we need specifically divide the tolls with regard to the different trains of the railway over which our train runs; but any other arrangement might be made for dividing the profits of the working between the two companies. In *The Midland Railway Company v. The Great Western Railway Company* (28 L. T. Rep. N.S. 718; L. Rep. 8 Ch. 814), Mellish, L.J. said that the 87th section of the Railways Clauses Consolidation Act is reciprocal. In the *Llanelli Railway and Dock Company v. The London and North Western Railway Company* (32 L. T. Rep. N.S. 575; L. Rep. 7 B. & L. 550), Lord Cairns said that an agreement for the division of the receipts from the through traffic, according to certain mileage proportions, with an allowance for working expenses, was entirely such an agreement as was contemplated by the 87th section of the Railways Clauses Consolidation Act 1845. Our agreement with the Tilbury Company is, we contend, also authorised by that section. Our third contention is that the Attorney-General cannot interfere unless he can show detriment to the public. In the case of *The Attorney-General v. The Great Northern Railway Company* (2 L. T. Rep. N.S. 653; 1 Dr. & Sm. 154), where Kindersley, V.C. enjoined the defendant company from trading in coal, he did so on the ground that the interests of the public were injured or endangered by the practice complained of, and held that it was competent for the Attorney-General to file an information to prevent it on that ground. In the present case there is no such injury to the public.

The Attorney-General (Sir John Holker Q.C.) and *Maonaghton* for the respondents.—The claim set up by the defendant company in their statement of defence is much wider than that which has been contended for at the bar in opening the appeal.



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They say, for instance, that they have not manufactured any carriages since the 1st July 1875, but they insist that they have a right to do so. [JAMES, L.J.—They do not claim any right except in connection with the Tilbury Company.] Under the 87th section of the Railways Clauses Consolidation Act 1845 they claim to have a right to let locomotive power and rolling stock to another company. [JAMES, L.J.—They do not claim to enter generally into the business of manufacturers of locomotives.] They practically do, if their contention is correct that the 87th section empowered them to enter into the agreement in question, for, if that is so, it would give them a right to do what they have done not only with the Tilbury Company, but with every company in the kingdom. The Act of 1863 empowered the two companies, or either of them, to enter into any agreement for alteration of the terms of the lease of the Tilbury line to Peto and Co., and to take a transfer of the lease, or a new lease of the line. [JAMES, L.J.—The Act authorises either of the two companies to take a lease and work the line; why should they not work it without taking a lease?] They must assume the liabilities imposed upon lessees by the Railways Clauses Act in order to become entitled to work the line. By not taking a lease they are really evading the control of the Board of Trade. [JAMES, L.J.—The working is part of what they would do under a lease. If the whole is *intra vires*, I cannot see how doing any part of the whole is *ultra vires*.] The companies are not authorised to work the line except in a particular way. If they do not take the responsibility of a lease, they are not authorised to enter into an agreement to work the line. Our contention is that the 14th section of the Act of 1863 empowered the two companies to enter into arrangements *inter se* as to the working, they having been authorised to take a lease of the line jointly and not to enter into a working agreement with the Southend Company without taking a lease. The 14th section does one of two things. It either contemplates an agreement between the two companies and the Southend Company as to certain matters, or it contemplates an agreement between the two companies without reference to the Southend Company. Supposing it contemplates the former, as the appellants contend, including an agreement to work the line of the Southend Company, then it is said that the 15th section is an amplification of that, and gives the necessary powers. How can that be, when the 15th section says: "The directors of the Southend Company and the directors of the two companies respectively may, subject to such sanction of shareholders as by this Act prescribed, enter into any contracts or agreements for effecting all or any of the purposes of this Act"? *Es concessio* there are purposes of this Act to be effected by agreement between the two companies *inter se*. If there are, then it is obvious that the 15th section was intended to do something more than simply apply to the agreements under the 14th section, if those agreements are confined to agreements between the two companies and the Southend Company. As for the argument upon the 87th section of the Railways Clauses Consolidation Act, that is a general clause which gives a railway company, into whose special Act it is incorporated, power to confer running powers on other companies. What

those running powers are has been discussed in several cases:

*Simpson v. Denison*, 10 Hare 51;  
*Winch v. The Birkenhead, Lancashire, and Cheshire Railway Company*, 5 De G. & Sm. 582; 7 Rail. Cas. 384.

Working agreements are a very different thing, and are not within the Railways Clauses Consolidation Act 1845 at all. They come under the Railways Clauses Act 1863 (26 & 27 Vict. c. 92), which provides that every alteration in a working agreement shall have the sanction of the Board of Trade. [JAMES, L.J.—That Act has no operation unless it is incorporated in the special Act.] Then as to the power of the Attorney-General interfere, that is a difficult matter; and the Attorney-General, for his own guidance, will be extremely glad to have the decision of the court one way or the other. If the question had depended upon principles of political economy, it would have been a very difficult point to solve, for many would say that this is something like free trade, that if the railway companies are authorised to use their capital for the purpose of manufacturing locomotives, and become the letters-out of waggons, in the end the result will be that they will be able to make locomotives and carriages cheaper than anybody else. On the other hand, we say that the result will be to extinguish private enterprise, and to create a monopoly. If the question were *res integra*, it might be a very difficult one for the Attorney-General to deal with; but surely he has a right to resort to the authorities. And in the *Attorney-General v. The Great Northern Railway Company* (2 L. T. Rep. N. S. 653; 1 Dr. & Sm. 154) a Vice-Chancellor of great eminence (Kindersley) laid it down as his opinion that such an agreement would lead ultimately to a monopoly. Then there is an unreported case in which the Master of the Rolls enjoined the London and North-Western Railway Company from making locomotives for other companies. But the question is not whether the public interest will or will not suffer, but whether the company is doing what it is not authorised by its Act to do; and, if it is, the Attorney-General ought to draw the attention of the court to that fact. That seems to have been the view taken by Jessel, M.R. in *The Attorney-General v. Cookermouth Local Board* (30 L. T. Rep. N. S. 590; L. Rep. 18 Eq. 172), where it was held that upon an information filed by the Attorney-General to restrain a public body from transgressing powers conferred by an Act of Parliament, it is not necessary to prove that injury to the public will result from the acts complained of; and that in this respect there is no difference between an *ex officio* information and an information at the relation of a private individual. [JAMES, L.J.—A local board stands in a very different position from a joint stock company. It is a delegate of the State for the purpose of performing certain public duties.] That was not the ground upon which Jessel, M.R. proceeded in that case, as is clear from his reference to *The Attorney-General v. The Oxford, Worcester, and Wolverhampton Railway Company* (2 W. R. 330). The Attorney-General may interfere not only whenever a shareholder may interfere, but further, where there is no proof of actual injury:

*Ware v. Regent's Canal Company*, De G. & J. 212.

[JAMES, L.J.—The decision there is not that the



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Attorney-General may interfere, but that it is clear that nobody but the Attorney-General can interfere. It does not show that the Attorney-General ought to interfere if the injury is very minute.] There must, it is true, be a substantial transgression of powers to entitle him to interfere. But it is very important that companies with statutory powers should be kept strictly within the four corners of their Act. *The Warden of Dover v. The London, Chatham, and Dover Railway Company* (4 L. T. Rep. N. S. 387; 3 De G. F. & J. 559) shows that the Attorney-General is the person to interfere in cases where a company transgresses its powers to the public injury. [JAMES, L.J.—That case does not carry the matter any further. It is merely a decision that a private individual, who cannot show special injury, has no right to complain of any violation of an Act by a company.] It goes a little further than that; it says that the proper person to complain in a case of that kind is the Attorney-General. In *The Attorney-General v. The Ely, Haddenham, and Sutton Railway Company* (20 L. T. Rep. N. S. 1; L. Rep. 4 Ch. 194) Lord Hatherley took the view we are contending for as to the right of the Attorney-General to interfere where what has been done by a company is not in accordance with the law. The jurisdiction is a very wholesome one, for who else can now interfere to keep railway companies within their limits? They also referred to

*Colman v. The Eastern Counties Railway Company*, 10 Beav. 1;

*The Ashbury Railway Carriage Company v. Riche*, 33 L. T. Rep. N. S. 450; L. Rep. 7 E. & I. 653.

Smart in reply.—Injury must be proved to entitle the Attorney-General to intervene. [BRAMWELL, L.J. referred to Brice on Ultra Vires, 2nd edit. p. 900.] *Ware v. The Regent's Canal Company* (3 De G. & J. 212) merely decided that no one but the Attorney-General had power to interfere, not that the Attorney-General had any power. [BAGGALLAY, L.J. referred to *Blakemore v. Glamorganshire Canal Company*, 1 My. & K. 154.] Under the 14th and 15th sections of the special Act combined, the agreement that we have entered into is a valid and legal agreement.

JAMES, L.J.—We will consider this case, especially with reference to what is said as to the general law. It is supposed that our decision will, in some way or other, govern other cases. In other cases there may not be exactly the same language, or exactly the same circumstances, but we must be careful that we do not prejudice other cases.

March 25.—The following written judgments were now delivered:—

JAMES, L.J.—At the time of the commencement of the transactions which led to this action there were three railway companies, the Eastern Counties, the Blackwall, and the Tilbury. The Eastern Counties and the Blackwall were much connected together, and have since been amalgamated, and by union and growth have become the great line called the Great Eastern. But while they were distinct lines the Tilbury line was projected. It was so projected and originally constituted in connection with and as an offshoot from them; but some years afterwards the Tilbury Company was incorporated as a distinct corporation. The only access of the Tilbury line to London is by means of what was the Eastern

Counties on the one side and the Blackwall on the other, and all its through traffic to and from London is from and to the London stations of what is now the Great Eastern Company. The Tilbury line appears to have been what is called a contractors' line, and was leased to Messrs. Peto and Co., and, while under lease to them, was worked by means of the locomotives and rolling stock of the Eastern Counties. In this state of things an Act was passed in 1863, (26 & 27 Vict. c. 69), to authorise arrangements between the London, Tilbury, and Southend Railway Company and the lessees of their undertaking, and the Eastern Counties and London and Blackwall Railway Companies, with reference to the lease and working of the London, Tilbury, and Southend Railway, and for other purposes. Then it recites the history of the thing up to a certain time; it recites that a lease had been given to Peto and Co., determinable upon giving twelve months' notice to the companies and the lessees; that is to say, there was power in the Board of Trade to determine it; and then it recites that whereas by arrangements between the Great Eastern Company and the lessees, the traffic on the London, Tilbury, and Southend Railway is worked by the Great Eastern, and whereas the Great Eastern and the London and Blackwall Companies received a proportionate part of the tolls for passing over, and so on, and whereas the lessees are desirous that powers should be given to effect such arrangements with reference to the lease as are by this Act authorised, and whereas it is expedient that the Tilbury Company and their lessees, and the Great Eastern and the Blackwall Companies respectively, should be enabled to agree upon such alterations in the terms of the lease, and in the arrangements for working the said railway, and in the apportionment of the receipts and expenses as by this Act authorised, and that the Great Eastern and the Blackwall Companies, jointly or severally, should be empowered to take a lease or a transfer of the existing lease of the Tilbury Company; then there are certain powers enabling them to take a lease, there are powers to make arrangements with the lessees, a power to transfer to the two companies, and the provisions are to be subject to the approval of the Board of Trade, and then it contains two clauses, the 14th and 15th, to which I shall refer more particularly afterwards. The lease to Messrs. Peto and Co. expired, and then the Great Eastern continued to supply locomotive power and rolling stock for the working of the Tilbury line under an agreement which was embodied in an indenture made between the Great Eastern Company of the one part and the Tilbury Company of the other part, which after various recitals contains clauses for the working of the traffic, the apportionment of the tolls, and various other purposes; and then it contains special provisions as to running powers, and various things which are usual between railway companies, such as the use of stations and so on. Then it contains this: "The Great Eastern Company shall supply the Tilbury Company with locomotive power at a price fixed per train mile for passengers, goods," and so on. And then as to the supply of carriages, the Great Eastern Company undertook to supply carriages not exceeding sixty in number, at an annual rent, and to keep them in repair, and they also agreed to supply further carriages not exceeding another number of

sixty, at a rate to be fixed, so much a day for each carriage. Then there was a similar clause as to the supply of goods waggons. This action is brought by the Attorney-General at the instance of certain relators, who may be considered as representing the body of manufacturers and dealers in locomotive engines and rolling stock; and its object is to have it declared that the Great Eastern Company is acting *ultra vires* and illegally in carrying on this business of what may be called jobbers of locomotives and carriages. The Master of the Rolls was of opinion that it was illegal, and that it was an illegality which the court ought, at the instance of the Attorney-General as representing the public, to restrain. On the argument on the appeal, three views of the case were presented by the appellants' counsel: first, that there was nothing, even in the absence of express parliamentary authority, wrong in what the Great Eastern was doing; secondly, that there was such parliamentary authority, if required; thirdly, that the Attorney-General, as representing the public, had no right to call for the intervention of the court, or, to put it in another form, that it was not such a case of sufficient public wrong as to make it the duty of the court to interfere with the company in the conduct of its own business. I have arrived at the conclusion that the appellants are right in each of these contentions. Upon the first, it appears to me that the arrangement which was made with Messrs. Peto in the first instance, and afterwards with the Tilbury Company, was a reasonable and proper, and therefore legitimate incident of the proper business of the Great Eastern Company as owners and workers of and carriers on their own line. The traffic on the Tilbury line, from the very nature of things, can only be profitably carried on in connection with that of the Great Eastern. It is manifestly, in my opinion, for the safety and convenience of the public that the same engines, the same carriages, the same staff should be employed to do all the work, instead of one set doing part, and another set doing another part of it. It is obviously for the profit of the two companies that such an arrangement should be made, otherwise they would not have made it. There is, as it seems to me, no pretence whatever for saying that this is a sham or a colour for enabling the Great Eastern Company to enter into some distinct business outside the Act of Parliament which constitutes the deed of partnership between the shareholders. If it had been a private partnership carrying on the business of working the Great Eastern Railway, it would have been just the arrangement which the managing partner would have entered into. It is not pretended that the Great Eastern have exceeded the capital which they are authorised to raise, nor that they have diverted from their own line and traffic proper any part of that capital required to enable them to fulfil the duties imposed on them or undertaken by them in respect of such line and traffic. They have, of course, a sufficient margin of engines and rolling stock, or they would not have been able to fulfil their agreement with the Tilbury Company; and if at any time they should feel themselves overstrained by the additional demand on their resources in that respect, they can have no difficulty in obtaining from the relators or others, on hire, a sufficient supply to make good the deficiency. It appears to me that, whether as regards a private

partnership, a joint-stock company, or an incorporated company, in the absence of fraud or deliberate perversion, the majority or managing partners may be trusted, and ought to be trusted, in determining for themselves what they may do, and to what extent they may go in matters indirectly connected with or arising out of their business relations with others. It is no part of the business of partners in a great shop to be money-lenders, but I should think it very strange if it were held unlawful for one of them to take a bill or cheque from a customer, handing him the balance over his account in cash. I recollect a case of an attempt being made to restrain an insurance company from paying or contributing to losses which were not technically covered by the terms of their insurances; but it was answered by the court that such liberality was a legitimate mode of preserving and increasing their customers (*Taunton The Royal Insurance Company*, 10 L. T. Rep. N. S. 156; 2 H. & M. 135). Where is this notion of *ultra vires* to extend to? Is it *ultra vires* for a railway company to make profit from the sale of meat and drink at its refreshment-rooms? Would it be *ultra vires* for two companies whose lines are connected to have joint workshops for the construction or repair of their rolling stock, or joint depôts of coals and other stores, or to enter into a joint contract with such persons as the relators for the hire of the rolling stock, and to apportion the costs and expenses between themselves according to the respective train miles run on their several lines? Would it be *ultra vires* for one company to let another company have the use of part of its offices, warehouses, and ground? Secondly, supposing, however, that this agreement should be held to require Parliamentary authority, it appears to me to be plainly authorised. The 14th section of the Act of Parliament (26 & 27 Vict. c. 69) is as follows: "The two companies may enter into agreements with respect to the working, maintenance, and management of the extension railway, or any part thereof, and of the railway of the two companies connected therewith, and with respect to the apportionment of the traffic and of the tolls, fares, and charges for traffic of the extension railway and the railways of the two companies, the appointment of a joint committee, or any other matter incident to the carrying out of the purposes of this Act." That is said to be the agreement between the two companies; that the two companies might enter as between themselves into agreements with respect to the working, maintenance, and management of the extension railway and their own railways connected therewith. It appears to me that, under that, the arrangement which was then in existence between the Great Eastern Railway Company and the lessees might have been taken over by the Blackwall Company; that if the two companies jointly took a lease of the extension railway, one of them might work it; if one of them took a lease, both or one of them might work it. It appears to me that there is scarcely any possible combination of things in which the two companies might not enter into arrangements between themselves to work the railway, and of course, if to work it, to find any part of the working of it, such, for instance, as the engine power and rolling stock. I am unable to find any implied restriction on the words of this section. It

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authorises the Eastern Counties and Blackwall Company, as between themselves, to make any arrangements for working the Tilbury line. If, as between themselves, they are authorised to do it, then it seems to me that they are necessarily authorised as between themselves and the public, and, of course, as between themselves and the owners of the Tilbury line. The latter did not require any parliamentary authorisation, for, of course, it is to the latter and to the public, so far as the public are concerned, wholly immaterial from whom they hire their power and rolling stock, and it is not denied that, so far as the Tilbury Company are concerned, they might have made with the relators, or with any other private person, the very bargain they have made with their neighbours, the Great Eastern. But, if necessary, there is the express sanction of the 15th section, which enabled the directors of the Southend Company, and the directors of the two companies to enter into any agreement, subject to the sanction of the shareholders, for carrying out all or any of the purposes of this Act, and one of the purposes of the Act, as it appears to me, was the arrangement which the two companies, the Great Eastern and the Blackwall, might make for working the extension railway. It is to be noted that the Legislature recognised and impliedly sanctioned the letting to Peto and Co., and, if it was not *ultra vires* or an improper employment of the property of the company to let to Peto and Co., the lessees, it would be very singular indeed that it should become *ultra vires* and improper to make exactly the same letting to the Tilbury Company, the lessors, on the expiration or determination of the lease. And what was to be done with the working of the traffic? What was to be done with the engines and carriages used for it, if the lease had been suddenly determined by default of the lessees? It was suggested in the course of the discussion that this arrangement might be a device to escape the power of control which Parliament evidently intended to give to the Board of Trade. It appears to me that that control was given for a very different and very intelligible purpose. An actual lease of the line involves a transfer of the parliamentary powers and of responsibility, and it may be well that the Board of Trade should see that such transfer is made to proper and sufficient persons, persons proper to be intrusted with the parliamentary powers and sufficient to answer such responsibility, and that the lease is not likely to affect the interests of the public by unduly diminishing competition or diminishing the conveniences for the public, the providing of which was the original consideration for the parliamentary powers conferred on the company. I can easily conceive the case of a company getting a lease of a parallel or nearly parallel line for the very purpose of practically closing it—a thing, of course, to be prevented. It was for some such purposes as that, with a view to some such considerations as I have stated, that I conceive the sanction of the Board of Trade, to be required to a lease. But I cannot conceive the Board of Trade's interfering with such a thing as the taking or letting on hire locomotive power and rolling stock. The Board of Trade may be like an elephant's trunk, capable of tearing up a tree or picking up a pin; but I do not conceive that the Legislature

intended that it should be employed in picking up such a very small pin as the agreement before us. I propose dealing with the third question raised before us, the rather because the Attorney-General pressed us to state our views of it, especially having regard to some decisions on the subject. In my judgment, where the matter is a mere matter of *ultra vires*—e.g., whether the managing partners of a concern are or are not doing something outside their charter, Act of Parliament, or deed of settlement, there ought to be some plain and sufficient public mischief shown to warrant a suit on behalf of the Sovereign or the public. It is not, in my opinion, sufficient to say the thing complained of is *ultra vires*, and that it interests the public that, whatever may be the nature or the extent of the excess complained of, the excess should be at once stopped, so that bodies incorporated and established by Act of Parliament should be taught to keep within their strict lines. I cannot accede to any such view of the duty of the Attorney-General or of this court. Where a company intrusted with large powers is deliberately violating an express enactment, or disregarding an express prohibition of the Legislature, it is really committing a misdemeanor, and ought to be at once stopped. In the case of *The Attorney-General v. The Great Western Railway Company* (L. Rep. 7 Ch. 767) the railway company were prohibited by law from opening a line before it was passed by an engineer appointed by the Board of Trade, a provision intended for the safety of people's lives, and they were going to disregard that prohibition, and it was no answer for them to say that the line was so safe that no mischief could arise. The company were, of course, restrained from this violation of an express compact with the Legislature. Again, in the case of *The Attorney-General v. The Cockermouth Local Board* (30 L. T. Rep. N. S. 590; L. Rep. 18 Eq. 172), they were doing works which would or might probably poison a running stream, in direct violation of the law which prohibited them from committing a nuisance. These seem to me good illustrations of the cases in which it is essential for the protection of the public and of individuals that the Attorney-General should interfere. But take the case of a railway company taking more of a man's land than it ought to take, or doing its work in a manner which he has a right to complain of, the Attorney-General would leave him to protect himself, and certainly would not be heard in this court in a suit at his relation, and certainly much less at the relation of a rival company or carrier. It would be different if what it was doing affected a whole district, which could show an actual *damnum* as well as a theoretical *injuria*. In the case before Kindersley, V.C., of *The Attorney-General v. The Great Northern Railway Company* (2 L. T. Rep. N. S. 653; 1 Dr. & Sm. 154), the Vice-Chancellor did proceed on the ground that it was a matter of grave damage and injury to the public. Of course, if such a company as that were allowed to embark in a gigantic coal business, it is easy to see that coal proprietors were not likely to be served on the line as they ought to be served, and there might arise other inconveniences. I am far from saying that a railway company ought to be permitted to carry on the trade of ironmasters, or colliery proprietors, or rolling stock manufacturers, not casually, not incidentally, not collaterally, in.

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the *bonâ fide* conduct of their own property and business, but as really a distinct and separate trade. I can conceive that such a case might be properly considered by the Attorney-General, and considered by this court, as a fraud on the Legislature, which had created and authorised the company only for what it professed and undertook to do. But, at all events, it must be something great, something substantial, to warrant such interference. It is not possible to define what is for this purpose great, what is substantial, any more than it is possible to define how much of small or how much of noise amounts to a nuisance; or what is or is not reasonably incident to a business. But generally speaking it is not practically difficult to ascertain when the line has been clearly transgressed. And in this case, speaking for myself, I should say that the facts do not show any ground of complaint on the part of the public, even if the agreement had been made out to be theoretically *ultra vires*. And it is, in my judgment, to be considered for the purposes of this action that there is no real difference between a body of shareholders incorporated by special Act of Parliament for the purpose of making and working a railway, and a body of shareholders incorporated under the general law (now applicable to large associations) for the purpose of establishing and working any other industrial enterprise. So far as the first has compulsory powers it must not abuse them; so far as it has statutory duties it cannot delegate them; so far as it is under any statutory prohibition or direction it must not violate the one or neglect the other. But even in these cases it is only where some public mischief is done, or where, in respect of something intended for the public protection, there is misfeasance or nonfeasance, that the Attorney-General ought to interfere. If a particular landowner has cause of complaint it is for him to appeal to the tribunals. If, as between the company and its shareholders, there is a wrongful application of the capital, or a wrongful incurring of liabilities, it is for the shareholders to complain. If, as between the company and any persons outside the company, it is entering into contracts *ultra vires*, it is for such persons to take proper advice and guard themselves from risks which they are perfectly free to avoid. I cannot myself see any principle on which the Attorney-General is to interfere with a railway company's contracts because they are *ultra vires*, any more than he would on the like ground interfere with the contracts of any other incorporated joint-stock company carrying on any other industrial enterprise. In neither case is it, in my judgment, for the Attorney-General to take up the complaint of a rival trader who says that the company is trading in something which it was not established or incorporated to trade in. I cannot think that it is for the Attorney-General to invoke the court, nor for the court so invoked to interfere to prevent a gigantic iron and coal joint-stock company incorporated from opening stores, however vast and however miscellaneous, for the supply of its workmen and neighbours. On these grounds I am unable to concur in the judgment of the Master of the Rolls, and I give my voice for discharging the order he has made.

BAGGALLAT, L.J.—I much regret that I have been unable to arrive at the same conclusions as my colleagues with respect to this appeal; and though

the fact of my taking a different view can have no effect as regards the order to be pronounced, I think it right to explain the grounds upon which, in my opinion, the order of the Master of the Rolls ought to be affirmed. A long series of authorities has declared the true effect and meaning, as regards the powers conferred by them, of the Acts of Parliament by or under which railway and other companies formed for carrying out large commercial undertakings have been for the most part incorporated; and I deem it of the highest importance, in approaching the consideration of questions similar to those involved in the present appeal, to guard against breaking in upon the general principles established by these authorities. The policy of the legislation of the last half-century in relation to such companies has from time to time been doubted, and is, indeed, still doubted by many whose views and opinions are deserving of the highest consideration, and the general principles to which I have alluded have not been established without much difference of opinion; but it must, nevertheless, be now accepted as settled law that corporations created by statute—whether by special Acts of Parliament, as in the case of railway, gas, and water companies, or by memoranda of association, deriving their force from the Joint-Stock Companies Acts—have not the same powers, privileges, and general incidents as are the attributes of common law corporations, but such powers, privileges, and incidents only as are conferred upon them by their special Acts or memoranda of association. Nor can such companies be regarded in the light of private partnerships; their shareholders are not exposed to liabilities and risks to which the members of private partnerships are subject, and their creditors have not the same remedies for obtaining payment of what may be owing to them as have the creditors of private partnerships. They have, moreover, ordinarily conferred on them powers of directly interfering with the property and interests of others; and the Legislature, while deeming it for the public interest to confer such powers and privileges upon the companies, has also thought fit, according to the construction which has been judicially placed upon their enactments, to define the limits within which such powers and privileges may be exercised. Acting upon these principles, Courts of Equity have interfered to restrain directors of railway companies from applying any portion of the corporate funds to purposes not strictly within the objects of their incorporation, and courts of common law have held that the deed of any such company, though under its corporate seal, does not bind it, if the deed amounts to a contract to do an act not authorized by its constitution, or, as the doctrine has been sometimes enunciated, if it appears by the express provisions of the statute creating it, or by necessary or reasonable inference from its enactments, that the deed is *ultra vires*, in other words, that the Legislature meant that such a deed should not be made. The general principles involved in those decisions have been repeatedly recognised and approved by the House of Lords, and notably so in the cases of *The Eastern Counties Railway Company v. Hawkes* (5 H. of L. Cas. 331), *The Shrewsbury and Birmingham Railway Company v. The London and North Western Railway Company* (6 H. of L. Cas. 113), and *Taylor v. The Chichester and Midhurst Rail-*

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way Company (L. Rep. 4 E. & I. 628); and these decisions of the House of Lords are of importance, not only as establishing the general principles to which I have alluded, but by reason of their express approval of leading decisions in Courts of Equity and Common Law, which serve to illustrate and distinguish the classes of objects which are and those which are not within the scope of the constitution of railway companies. Amongst others approval has always been expressed of the decision and dicta of Lord Langdale in *Colman v. The Eastern Counties Railway Company* (10 Beav. 1), in which that learned judge held that the circumstances of the proposed application of the company's funds being for the probable benefit of its shareholders, or even for a purpose of such public or national importance as to make it proper to grant legislative authority to so apply it, was not to be regarded in considering whether such an application of its funds was within the statutory powers then possessed by the company. Again, the case of *Munt v. The Shrewsbury and Chester Railway Company* (13 Beav. 1), decided by the same judge, and other cases with which we all are familiar, illustrate the uniform practice of all the courts before which such questions have arisen, of keeping railway companies strictly within the limits of their powers, and of checking what might appear to be very slight excesses. In the comparatively recent case of *The Ashbury Railway Carriage Company v. Riche* (33 L. T. Rep. N. S. 450; L. Rep. 7 E. & I. 653) the same general principles were enunciated in the House of Lords in terms at least as were laid down in the earlier cases. It is true that, in that case, the question which called for the decision of their Lordships was whether a certain contract was authorised by the memorandum of association of a company under the Joint Stock Companies Act 1862; but there is no distinction between statutory corporations under railway and other similar Acts, and statutory corporations under the Joint Stock Companies Act, as regards the extent of their powers to enter into contracts or to deal with their corporate funds; both are limited in the exercise of their powers to purposes within the scope of their constitution, though, as regards the former, we have to look to their Acts of incorporation, and, as regards the latter, to their memoranda of association, to ascertain what these purposes are. In the case of *The Ashbury Railway Carriage Company v. Riche* the present Lord Chancellor (Lord Cairns), in moving the judgment of the House, made use of the following language: "In such a case as that which your Lordships have now to deal with, it is not a question whether the contract sued upon involves that which is *malum prohibitum* or *malum in se*, or is a contract contrary to public policy and illegal in itself. I assume the contract in itself to be perfectly legal, and to have in it nothing obnoxious to the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract. Now I am clearly of opinion that this contract was entirely, as I have said, beyond the objects of the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, my Lords, it is not a question whether the contract ever was ratified or was not ratified; if it was a contract void at its beginning, it was void

because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder had said, 'That is a contract which we desire to make, which we authorise the directors to make, to which we sanction the placing the seal of the company,' the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by the Act of Parliament, they were prohibited from doing." To fully appreciate the force of the words which I have just quoted, it is necessary to bear in mind that it had been urged in the course of the arguments that all contracts, except such as were expressly or by necessary implication forbidden, were within the powers of the company by reason of its being a corporation, and that although the contract in question might have been *ultra vires* of the directors, whose delegated powers were limited to the purposes defined by the memorandum and articles of association, it might be rendered binding by the subsequent assent of the shareholders. With reference to this argument, Lord Selborne made the following observations: "I think that contracts for objects and purposes foreign to or inconsistent with the memorandum of association are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, than that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do." I may here observe that the limits which judicial decisions have imposed upon the powers legally exercisable by commercial companies incorporated by statute have been uniformly recognised by the Legislature. Not only the Consolidation Acts, which are incorporated with the special Acts, but the special Acts themselves recognise the necessity of conferring special powers upon the companies, beyond those incident to their corporate character as commercial companies, to enable them to enter into contracts, or to spend their corporate funds, or to do any other acts or things for furthering or in connexion with purposes which are beyond the scope of their constitution; not a special Act passes to enable one company to lease its railway to another without a statement in the preamble that the granting such a lease would be of great public advantage, but that it cannot be effected without the authority of Parliament, a statement of the want of authority on the part of the company to do that which would admittedly be of great public advantage unless such authority is specially conferred upon it; even working agreements between two companies whose railways are continuous depend for their validity upon powers, either general or special, conferred by statute. As an illustration of the extent to which the Legislature has gone in recognising the necessity for legislative sanction to enable companies to effect purposes beyond the scope of their original constitution, I may mention that in one of the statutes to which our attention has been directed during the arguments on the present appeal—19 Vict. c. 15—there is a statement in the preamble that the companies then authorised to work the Tilbury Railway had

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obtained a supply of water at Southend by means of boring, and that it would be of advantage to the inhabitants of Southend, which was badly supplied with water, if the companies were authorised to supply water to any company or person desirous of contracting for the same, but that such purpose could not be effected without the authority of Parliament, and, by the enacting part of the statute, the companies were authorised to sell water from their works at Southend, but were restrained from laying down or expending any portion of their capital in laying down any pipes for the conveyance of such water beyond the limits of their own property. The water which the companies were so authorised to sell was in excess of what they required for their purposes; it would be useless and unprofitable to them if they were unable to sell it, whilst the sale of it would result in a certain profit, but the sale even of that which would otherwise be waste water was not within the scope of their constitution, and would consequently be *ultra vires*, unless express authority were given to the companies to enable them to make such sale, and such express authority was consequently given, but accompanied by a restriction which shows how jealously the Legislature guards against the limited powers conferred upon such companies being exercised beyond the local limits assigned for their operations. I will now proceed to consider the circumstances of the case with which we have at present to deal. They are somewhat singular. The Great Eastern Railway Company, which is a company possessing not only the ordinary powers usually conferred on railway companies, but also special powers under various Acts of Parliament, and particularly under an Act of the 26th & 27th of the Queen, to which I shall have occasion presently to refer, by an instrument under its corporate seal, and bearing date the 1st June 1876, contracted with the Tilbury Railway Company to supply that company with locomotive power, and also with carriages and goods waggons, for certain specified periods of time, and upon certain other specified terms and conditions. The contract so entered into by the Great Eastern Company has been held by the Master of the Rolls to be *ultra vires* of that company; but, so far from restraining the company from applying any portion of its corporate funds in giving effect to it, he has thought it right, having regard to the very special circumstances of the case, to allow the company to carry out the contract, though he has granted an injunction in general terms, restraining the company, its directors, servants, and agents from letting for hire any locomotive engines, or other rolling stock, except for the purposes of the traffic over another railway in extraordinary emergencies; and from manufacturing locomotive engines, or other rolling stock, for the purpose of letting the same on hire, or for any other purpose except for that of being used by the company upon a railway worked by it. I propose to consider presently the special circumstances which led the Master of the Rolls to make this order, which is the order now under appeal, but I think it will be convenient to consider, first, whether that which the company has been restrained from doing would, if done by it, be in excess of its statutory powers, and whether, also, the contract of the 1st June 1876 was one into which it was beyond the scope of its authority to enter. Now, having regard to

the established general principles to which I have referred, it can hardly be doubted, as a general proposition, that Railway Company A would be acting in excess of its powers were it, in the absence of any special powers authorising it in that behalf, to enter into a contract with Railway Company B to let to company B such locomotive engines or other rolling stock as company B might require for the purposes of its traffic. In a greater or less degree, according to the circumstances of any particular case, the supply by company A of engines or rolling stock in performance of such a contract must necessitate the providing and keeping in good working order of a greater number of engines, or a larger quantity of rolling stock, whether manufactured by company A or otherwise acquired, than would be requisite for the proper working of its own railway, and the maintenance of such a supply of engines and rolling stock would render necessary the employment of a portion of the funds of company A. It can in no way be said that in the absence of special powers such an employment of its funds would be within the scope of the constitution of company A; however profitable the carrying on of such a trade or business might be, it would not be one of the purposes for which the company was incorporated. And if, instead of supplying locomotive engines on hire, company A were to bind itself to provide locomotive power—in other words, to provide not only the engines, but also the fuel for their consumption, and the wages of sufficient servants to work them—there would be a necessity for a still larger employment of its funds. But, admitting the general proposition to be, that the entering into any such contract would be in excess of the powers of company A, the question arises, whether it would be applicable to the case of two companies whose railways are continuous as are those of the Great Eastern and Tilbury Companies. In my opinion, the proposition is as applicable to such a case as to one in which the systems of the two companies are quite distinct. The circumstance that the Tilbury Company is or may be regarded as an extension or continuation of or as a branch from the Great Eastern system, renders it highly desirable that some arrangement should be come to for such a working of the two systems as should avoid the inconveniences to the public, and the consequent loss to the shareholders, which would necessarily arise if they were worked separately; but to effect such a working in no way necessitates the entering into such a contract as that which we are now considering. Under similar circumstances the inconvenience and loss arising from separate working are usually avoided by the adoption of one or more of the following schemes: First, by the one company exercising, either by agreement or under statutory authority, running powers over the other; secondly, by the companies availing themselves of the powers conferred on them by the 87th section of the Railways Clauses Consolidation Act 1845, and arranging for the trains of each company passing over the lines of the other, upon terms arranged between them; or, thirdly, by obtaining statutory powers, under which the line of the one company can be leased to the other, in which case the leased line is worked as if it were part of the general system of the other company. But each and every of these schemes can be efficiently carried out, and as between other companies have



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been repeatedly carried out, without any letting of locomotive engines or rolling stock, or any contract for the supply of locomotive power by the one company to the other. Now, adequate powers have been obtained for the lease of the Tilbury railway to the Great Eastern Company, but, for some unexplained reason, it has not been deemed expedient by the two companies to adopt this mode of arranging for the working of their respective railways as component parts of a continuous system. It is also worthy of note that, by the agreement of the 1st June 1876, the two companies have made arrangements under which each company has acquired running powers over portions of the railways of the other, and provision is made for through booking over their respective lines. These arrangements are doubtless for the convenience of the public, and will carry their own profit, but they could be quite as efficiently carried out if the Tilbury Company used their own engines and rolling stock, instead of renting them from the Great Eastern Company, or being supplied by that company with locomotive power. It has been suggested that that which the Great Eastern Company has been enjoined from doing might be done by them, or, indeed, by any railway company under the provisions of the 87th section of the Railways Clauses Consolidation Act 1845, but the powers conferred by that section are limited to the making of arrangements for the passage of the trains of one company over the railway of another, and for the division or apportionment of the tolls taken on their respective railways—arrangements which are perfectly independent of the sources from which either company obtains its engines and rolling stock or its locomotive power. The competency which we are now considering is not the competency of the Tilbury Company to hire, instead of manufacturing or buying, their engines and rolling stock, but the competency of the Great Eastern Company to manufacture or buy more than they require for working their own railway, and to let the surplus stock for hire to the Tilbury Company—in other words, to carry on for profit a trade or business other than that which was authorised by their Act of incorporation. I can arrive at no other conclusion than that such purposes are *prima facie* foreign to the purposes of a railway company, and in the absence of special powers are *ultra vires*. But it is urged on behalf of the Great Eastern Company that special powers have been conferred upon them by the statute (26 & 27 Vict. c. 69), and that, under the provisions of that statute, they were authorised and empowered to let locomotive power and rolling stock to the Tilbury Company, and consequently to enter into the agreement of the 1st June 1876. In my opinion the statute in question conferred upon them no such power. On the 22nd June 1863, the date of the passing of that statute, the Tilbury Railway (which was referred to in the statute as the "Extension Railway") was in lease, under statutory powers, to Sir Samuel Morton Peto and others for a term of years which would expire on the 3rd July 1875, and was being worked by the Great Eastern Railway Company, and that company and the Blackwall Railway Company were respectively entitled to proportionate parts of the tolls, fares, or charges in respect of traffic passing over their railways to and from the Tilbury Railway, subject to certain

deductions for the conveyance of that traffic. The preamble of the statute stated these several circumstances, and that the lessees were desirous that power should be given to effect certain arrangements with reference to the lease, and it further stated the several objects which the statute was intended to effectuate, viz.: First, the enabling the three companies, that is the Great Eastern, the Blackwall, and the Tilbury Companies, and also the lessees to agree upon certain alterations in the terms of the lease, in the arrangements for working the Tilbury Railway, and in the apportionment of the receipts and expenditure; and, secondly, the empowering the Great Eastern and Blackwall Companies, jointly or severally, to take a lease, or transfer of the existing lease, of the Tilbury Railway. Much stress has been laid by the counsel for the appellants upon the reference in the preamble to alterations in the arrangements for working the Tilbury Railway, and it has been contended that it indicated an intention on the part of the Legislature to confer powers upon the three companies to make any arrangements they might think fit for working the Tilbury Railway as well after the expiration as during the continuance of the existing lease, and without any necessity for the Great Eastern and Blackwall Companies, or either of them, to accept a new lease after the expiration of the existing one. I am unable to take this view of the language used. In any view of the case, it would be a very strained construction; but when the reference in the preamble to proposed alterations in respect of three several matters is taken in connection with the immediately preceding recitals of the existing arrangements in respect of the same matters, the conclusion appears to me irresistible that the proposed alterations are in the existing arrangements. And this view is confirmed when we come to the 4th section of the enacting part of the statute, which is the section declaring the purposes of the Act. That section enables contracts or agreements to be entered into for three several leading purposes. First, for alterations in the existing lease, whether transferred or not; secondly, for the surrender of that lease or the transfer of it to the Great Eastern and Blackwall Companies, or one of them; and, thirdly, for the grant of a new lease to the same two companies, or one of them, and also for certain minor purposes incidental to these three; and by the 10th section it is enacted that no alteration of the existing lease and no new lease shall have any operation until the same shall have been approved by the Board of Trade. The 4th section confers no power except in connection with a lease present or future, and the scope of the statute is to provide for the working of the Tilbury Railway by the Great Eastern and Blackwall Companies, or one of them, under a lease from the Tilbury Company, either the existing one or a new one to be granted on its expiration, but subject to the approval of the Board of Trade, and subject also to the provisions of the Railways Clauses Consolidation Act 1845, relative to leases of railways. The working of the Tilbury Railway under arrangements to be made between the companies freed from the provisions of the Consolidation Act and from the control of the Board of Trade, however much it may have been the object of the companies to secure it by the adoption of the contract of the 1st June 1876, is, in my opinion, contrary to the scope of the statute. But it has



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been urged upon us, that however inconsistent it may appear to be that the Legislature should so carefully guard against any improper exercise by the companies of the restricted powers of working the Tilbury Railway which it has conferred upon them, and should at the same time give them unrestricted powers of doing the same thing in another way, such unrestricted powers have in fact been conferred upon them, and the 14th and 15th sections of the statute are referred to in support of this contention. Now, the 14th section simply confers powers upon the two companies, that is, the Great Eastern and the Blackwall Companies, to make arrangements *inter se*, not arrangements with the Tilbury Company for the working and management of the Tilbury Railway and of their own railways connected with it—a power which would be exercisable in the event, and in that event only, of the two companies becoming joint lessees, and for the exercise of which there can be no occasion, now that the Blackwall Railway, by reason of the lease of it for 999 years to the Great Eastern Company, has become part of the general system of that company. And the 15th section, whatever may be the extent of the powers conferred by it, is clearly confined to contracts or agreements for effecting the purposes of the Act, which purposes do not, according to the view which I have expounded of the general scope of the Act, include the entering into working agreements otherwise than in connection with or incidental to a lease of the Tilbury Railway, duly transferred or granted to the two companies or one of them, in pursuance of the powers in that behalf conferred by the Act. I have arrived, therefore, at the conclusion that the Great Eastern Company had not authority, either under the general powers possessed by it in common with other companies whose Acts of incorporation incorporate the Consolidation Acts, or under the special powers conferred upon it by the statute 26 & 27 Vict. c. 69, to enter into the contract of the 1st June 1876, or to do any of the acts or things which it has been enjoined from doing by the order of the Master of the Rolls. I pass on to consider the special circumstances of this case which led the Master of the Rolls to make the order appealed from, and whether such special circumstances justified the order so made. I have hitherto dealt with the agreement of the 1st June 1876 as a contract for the supply of locomotive power, but as originally executed it was also a contract for the supply of general rolling stock, including carriages, goods waggons, and luggage and brake vans. Now, it is to be observed that the contract for the supply of the rolling stock other than locomotive engines expired before this action was commenced, and that the contract for the supply of locomotive power was for a period terminating on the 1st July 1880, having, therefore, two and a half years to run at the date of the order of the Master of the Rolls. In addition to this, the Great Eastern Company had, for several years previously to the date of the agreement (1st June 1876) and with the sanction of the Legislature down to the 3rd July 1875, when the Peto lease expired, though without any such sanction after that lease had come to an end, supplied locomotive power and rolling stock for the general working of the Tilbury Railway; and the engines and other rolling stock supplied for such purpose were

necessarily in excess of what was required for the use and working of its own railway, and for such excess of engines and rolling stock, or the greater portion of them, the Great Eastern Company would have no employment after the expiration of the Peto lease, unless they continued to work the Tilbury line or let the engines and rolling stock to the Tilbury Company to enable it to work its own railway. Under these circumstances, and apart from any considerations arising out of the *ultra vires* character of the transaction, there would not appear to be anything unreasonable in the Great Eastern Company, after it had ceased to work the Tilbury line, letting to the Tilbury Company that which would otherwise be useless and unprofitable to the Great Eastern Company. It is true that that company could legitimately, though perhaps not so profitably, have disposed of such rolling stock by sale, or have reserved it for future use on its own railway without incurring the obligations imposed upon it by the contract with the Tilbury Company; but I nevertheless agree with the Master of the Rolls in thinking that the contract, though *ultra vires*, could hardly be considered mischievous, and for this reason, and having regard also to the difficulty arising from the circumstance of the Tilbury Company not being a party to the action, I further agree with him in thinking that it was not unreasonable that any injunction which upon the general merits of the case he should deem it right to grant, should not extend to restrain the performance of the agreement of the 1st June 1876. But there is another view of the case. The statement of claim had charged the Great Eastern Company with having commenced to let on hire locomotive engines and other rolling stock to divers companies and persons, and amongst others to the Tilbury Company, and to manufacture rolling stock for the purpose of letting the same on hire, and in particular with having entered into the contract of the 1st June 1876. In reply to this charge, the Great Eastern Company did not limit their defence to a justification of their having entered into the agreement of the 1st June 1876, but by the 14th paragraph of their statement of defence, they insisted that under and by virtue of the powers and provisions contained in the statute 26 & 27 Vict. c. 69, or otherwise, they were authorised and empowered to let rolling stock and locomotive power to the Tilbury company. This was an assertion of a general right, and the contract of the 1st June 1876 was merely referred to as an instance or example of an exercise by the company of the general right claimed. And the arguments on the part of the appellants, both in the court below and before us, were to the like purport. It was further insisted on behalf of the appellants, that the contract of the 1st June 1876 was substantially an agreement under the 87th section of the Railways Clauses Consolidation Act 1845. I have already stated my opinion to be, and have assigned my reasons for so holding, that neither of these contentions can be supported; but for the purpose of ascertaining the extent of the claim asserted, and of determining whether the acting under the asserted claim should be restrained, it is necessary to consider the nature and extent of the contracts into which it would be competent for the Great Eastern Company to enter upon the assumption that such contentions were well founded. Now, if the Great

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Eastern Company had the general power claimed of entering into contracts for supplying locomotive power, and letting all kinds of rolling stock to the Tilbury Company, they would be under no obligation to limit their contracts to the short periods fixed by the contract of the 1st June 1876; it would be open to them to enter into contracts, with all their attendant risks, to supply all such locomotive power and rolling stock as the Tilbury Company might require for any number of years. Again, if the appellants are right in their contention that the contract of the 1st June 1876 is substantially an agreement under the 87th section of the Railway Clauses Consolidation Act 1845, there is nothing to prevent the Great Eastern Company, or indeed any other railway company, from entering into similar contracts with any and every other railway company whose railways are continuations of or branches from their own, or over which they have or can arrange for through traffic, if indeed their powers could be limited to this extent; and the performance of such contracts must impose upon the companies entering into them, the obligation of either manufacturing or buying the necessary rolling stock, and of procuring the necessary fuel, and of engaging and paying the necessary servants. That the Great Eastern Company are manufacturers of engines and other rolling stock appears from their statement of defence, though they assert that they so manufacture for purposes within the scope of their powers as interpreted by themselves. Upon the whole, it appears to me that the claim asserted by the Great Eastern Company is one which, if well founded, would enable them to carry on a very large and a very speculative trade, and one which, in my opinion, it is not within the scope of their constitution legitimately to carry on. I think further, that though the particular contract into which the company had entered is one the performance of which it is not under the circumstances necessary to restrain, it is, nevertheless, a contract into which they were not competent to enter, and that taking this circumstance into consideration in connection with the general claim asserted and insisted upon, the case was one which called for the interference of the court, and that the order made by the Master of the Rolls should be affirmed. It has been objected that it was not competent to the Attorney-General to sue in the present action, though it might have been open to a shareholder to interfere for the purpose of preventing an improper application of the corporate funds. In my opinion, this objection cannot be sustained. If the view which I have taken of the general merits of the case is correct, the Great Eastern Company have exceeded their powers, though under circumstances admitting of extenuation, and have asserted a general right to exceed them in the same direction to any extent they may think fit; in other words, they have done and threatened to do that which the law has forbidden them to do. It is the interest of the public that the law should in all respects be respected and observed, and if the law is transgressed or threatened to be transgressed, as in my opinion it has been by the Great Eastern Company, it is the duty of the Attorney-General to take the necessary steps to enforce it, nor does it make any difference whether he sues *ex officio* or at the instance of relators. I am unable to

distinguish this case in principle from that of the *Attorney-General v. The Great Northern Railway Company* (2 L. T. Rep. N. S. 653; 1 Dr. & Sm. 154) decided by Kindersley, V.C. eighteen years ago, and the authority of which has never to my knowledge been questioned. In that case the information was at the relation of a coal merchant, and its object was to restrain the defendant company from carrying on the business of coal merchants. In that case, as in this, it was contended on behalf of the defendants that the wrong complained of, if it was a wrong, was not in itself an illegal act as against the public, though it might be as against a shareholder, and that the Attorney-General could not maintain an information on behalf of the public; but the law and the practice in this respect were declared by the Vice-Chancellor in the following terms, in which I entirely agree: "Wherever the interests of the public are damaged by a company established for any particular purpose by Act of Parliament acting illegally and in contravention of the powers conferred upon it, I conceive it is the function and duty of the Attorney-General to protect the interests of the public by an information."

BRAMWELL, L.J.—The first question in this case is whether (setting aside the statute 26 & 27 Vict. c. 69) the defendants have done, or are doing or threatening to do, something unlawful in the matters complained of. It is said that what they have done, or are doing and threatening to do, is unlawful—contrary to law. The reason given is that it is *ultra vires*, that they have no power to do it, and that as they have no power to do it, it is unlawful. To show that they have no power to do it, the Acts under which they are created and constituted are referred to, and certainly among the things expressed that they may do is not to be found the letting of locomotives on hire. There is no prohibition of doing it, but there is no permission. It is said that because they are not empowered or permitted, they are prohibited; and that they are, therefore, disobeying an Act of Parliament, and so breaking the law. This is, undoubtedly, contrary to one's general idea that, unlike some countries where it seems as though nothing is lawful save what is permitted, here in England everything is lawful save what is prohibited. It is opposed to those free trade and *laissez faire* notions which are commonly supposed to have something in them, and under the influence of which some people think that England has thriven considerably. It is said by Mr. Brice (Brice on *Ultra Vires*) that this doctrine or notion was first put into operation in the cases of *The Attorney-General v. The Great Northern Railway Company* (*ubi sup.*) and *The East Anglian Railway Company v. The Eastern Counties Railway Company* (11 O. B. 775). I was counsel for the plaintiffs in the latter case. I know none at common law before it in which a trace of this doctrine is to be found, and, certainly, I was never more surprised than at that decision—a decision which proceeded on grounds which, with all respect be it said, were erroneous, and led, as I believe they have in other cases, to an erroneous result—the mistake being in not distinguishing that many of the provisions of Acts of Parliament constituting companies are not provisions as between the companies and the public, but agreements among the shareholders *inter se* that constitute their

agreement of partnership, their instrument of settlement. In the case of *The Attorney-General v. The Great Northern Railway Company*, it was said that where in the case of injury to private interests it would be competent for an individual to apply for an injunction to restrain a company from using its powers for purposes not warranted by the Acts creating it, it is competent to the Attorney-General, in case of injury to public interests from such a cause, to file an information for an injunction. But, I ask, with sincere respect of the learned judge, what is the similarity or analogy between the two cases, and what is the injury to public interests in such a case? How is the public injured, or any class of it, when directors of a company do that which is not authorised by their Act, or charter, or deed of settlement, and break their agreement of partnership? What is there like that when the whole company, directors, and shareholders, do something not agreed on in their agreement of partnership? It may be unlawful on other grounds, but they are not like, they are wholly different. It is to be noticed that the only case cited by the Vice-Chancellor is a case of a complaint by a shareholder. However, these cases were followed by others, and it became the law that acts *ultra vires*, in cases of corporations, were not merely null and void, but were absolutely contrary to law and illegal. I am not doubting the least that there is a reasonable and well-founded doctrine of *ultra vires*. I refer for a statement of it to what was said by Lord Cairns in *The Ashbury Railway Carriage Company v. Riche* (33 L. T. Rep. N. S. 450; L. Rep. 7 E. & L. 653), and, if I may be permitted to do so, I refer to what I said in *Bateman v. The Mayor of Ashton-under-Lyne* (3 H. & N. 323). I have no doubt that a shareholder, not consenting, has a right to object to an act not within the terms of the partnership. I have no doubt, also, that if a thing is prohibited by the statute creating a corporation, the doing of that thing is unlawful, and may be restrained. I have no doubt that if a corporation is created by Royal Charter, and the provisions of the charter are disobeyed, the charter is jeopardised. I have no doubt that if a railway company is prohibited from opening its railway with a single line, it may be restrained from doing so; that the pollution of a river, forbidden by law, may be restrained, and that other acts contrary to law, or contrary to a duty or right of the public, may be restrained or punished. My doubt is where there is no prohibition, and the act is not contrary to any duty towards, or in violation of, any right of the public; whether it can be the law that if six partners carried on the trade of hatters they might agree to deal in boots, but that if seven associate themselves in a registered company, as hatters, their dealing in boots is not only *ultra vires*, but unlawful—an offence possibly punishable—I admit it is *ultra vires*, that is decided in *The Ashbury Railway Carriage Company v. Riche*—and the public is entitled to hold a registered company to its registered business. There is a noticeable thing in this *ultra vires* doctrine. It is recognised and acted on in courts of common law, as nullifying *ultra vires* contracts, but it is apparently always enforced against offenders in courts of equity only. But if acting *ultra vires* is unlawful, surely there must have been a remedy for, or power of, preventing it at law before the Judicature Acts. I mean a remedy

at the instance of the Crown. No doubt a *mandamus* would lie to enforce the performance of a duty in a corporation to do a thing ordered by statute or charter; but is there any case of a *mandamus* not to do a thing—not to let, for instance, carriages on hire? No doubt, also, in some cases a criminal information would lie where an illegal act was done. But is it supposable that one would lie here? If it would, so would an indictment, as the act is illegal. Then it is said that a *quo warranto* may be maintained. So it may in some cases; but what usurpation of a franchise is there here? I cannot but entertain great doubt if there is any way of reaching this matter at common law, and consequently great doubt if there ought to be any in equity: (see *Attorney-General v. Utica Insurance Company* and *Attorney-General v. Tudor Ice Company*, cited by Mr. Brice, 2nd. edit. p. 905.) However, the law has been so laid down that I think we ought to be governed by it, whatever doubts I may have of its original validity, and that the only utility in discussing its origin is to try and find out its principle and extent, and see if any particular case is within it. Now what have these defendants done here? They are not letters on hire of locomotives and rolling stock. They do not carry on, nor profess to carry on, such a trade or business. What has been done is this. The appellants are owners of and work a very large extent of line (1300 miles). I believe they have a vast number—many hundreds—of locomotives. The Tilbury Company are owners of a small line, having access to London, to which their traffic mainly goes, only over the lines of the appellants; they have not and never had any locomotives. Their line has been worked by lessees from its opening down to the year 1875; and since then it has worked its traffic in the following manner: the appellants furnish to the Tilbury Company locomotive power and rolling-stock sufficient for the Tilbury Company to work their traffic. The agreement as to the locomotive power is that sufficient engine drivers, stokers, coals, and all necessities save water, for working the locomotives, shall be furnished by the appellants to the Tilbury Company; that, during their use by the Tilbury Company, the men shall be servants of that company; that the remuneration to the appellants for what is called the hire of the rolling stock shall be at a certain rate. This agreement has been acted on, and was so at the time of the commencement of this action, and has been so since. That it is for the benefit of the two companies, or was when they made it, is certain. We ought to be satisfied of that from their having come to it. Probably, also, the working of the Tilbury line by the men employed by the Great Eastern Company, who are familiar with the approaches to London, is beneficial to the public. Anyhow, the arrangement was come to by the companies for their supposed benefit, and not a pretence of injury or wrong to the public, or any individual is suggested. Of course we have heard about great companies getting a monopoly; but, as the Attorney-General admitted, if they get it in such a case as this, it is because they can undersell everybody else, which, as he said, is not a thing for the public to mourn over. But the pretence is idle. Individual energy and competition will keep the private trader in possession of part of such a trade as that here in question. However, some locomotive makers,

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with a view to their personal gains, complain, and under their auspices the case comes before us. Whether the Attorney-General has any discretion to refuse the use of his name, I know not. If he has, and has decided to let it be used, I am most certain that he has not done so without due consideration, or from any other motive than a sense of duty. Nobody has suggested that there is any question of public policy involved in the present case, unless the danger of monopoly. However, there are the decisions, and they must be obeyed, whatever we may think of the motives of the relators, which, however, seem of the same character as objections to machinery, or doing more than a certain quantity of work in a certain time, or any other mischievous objection to liberty of action. But the decisions have not gone to the extent of saying that nothing can be done but what is expressly mentioned in the statute. There may be a ferry boat to aid railway traffic, book stalls may be let, refreshment rooms kept, and other things done which may be called ancillary or subordinate to the main purpose of the railway company, or arising out of or consequent on its existence. I hold that this letting on hire is such a case. Suppose on an emergency rolling stock was wanted, might it be let for a day? If so, for a week, or month, or year? Suppose it was found that there was an excess of stock which could profitably be let. Is it to remain idle that these relators may have the chance to make a few more? Take the case of a gas company, and suppose it could work up the coke when not more profitably than it could if sold, may it not be done? Must they sell their coke to others who must heat it? Here the Tilbury Company had no rolling stock. Unless they hired of some one, their line must remain unworked to the public injury, and loss of tolls to the defendants. Of no one could the Tilbury Company hire so cheaply as of the defendants. I am of opinion, then, that this arrangement is not *ultra vires*, independently of the particular statute which I proceed to examine. I am of opinion that it is allowed by the statute of 1863. Let us examine that Act. There were the three companies and the lessees. It is manifest that negotiations had existed among the parties interested. It is clear that the Act contemplates that the lease might be surrendered without a new one being made. It is absolutely certain that it would expire in twelve years, and might be determined in a year. Now it is almost certain that it would be contemplated that the Great Eastern and Blackwall Companies, or one of them, could advantageously for all parties work the Tilbury line without a lease, and that provision would be made enabling them to do so. Accordingly the title of the Act is to authorise arrangements between the Tilbury Company and lessees and the two companies with reference to the lease and working of the Tilbury line, not with reference to the working *thereunder*, that is, under the existing or any other lease, but with reference to the lease and with reference to the working. There are also the words "and for other purposes." Then the preamble recites the facts, and that the traffic on the Tilbury line is worked by the Great Eastern Company. It is odd that, if this was *ultra vires* and illegal, it should be recited as one fact on which the legislation is based. Then it recites that it is expedient that the four parties should be enabled to agree upon certain alterations

the terms of the lease in the arrangement for working the railway, and in the apportionment of the receipts. This is not under the lease only, for its surrender was contemplated, but an arrangement under a lease, if there was one, and otherwise if there was not. Then comes the enacting part. The first thirteen sections deal with the existing lease, its surrender, and the granting of a new one, and of an alteration or readjustment of existing apportionments of toll, &c. Then comes sect. 14. I am at a loss to see the object of this section, unless it relates to something other than where a lease exists. Suppose it refers to the two companies, what does it enable them to do, if there is a lease, which the Act had not already enabled them to do? If they might jointly take a lease, it must follow that they might make such arrangements as mentioned in sect. 14. It is hardly supposable that it meant that one might take a lease and then agree with the other that the other should maintain, work, and manage. But that section must be read in connection with sect. 14, and what is the meaning of that? It is confessed that on the construction of the Attorney-General it is unmeaning. The Master of the Rolls says: "It is very difficult to understand why that was put in, because, as I understand, the 4th section effects the same purpose in substance." I agree; but, with submission, if a reasonable and useful meaning can be given to those sections, it ought to be done, rather than treat them as idle and useless. It may be that sect. 14 relates to agreements between the two companies only, but they may be agreements for the working, maintenance, and management of the Tilbury Railway, and the apportionment of tolls and traffic on that line, which would be nugatory without the consent of the Tilbury Company; and then comes sect. 15, which shows that agreements may be made with it, that it may enter into contracts or agreements. Now, no doubt, leases as a rule are or contain contracts, but they are not spoken of by the word "contract" or "agreement," because the primary object of the lease is the creation of the estate, and the contracts and agreements are only consequential and ancillary. Then, if a lease is made, the "subject to such sanction of shareholders as by the Act prescribed" is superfluous, as that has already been provided for. Besides, the contracts may be for all or any of the purposes of the Act, and incidental thereto. Further, the contracts may contain such covenants, clauses, powers, &c., as may be mutually agreed upon between the parties thereto. But by sects. 9 and 10, a restriction is placed on the power of putting whatever clauses in the lease may be acceptable to the parties. It may be said that, if this reasoning is correct, it shows only that the appellants might work the Tilbury line. But it is impossible to suppose that, if they may do that, they may not do what they have done. The difference is in words only; nothing turns on the liability to passengers. Those who undertake to carry are liable if there is default; all that would be necessary would be for the appellants to say that they would work the line, the Tilbury Company finding stations, servants, water, and carriages. It is said that, if so, the condition that the Board of Trade must approve the lease may be avoided. Why the Board of Trade was to have a voice in the matter, I know not. Perhaps it is

a bit of that meddling, inspectory legislation of which we have so much. However, there it is; it may be that a lease is an important definite thing generally for a length of time, and so it attracted attention, and was thought worth supervision, while a mere working arrangement was not so considered. All we can say is that the Legislature thought the supervision of the Board of Trade necessary to a lease, and did not think so as to a working arrangement. Another matter which seems remarkable is this: The injunction does not stop the illegal practices—the execution of the unlawful agreement. That it permits. What it prohibits is what is threatened or rather claimed as a right. But is a threat only sufficient? If the thing is unlawful, not merely *ultra vires*, should a court of law permit it? Here is an illegality made by Parliament the basis of legislation, and permitted to continue by a court of law. I am of opinion that the judgment of the Master of the Rolls should be reversed.

JAMES, L.J.—The information will be dismissed with costs, including the costs of the appeal.

Solicitor for the appellants, *Capel A. Curwood*.

Solicitors for the respondent, *Hargrove and Co.*

Nov. 18 and 27, 1878.

(Before JAMES, BAGGALLAY, and THESIGER, L.JJ.)

SHEFFIELD v. EDEN. (a)

*Solicitor — Lien — Mortgage deed — Mortgage by client to solicitor.*

*Plaintiffs, who were solicitors to E., advanced money on his account to certain builders, and E. executed a mortgage to them of some property to secure such advance, subject to a first mortgage previously made to another person. Plaintiffs themselves prepared the mortgage deed. Subsequently the plaintiffs brought an action against the first mortgagee and the third and fourth mortgagees and the mortgagor, to redeem the first mortgage, and to foreclose the third and fourth and the equity of redemption. The usual decrees for redemption and foreclosure having been made, the plaintiffs, on drawing up the minutes, claimed, in addition to their mortgage debt and interest, a lien upon the mortgage deed for the costs of its preparation, and also for the general bill of costs of their client, the mortgagor.*

*Held (affirming the decision of Fry, J.), that the plaintiffs had no lien on the mortgage deed for the costs of its preparation, or other costs due to them from the mortgagor. The deed was never the deed of the client; it was from the beginning the deed of the plaintiffs, who held it on their own account as mortgagees, and not for their client.*

THIS was an appeal from a decision of Fry, J.

The plaintiffs, Isaac Sheffield and Thomas Needham Sheffield, who were solicitors for Thomas Edward Eden, agreed to advance certain sums of money on his account to a builder. By two indentures dated the 13th Jan. and the 30th March 1868 Eden conveyed some freehold building land to the plaintiffs and their heirs, by way of mortgage for securing the repayment of such sums of money. The plaintiffs themselves prepared the two mortgage deeds. The property in question was at that time subject to a first mortgage for

12,000*l.* to another person, and the title deeds were in his possession. The property was subsequently mortgaged a third and fourth time. The present action was entered against E. (since deceased) and against the first, third, and fourth mortgagees, to redeem the first mortgage, and to foreclose the third and fourth, and the mortgagor. The plaintiffs claimed to be entitled to costs, charges, and expenses incurred as the solicitors of Eden, and also maintained that they had a lien on all deeds and documents in their possession in respect thereof.

The usual decree for redemption and foreclosure having been made at the hearing before Fry, J., when the minutes were being drawn up, the plaintiffs applied to the registrar to insert in the decree a direction that an account should be taken of what was due to them for costs in respect of which they had a lien on the deeds and papers in their possession, and that if the third and fourth mortgagees and the representatives of the mortgagor should redeem the plaintiffs under the decree without paying the amount certified to be due on taking such account, the said lien might not be prejudiced, nor the plaintiffs ordered to deliver up the deeds and papers in their possession. The registrar declined to insert this declaration, whereupon the plaintiffs applied to the learned judge in the court below to vary the minutes in the way proposed. Fry, J. refused to entertain the application, the question not having been considered at the hearing.

The plaintiffs appealed.

*Fischer, Q.C. and Whitehorne*, for the plaintiffs, contended that as the mortgage deeds were drawn by them under the instructions of Eden, they were entitled to hold the deeds against all the world until their costs were paid. Although the mortgage deeds were drawn by the plaintiffs for themselves, they were not exclusively their property. The mortgagor had always a contingent property in the deeds, and therefore such an interest as would support a lien in the solicitors, who claimed not only for the costs of preparing the deeds, but generally for costs due to them from Eden. In *Colmer v. Eds* (23 L. T. Rep. N. S. 884; 40 L. J. 185, Ch.) it was held that a solicitor was entitled to a general lien for costs on papers deposited with him by his client for a particular purpose only, unless that general lien was excluded by a special agreement.

*North, Q.C. and Alexander*, for the fourth mortgagee, and

*G. Sangster Green*, for the third mortgagee, were not called on.

JAMES, L.J.—I am of opinion that this appeal must be dismissed. The deeds in question being mortgage deeds by which the client gave a charge on the property to his solicitors, never were the deeds of the client; they were the solicitors' own deeds. The solicitors might have had a claim against their client as mortgagor for their preparation, but when the deeds were executed they became the deeds of the solicitors. A lien only attaches to documents which are the client's property; it cannot extend to what is the solicitor's own property.

BAGGALLAY, L.J.—I am of the same opinion. We have not seen the deeds; the case has been argued on the assumption that they are the mort-

(a) Reported by E. S. ROCKE, Esq., Barrister-at-Law.

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gage deeds alone. Directly these deeds were executed, they remained in the possession of the solicitors, not in their capacity of solicitors to the mortgagor, but as their own property as mortgagees. The property was in them, not in their client. They might have handed them over without his consent to another person as transferee of the mortgage, or as purchaser under their power of sale.

THE SINGER, L.J.—I am entirely of the same opinion. These deeds were in no sense the deeds of the mortgagor, but were the deeds of the mortgagees as such, and not in their possession as solicitors for the mortgagor. I may add that, although there may be a contingent right of redemption in the mortgagor, it would be unreasonable to imply a lien from such a right, and reasonableness is the foundation of all the legal doctrine of lien.

Solicitors: *F. Sheffield; C. Blake; Benham and Tindell.*

Wednesday, Jan. 15.

(Before JESSEL, M.R., and BAGGALLAY and BRAMWELL, L.JJ.)

HUGGONS v. TWEED. (a)

Counter-claim—Rules of Court, Order XIX., r. 3; Order XXII., r. 9.

*Executors of a debenture holder in a company, commenced their action to carry into effect the trusts of a deed for securing the debentures, and to obtain payment. The company delivered a defence and counter claim, setting up that the plaintiff's testator had been a director and promoter of the company, and had sold an estate to the company without disclosing his ownership, and had thereby made a profit considerably exceeding the amount due on the debentures. The plaintiffs applied to exclude this counter-claim on the ground that it ought to be tried in a separate action. The application having been refused by Hall, V.C., the plaintiffs appealed.*

*Held, that, taking Order XIX., r. 3, and Order XXII., r. 9, together, an appeal would lie; but that the reason pointed out in rule 3 of Order XIX. must be regarded; and that the question of convenience was the principal ground on which the judge below had to decide. The discretion of the judge in first instance in deciding whether a counter-claim should be excluded or not would not be interfered with by the Court of Appeal, unless it was shown that the order of the judge would produce great inconvenience, or probable injustice. In the present case that discretion had been rightly exercised by the V.C., and therefore the appeal must be dismissed with costs.*

THIS was an action commenced in May 1878 by the executors of T. C. Munday, the holder of debentures in the San Pedro (Chili) Copper Mining Company (Limited) to the amount of 2000*l.*, against the company and the trustees of a deed for securing payment of the debentures, to have the trusts of that deed carried into effect. Mr. Munday died in 1875. In April 1878 the company passed an extraordinary resolution to the effect that it had been proved to their satisfaction that it was advisable to wind up the business. On the 10th May 1878 the winding-up was ordered to be

continued under supervision, and on the 23rd May an order was made for a receiver and manager. The company delivered a statement of defence and counter-claim. By the defence it was alleged that the amount due from the executors of Munday to the company, under the circumstances stated in the counter-claim, exceeded the amount due from the company on the debentures held by the executors, and the company claimed to set off the sum so due to them against the amount due on the debentures. The company then alleged, by way of counter-claim, that at the time of the agreement of the 12th Feb. 1872, thereafter mentioned, Munday and other persons, who had formed a syndicate for the purpose of purchasing the mine and property referred to in the memorandum of association, and forming a company to take them over, had agreed with the then owners for the purchase of them for 16,000*l.* That the agreement for purchase was entered into in the name of F. B. Wilson; as the nominal purchaser. That on the 31st Jan. 1872, Munday and others of the promoters held a meeting, at which it was resolved that the company should be formed with the object of purchasing and working the above mines and property, and that the purchase money should be 40,000*l.*, and that the first directors should be Munday and two other persons, who were promoters and members of the syndicate. That on the 12th Feb. 1872 an agreement was entered into between Wilson and William Allen, that Wilson should sell to the company to be formed as therein mentioned the mines and property for 40,000*l.* That Allen was a mere nominee of the promoters, and the agreement had been settled under their direction. That on the 2nd March 1872 a meeting, called a preliminary meeting of directors, was held, at which only Munday and another were present, at which they purported to approve of the contract, and to adopt the memorandum and articles of association, and directed the solicitors to register the company. That the company was accordingly registered on 4th March 1872. That the memorandum stated the object of the company to be to purchase and work the mines and property comprised in the agreement of the 12th Feb. 1872, and by the articles the agreement was adopted, and Munday and the two other persons above referred to were appointed the first directors. It went on to show that the purchase had been completed, and the 40,000*l.* paid to Wilson by the direction of the directors out of the moneys received from shareholders; and that the profit of 24,000*l.* was divided among the members of the syndicate with the knowledge of the directors, Munday receiving 2625*l.* as his share. That no communication was made by the directors, or any of them, to the persons who were invited to take shares or apply for debentures in the company, to the effect that any of the directors were interested in the property purchased by the company, or were to receive any part of the purchase-money, and that the shareholders other than the directors were wholly ignorant of those facts until the winding-up. The company claimed that the executors might be ordered to pay to the company the 2625*l.* received by Munday, with interest from the time when he received it, and might also be ordered to pay to the company the 21,375*l.* which Munday, in breach of his duties as a director, directed or allowed to be paid to the other members of the syndicate,

(a) Reported by E. S. ROCHES, Esq., Barrister-at-Law.

with interest from the time when it was so paid; and that, if the executors did not admit assets, Munday's estate might be administered. The plaintiffs applied by summons to have the counter-claim excluded, on the ground that it could not be conveniently disposed of in the present action, and ought to be tried in an independent proceeding.

The application was refused by Hall, V.C. in chambers.

The plaintiffs appealed.

*Dickinson, Q.C. and Beale*, for the appellants, contended that the case raised by the defence and counter-claim ought to be disposed of in a separate and independent action. Here the question involved was whether the trusts of this deed should be carried into execution, but neither the defence nor the counter-claim had any bearing on that question. With regard to the right of appeal, although under the terms of Order XIX., r. 3, it was left to the discretion of the judge in the first instance to follow the course which appeared to him most convenient, yet that rule must be read in connection with Order XXII., r. 9, which provided that on an application to exclude a counter-claim "such order shall be made as shall be just," and in this case the most just and convenient course would be for the company to proceed by independent action, and, if they established their claim, to attach whatever might be coming to the plaintiffs in this action.

*Hastings, Q.C. and Grosvenor Woods*, for the company, were not called upon.

*Jessel, M. R.*—The first point we have to consider is on the construction of the general rules, in the framing of which I am afraid that a little slip has occurred. There are two rules bearing on the case, Order XIX., r. 3, and Order XXII., r. 9, the former of which empowers the court or judge to exclude the set-off or counter-claim on an application before trial, the latter on an application before reply. The former rule is found in the schedule to the Act of 1873; the latter rule was one of the rules framed under that Act, with which the schedule was not originally incorporated, and probably it is owing to this that the difference between the two rules escaped notice. Taking them together, I think it tolerably clear that we ought to hold the case to be one in which an appeal will lie; but we must not forget that Order XIX., r. 3, treats the matter as one of convenience. Now the question how a claim can be most conveniently disposed of is for the discretion of the judge—a judicial discretion indeed, but still a discretion, the exercise of which is not lightly to be interfered with. The Court of Appeal, in a strong case, would interfere with the exercise of this discretion, but I think that it ought to do so only in a strong case where injustice is likely to be done if it does not interfere. I say nothing about the merits of the pleadings in the present case, for it is possible, though not, I think, very likely, that there may be a demurrer, and I do not wish to say anything to prejudice the argument of the question which would then have to be disposed of. The plaintiffs are the executors of the holders of debentures of the defendant company, and ask to have the trusts of a deed for securing the debentures carried into execution; that, in substance, they seek to obtain payment out of the property which has been made a security for the debentures. The defence set up by the

company is: "Your testator was a promoter and director of the company, and in that capacity he sold property to the company at a profit, concealing the fact that he was one of the owners, and he received as his share of the profit a sum of 2600*l.*, which ought to be set off against his claim upon the company." The case thus set up is one of an act wrongful indeed, but which does not give a mere claim for damages arising from a tort, but creates an equitable debt, and I cannot see any reason why the court should say that it is not to be allowed to be set off in the pending action. If the case made by the defendants is true, the plaintiffs have no right to interfere with the property of the company. The case raised by the counter-claim is the same as that raised by the defence, and I think it right that the company should be allowed to bring it forward by way of counter-claim. The company may say, "We will waive the set-off, we should prefer obtaining a judgment, and leaving you to take a dividend." I think that the Vice-Chancellor has exercised a sound discretion, but, had I felt more doubt on the subject than I do, I should not have thought it a case for interfering with his decision. It is urged that, if the counter-claim is allowed to stand, the plaintiff is deprived of his right to get security for costs; but that argument applies in every case of counter-claim, and the Legislature has not thought fit to provide for it. Then it is said that this action ought not to be delayed, inasmuch as another debenture holder has brought an action. But the company is not to lose any of its rights against the plaintiffs because another debenture holder has taken proceedings. I am not sure that any ill result is likely to follow, and the court has power to continue the receiver in both actions.

*Baggallay, L.J.*—The counsel for the appellants rest their case on Order XXII., rule 9. The distinction between that rule and rule 3 of Order XIX. is, that under the last named the application may be made at any time before trial, and under the other, must be made before reply. Rule 9 seems as if it had been originally intended to apply only to the case of persons other than the plaintiff. And such a person might have a right to say, "Why is the case against me to be mixed up with an action with which I have nothing to do?" Here the contest is between the same parties, and the question to be considered is only what is the most convenient mode of having the case disposed of. On a question of that kind we should not readily interfere with the discretion of the judge of first instance.

*Bramwell, L.J.*—The argument of the appellants is not founded on principle, but on the ground that it is more convenient that the question raised by the counter-claim should be decided in a separate action. On such a question the Court of Appeal will not disturb the decision of the court of first instance except for very strong reasons, and in the present case I am in favour of the conclusion at which the Vice-Chancellor has arrived.

Solicitors: *J. Rand Bailey; Stibbard, Gibson, and Co.*



CT. OF APP.]

WADDELL v. BLOCKEY.

[CT. OF APP.]

Wednesday, Dec. 18, 1878.

(Before JAMES, BAGGALLAY, and THESIGER, L.JJ.)

WADDELL v. BLOCKEY. (a)

*Practice—Abandoned motion—Motion for new trial—Appeal—Security for costs—Special circumstances—Rules of Court 1875, Order XXXIX., r. 1; Order XL., r. 10.*

*In an action tried before a judge without a jury, judgment was given for the plaintiff. The defendant gave notice of appeal, and also obtained *ex parte* a rule nisi for a new trial on the ground of excessive damages. He did not set down the appeal for hearing, but before the argument of the rule for a new trial gave fresh notice of appeal to set aside the judgment and enter judgment for the defendant. The plaintiff applied to dismiss the first appeal for want of prosecution, and the second appeal as being irregular (having been brought during the pendency of the first appeal), and also for security for costs, on the ground that the defendant was a pauper.*

*Held, that, although the plaintiff was not entitled to an order for the dismissal of the first appeal for want of prosecution, because it was entirely gone, not having been set down in time, he was entitled to an order for the costs as of an abandoned motion.*

*When the time came for the plaintiff to show cause on the motion for a new trial, the court was empowered, by Order XL., r. 10, to set aside the judgment without a new trial if it thought fit, therefore the motion to set aside the judgment as a separate appeal was unnecessary, and the appellant must give security for costs.*

THE action in this case was tried before Huddleston, B., without a jury, on the 7th Aug. 1878, when a verdict was found and judgment given for the plaintiff for 43,547l.

On the 22nd Aug. the plaintiff issued a debtor's summons against the defendant on the amount recovered in the action.

On the 19th Sept. the defendant, being dissatisfied with the finding, and also with the measure of damages adopted by Huddleston, B., gave notice of motion for the 2nd Nov. that the judgment should be set aside and a new trial granted on the grounds therein stated; or that judgment should be entered for him. He did not set down this appeal for hearing, but, on the strength of the notice having been given, he obtained an order in bankruptcy staying the proceedings on the debtor summons.

On the 7th Nov. the defendant obtained *ex parte* an order nisi for a new trial on the ground of excessive damages; and on the 5th Dec. he gave fresh notice of motion to set aside the judgment and enter judgment for him. The plaintiff thereupon gave notice of motion to dismiss the appeal of the 19th Sept. for want of prosecution; and to discharge the second notice of appeal of the 5th Dec. for irregularity; or, in the alternative, that the defendant might be ordered to give security for costs of the second appeal, on the ground that the defendant was a pauper, of which fact evidence was produced, in an affidavit filed by the defendant in opposition to the debtor's summons, showing that he had no means wherewith to pay the moneys recovered in

the action, or any part thereof, and that for a long time past he had been living, and was still living, upon the charity of his friends.

Warmington, in support of the application, contended that the first appeal ought to be dismissed for want of prosecution, the notice of appeal never having been withdrawn, and therefore being still pending; and that the second notice should be dismissed as being irregular, having been brought during the pendency of the first appeal. If, however, the court should hold that the second appeal was regular, he asked for security for costs, the defendant being in insolvent circumstances. If the plaintiff was not entitled to dismiss the first appeal for want of prosecution, he was entitled to the costs as of an abandoned order. The following cases were cited:

*Re National Funds Assurance Company*, 35 L. T. Rep. N. S. 669; L. Rep. 4 Ch. Div. 805;  
*Hankin v. Turner*, 29 L. T. Rep. N. S. 285, 611; L. Rep. 10 Ch. Div. 372;  
*Ustil v. Brearley*, 38 L. T. Rep. N. S. 65, 249; L. Rep. 3 C. P. Div. 206.

O. H. Anderson, for the defendant, submitted that the formal notice of the 19th Sept. only involved an application for a new trial. It was now entirely gone, and the second notice was regular. There were no special circumstances to justify the court in calling upon the defendant to give security for costs, the poverty, in itself, not being a sufficient ground; and there was a substantial question to be tried as to the measure of damages. He referred to

*Rouke v. The White Moss Colliery Company*, 35 L. T. Rep. N. S. 160; L. Rep. 1 C. P. Div. 556.

JESSEL, M.R.—The first point for decision is, what is to happen when a party gives notice of appeal and does not bring the appeal to a hearing. Ought his opponent to move to dismiss the appeal for want of prosecution, or is he entitled simply to ask for the costs of the motion as an abandoned motion? In the present case, the defendant's proper course, if he wished to have a new trial, was to obtain *ex parte* a rule nisi for a new trial under Rules of Court 1875, Order XXXIX., r. 1. Instead of that he gave formal notice of motion that the judgment might be set aside and a new trial had, or that the judgment might be entered for the defendant. That notice involved an application for a new trial, but it involved something more, for it asked that the judgment might be entered for the defendant. It was such a notice that, if the motion had been brought on, the plaintiff must have appeared, or he would have been liable to have the judgment set aside behind his back. But the defendant did not set it down for hearing; there was therefore no motion, and the plaintiff could not move to dismiss the appeal for want of prosecution, but he was entitled to treat it as an abandoned motion, and to ask for the costs of it as such. That must, therefore, be the order as to that notice of motion. As to the other point, namely, the application for security for costs, the case stands thus. The defendant applied for and obtained a rule nisi for a new trial; but now he gives notice of another appeal, asking that the judgment may be entered for him. By his own showing he is unable to pay the costs, and the question for the court to consider is, whether a pauper is entitled to take such a proceeding as this without giving security for costs. The

(a) Reported by E. S. ROCHE, Esq., Barrister-at-Law.

appeal, in itself, is not frivolous, for there is a serious question for argument. That being so, was this second motion necessary? for a pauper is not entitled to indulge in the luxury of a mere precautionary proceeding. It is quite plain that the substantial question is whether 43,547*l.*, or nothing at all, is due from the defendant. That question could be considered and decided on the application for a new trial; and if the court were to decide in the defendant's favour, and were satisfied that it had all the materials before it, and thought no new trial necessary, it could at once give judgment for the defendant under rule 10 of Order XL. So that it is impossible to contend that this second appeal is necessary for deciding the important question in the action. Then for what object was it given? It is suggested that, if the application for a new trial were entirely refused and the judgment not set aside on that application, the defendant would then have the benefit of the present appeal. But in that case there would be ample time to give notice of appeal. I think, therefore, that this appeal was not necessary, and that, if the defendant wishes it heard, he must give security for costs. But as the costs will not be much increased by it, 20*l.* will be a sufficient sum to deposit. The plaintiff's costs of this application will be costs in the action, and the defendant will have no costs.

BAGGALLAY and THESIGER, L.JJ. concurred.

Solicitors: A. G. Ditton; Flux and Co.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Saturday, Dec. 14, 1878.

(Before JESSEL, M.R.)

*Re FOREST OF DEAN COAL MINING COMPANY. (a) Company—Director—Promotion money—Breach of trust or misfeasance—Companies Act 1862, s. 165. A director of a company who has knowledge of a fraud, breach of trust, or misfeasance, committed before he was a director of or connected with the company by which the company's money was lost, is not liable under sect. 165 of the Companies Act 1862, or otherwise, for not communicating such knowledge to the company, or for not instituting proceedings for the recovery of the money lost.*

#### ADJOURNED SUMMONS.

The company was formed in 1873, for the purchase from a Mr J. F. Corbet of certain collieries in the Forest of Dean.

The purchase money was fixed at the sum of 35,000*l.*, to be paid partly in money and partly in shares; and it was agreed that J. F. Johnson, the promoter of the company, should receive 10,000*l.*, as promotion money, and the money was paid to him and his nominees.

At the time of the purchase Osman Barrett held a mortgage for 7000*l.* on the collieries. He concurred in the sale to the trustees of the company, and took a fresh mortgage. At or about the same time he was informed by Corbet of the payment of 10,000*l.* to Johnson and his nominees. He was not then either a director or a shareholder of the company.

Two years afterwards, or more—viz., in December 1875—he became a director of the company, and took the requisite number of shares.

He did not communicate to his fellow-directors the fact of promotion moneys having been paid to Johnson, nor did he take any steps for its recovery.

In 1877 the company was ordered to be wound-up, and the liquidator moved that Johnson and his nominees should repay the 10,000*l.*, and also that Barrett should be made liable, on the ground that it was his duty to disclose the payment to the company, and to take steps for the recovery of the money.

*Chitty, Q.C.* and *Whitehouse* for the liquidator.—Barrett has been guilty of wilful misfeasance or breach of trust. The company's money was misappropriated, and he ought, as trustee, to have taken steps for its recovery.

*Davey, Q.C.* and *Bush*, for Barrett, were not called upon.

JESSEL, M.R.—I am quite clear upon this case. One must be very careful, in administering company law, not to press hardily on honest directors. To make them liable for constructive defaults such as this would be to deter all men of property or of character from becoming directors. On the one hand, the court must do what it can to bring fraudulent directors to account; on the other, it must be practicable for honest men to act reasonably as directors. Wilful default no doubt includes the case of a man who might by suing earlier have recovered a trust fund, and who has not done so; such a trustee would be liable for want of due diligence in his trust. But we must be careful how we apply to directors of public companies the principles which are applicable to trustees. Directors are sometimes called trustees, sometimes commercial trustees, sometimes managing partners. It does not matter what you call them, so long as their real position is understood. They are commercial men managing a concern for the benefit of themselves and others. As such they are doubtless bound to use ordinary diligence, having regard to their position; though an ordinary director who only occasionally attends the meetings of the board cannot be expected to devote so much time and labour to the affairs of a company as the managing partner of a business. But when there has been no fraud or dishonesty, and a director has omitted to get in a debt due to the company by not suing at the proper time, or when the debtor was solvent at one time and not at another, it appears to me that it by no means follows as a matter of course, as it might in the case of ordinary trustees, that the directors ought to be made liable. Traders carrying on business have a discretion as to suing for a debt which is not vested in the ordinary trustees of a debt. They must often give time to their customers, for fear lest by unduly pressing them they may drive them into bankruptcy. They often even go further, and lend money to customers and supply them with goods, in the hope that better times may come and enable them to pay their debts. Again, it may often be injurious to a trading concern to sue its debtors and drive them into bankruptcy. The loss might be greater than would be incurred by letting them go without action against them. The position of director carries no direct relation to the rule which makes

(a) Reported by J. H. THOMPSON, Esq., Barrister-at-Law.

CHAN. DIV.]

Re FOREST OF DEAN COAL MINING COMPANY.

[CHAN. DIV.]

it incumbent upon a trustee to sue a debtor of the trust estate at once, or incur the risk of being made personally liable. In other words, a debtor to a trading concern must be presumed to be solvent until the creditor proves his insolvency. The director must, like an ordinary managing partner, be allowed a full discretion in such matters, and in the honest exercise of such a discretion he will not be interfered with by the court. His position is in this respect totally different from that of an ordinary trustee. It is true that directors are called "trustees;" and no doubt they are trustees of the assets which come to their hands; but they are not trustees of a debt which is due to the company. The company is the creditor, and they are the managing partners of the company. You may have an actual trustee of a debt whose duty it is to get the debt in; but that is not the case of a director who is a managing partner. No doubt the debt is due to the firm, that is the company, but the director is not on that account a trustee of the debt; though there may be circumstances in which he would be liable. So much for the question of unpaid debts. The next point is: does that reasoning which applies to a debt apply to a demand like this which is liability and not debt. The case is not the same as that of an uncontested debt. To take an analogy: In the case of trustees who are duly appointed, liability extends to their getting the trust moneys into their hands. But does anybody imagine that trustees are bound to inquire into the dealings of past trustees with the trust fund? Take this case: A trust fund of 10,000*l*. One of the trustees, with the connivance of the others, embarks the trust fund in trade. Ten years afterwards he replaces it. Five years after that new trustees are appointed, who find the fund intact. One of the trustees is told all this. It is intolerable to suppose that the new trustees should be made liable for not filing a bill to compel the retired trustee to give an account of all the extra profits which he had made with the fund. The *cestui que trust* would have power to enforce such a claim. In my opinion it would be extending the liabilities of trustees, which are quite heavy enough as it is, to a point to which they have never been stretched before. If there has been an error on the part of courts of equity it has been in pressing honest trustees too far: and the result has been, that it has become difficult to get honest trustees. I am always ready and anxious to make dishonest men liable, but I have always thought it would have been wise if courts of equity had been less strict on persons honestly anxious to fulfil their trust with respect to mere omissions, or even what they have chosen to term neglect, or when there has been some error of law or judgment on the part of themselves or their legal advisers, or of some defalcation for which they have been sometimes made liable for vast sums of money, although they had taken every possible pains to engage proper solicitors and counsel, and to engage proper agents to advise them and manage the estates and receive the rents and profits. It is, therefore, not the duty of a judge to strain or stretch the law so as in such a case as this to make the new trustee liable. Now to apply this reasoning to the actual case before me, I must first consider what is the condition of the respondent. He was in the first instance the mortgagee of the vendor for, as I understand, some 7000*l*.

The vendor had a mine which was worth 25,000*l*.; a company was formed for the purpose of buying the mine. The promoters induced the vendor to do what was no doubt very wrong, to add nominally to the purchase price the sum of 10,000*l*., so that the nominal price of the mine was 35,000*l*. instead of 25,000*l*. And the plan was to pay the vendor 25,000*l*. in money and shares, and the directors were to divide the 10,000*l*. between themselves and the promoters. All these promoters are no doubt liable, and the vendor gets 25,000*l*. and no more, which is as much as he would ever have got. But it must not be forgotten that the company has affirmed the sale for 25,000*l*., not reckoning the extra profit, and it is impossible for the liquidator now to say that it was not a good sale to the extent of 25,000*l*. Now Mr. Barrett, as mortgagee, knew of the transaction, and he was paid to some extent—not out of the 10,000*l*., but out of the 25,000*l*. He therefore did not receive any part of the plunder. But the ground upon which it is sought to make Mr. Barrett liable is this: The transaction took place in 1872, and he became a director of the company in Dec. 1875. Little more than a year afterwards, in 1877, the company went into liquidation. It is said that, having knowledge of all these circumstances when he was appointed director, it was his duty to communicate the knowledge which he had acquired three years and a quarter previously to the shareholders, and that it was also his duty to institute a suit for the recovery of the 10,000*l*. of which the company had been defrauded; and that because he did not communicate that knowledge to the shareholders, and because he took no steps to institute such proceedings, he ought to be made liable for this 10,000*l*. under the doctrine of wilful default, which means, I suppose, that he is bound to show that, if proceedings had been instituted soon after Dec. 1875, when he became a director in the company, those proceedings would not before Dec. 1876 have produced the 10,000*l*. To my mind it is simply unreasonable and extravagant to suppose anything of this sort, and it is incredible that that would have been the case. In the first place, it has never been held to be the duty of a director to communicate to the company knowledge acquired by him years previously as to misconduct with reference to the affairs of the company on the part of other persons for which they may still be liable. I know of no reason whatever why a director should be compelled to disclose to his shareholders his antecedent knowledge even of frauds committed on that company. I will put a case which sounds ridiculous; but ridiculous illustrations are sometimes not the worst mode of treating propositions of such a character. Suppose the case of a company dealing with a butterman for the supply of butter, and one of the directors of the company had three years before purchased the butterman's business, and had discovered that that butterman had been in the habit of supplying the company for some years, and had also discovered from the vendor's books that he had during that period supplied butter at short weight and had already defrauded the company of 1000*l*. Would he in such circumstances be liable to the company for not disclosing the fact to the shareholders, and would he or his estate be liable to replace the sum of 1000*l*. in case he did not make such disclosures? It would

obviously, to my mind, be an extravagant proposition that the director in such circumstances should be made liable. This, however, has, of course, no relation to cases where the whole matter forms part of one transaction, and where there has been some arrangement, some juggle, by which the parties to a fraud might say, "We will not go on the direction of the company until the fraud is completed"—because the courts are quite strong enough to reach cases of that kind when they occur—but this is a case where the man derived no benefit whatever from the fraud of the promoters. It seems to me that I should not be expounding or applying the law, but making the law, if I was to hold directors liable for withholding their knowledge from shareholders under such circumstances. Then is Mr. Barrett liable in this case for not taking proceedings? I do not think that it is very likely he would have succeeded at the board in persuading his directors to take proceedings at all. I do not think the majority of the board would have concurred with him without the sanction of the shareholders; but even if he had got their concurrence, what would it have amounted to? It seems to me it would still have fallen within the range of the observations which I have already made: that, as there was no obligation upon him to tell his brother directors the knowledge he had, so there was no obligation to initiate, by resolution or otherwise, any attempt to sue the promoters, because it must be remembered that it was not an admitted debt. The proceedings would certainly have been hostile, and it by no means follows that any money would have been forthcoming. A discreet director might well have said, "It is not wise to take proceedings in this matter, we shall probably get nothing by it; and if we do, it may do the company great mischief, and we had better let bygones be bygones." I do not think it is for this court to say that a man is to be made liable simply because he does not choose, or does not take steps, to sue in such circumstances. That being so, I do not think that he is under any liability at all; but even if he were, he would be liable not for the 10,000*l.*, but only for what was lost by his not suing. Suppose the company had brought an action in the beginning of 1876, who can tell whether the action would have been ended in 1877, when the company went into liquidation? I am satisfied that the case would have been litigated to the utmost, and the company would have gone into liquidation long before the action was over. So that from that point of view I am not satisfied that anything was really lost by the company's not suing, and therefore on that ground the motion is altogether unreasonable. Then the next question is, whether the 165th section of the Companies Act 1862 applies. That section provides that, "When in the course of the winding-up of any company under this Act, it appears that any past or present director, manager, official, or other liquidator, or any officer of such company, has misapplied or retained in his own hands, or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company," he may be made liable. Now, Mr Barrett is not liable under the first part of the section at all. It was not money in his hands; he is not liable for money of the company, because the money had gone long ago; and therefore, if he is liable at all,

it is for misfeasance or breach of trust in relation to the company, which means in this case either non-communication of knowledge to the shareholders or not endeavouring to institute proceedings. Then the section provides that "the court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager, or other officer, and compel him to pay any money so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust, as the court may think just." Of course, if I had come to the conclusion that Mr. Barrett was liable for a breach of trust, I have jurisdiction under that clause to make him pay, but it must be for breach of trust or misfeasance. But I should be sorry to hold that under those words I have a summary jurisdiction to inquire whether a man had properly exercised a discretion as director with respect to suing or not suing a debtor to the company, even when the debt was not disputed, and *a fortiori* when it is a demand of this kind. I do not think myself that the section applies to anything but what I may fairly call plain and ordinary cases of misconduct—and by the word ordinary I mean as regards these companies, for many of them are certainly quite extraordinary as regards other transactions—or that it was intended to go beyond what was the settled law before the statute was passed, so as to make that a misfeasance or breach of trust which would not have rendered a man liable as a trustee before the passing of the Act. The summons against Barrett will be dismissed with costs.

Solicitors: *Wilkins, Blyth, and Fanshawe*; *Torr and Co.*, agents for *Borlase and Yearsley, Mitchell-dean*.

March 13 and 20.

(Before FRY, J.)

HUTCHINSON v. ROUGH. (a)

*Will—Construction—"Effects"—Direction to "take a house"—Gift of residue—Failure of purpose for which legacy to be applied.*

*A gift by will of "my household furniture and effects of all kinds," followed by a gift for another purpose of "all my other real and personal estate,"*

*Held to include only effects ejusdem generis.*

*A direction by a testator to his executors "to take a suitable house for my three daughters to reside in with their governess,"*

*Held to entitle the daughters to the sums which ought to have been expended in taking a house for such a purpose during their minorities.*

*A gift by will of "all my other real and personal estate," upon certain trusts, followed by two specific gifts,*

*Held to include all property not previously or subsequently specifically given by the same will.*

*A testator gave his residuary estate to his executors "upon trust out of the rent or produce of my said real estate, and other moneys on loan or other-*

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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wise to form a fund, the same to be applied in establishing my three sons in their several professions in such proportions as my executors deem fit." One of the sons had been entered in a profession by his father, but neither of the other two sons had adopted a profession or expressed an intention of doing so.

*Held, that notwithstanding the testator's purpose had failed, the sons were entitled to the whole residuum in equal shares for their own benefit.*

WILLIAM HENRY ROUGH made his will, dated the 4th July 1869, as follows:

I declare this will is not intended to apply to the property settled on my late wife and our children, or otherwise comprised in any settlement made by me. I give and bequeath unto Thomas Hutchinson, of Barnes Cray, and Angus William Hall, late captain in the 58th regiment, their executors, administrators, and assigns, my household furniture and effects of all kinds, upon trust to use or dispose of the same for the benefit of my three daughters. I direct my executors to take a suitable house for my three daughters to reside in, with their governess, and request my sister, Mrs. Hall, to select the governess. I give, devise, and bequeath unto the said Thomas Hutchinson and Angus William Hall, their heirs, executors, and assigns, all my other real and personal estate upon trust out of the rent or produce of my said real estate, and other moneys on loan or otherwise to form a fund, the same to be applied in establishing my three sons in their several professions in such proportions as my executors deem fit. I bequeath to my sister, Mrs. Anderson Blair, the balance of money payable on my life policy in the "Greaham." After payment of my debt to her, I give unto my sister, Mrs. Hall, the standing portrait of my mother. Lastly, I appoint the said Thomas Hutchinson and Angus William Hall executors of my said will, and guardians of my said children."

The testator died on the 5th Nov. 1869, and his will was duly proved. He left six children, viz.: Helena Sarah Rough, William Edward Morrison Rough, Arthur Thomas Rough, Caroline Harriet Rough, Ada Mary Rough, and Frederick Henry Rough, all of whom were then infants.

In 1870 the executors obtained a decree for the administration of the testator's real and personal estate, and, pursuant to an order made on further consideration, the real and outstanding personal estate of the testator, and his furniture, were sold, and the proceeds paid into court.

Under a scheme approved by the judge, it was provided that the children should be maintained and educated out of moneys to which they were entitled other than those passing under the will, and none of the children received any portion of the testator's estate. The daughters resided at school, or with friends, and no house was taken for them, as directed by the will.

Helena Sarah Rough married, and Frederick Henry Rough, the youngest child, attained the age of twenty-one years in Jan. 1879.

The testator had, at the time of his death, brought up William Edward Morrison Rough for the army, and he had since become a lieutenant therein. The testator had not brought up or destined Arthur Thomas Rough or Frederick Henry Rough, for any profession or business, and they had not entered or expressed any intention of entering into any profession or business.

Doubts having arisen as to the construction of the will, William Edward Morrison Rough presented a petition in the cause praying that the respective shares and interests of himself and the testator's other children, under the will, might be

ascertained and declared, and the moneys in court divided accordingly.

*Glassey, Q.C. and Millar*, for the petitioner, the testator's eldest son and heir-at-law, contended that it was impossible to say what the testator meant by the direction as to the house to be provided for the daughters, and that that part of the will was void for uncertainty. The words "all my other real and personal estate," &c., did not beneficially exhaust the residue because after that the testator had bequeathed the balance of money payable on the policy and a portrait. If he meant that all his residuary property was to be given to the sons he might have said so. The words "out of" showed that it was intended to set apart a fund for placing the sons out in professions. As this had never been done there was an intestacy as to the residue. They cited

*Cowper v. Mantell*, 27 L. T. Rep. O. S. 130; 22 Bear. 231;

*Re Ward's Trusts*, 27 L. T. Rep. N. S. 668; L. Rep. 7 Ch. App. 727.

*Higgins, Q.C. and Simmonds*, for the testator's younger sons, Arthur Thomas Rough and Frederick Henry Rough.—It was agreed that, if the executors were willing, a fund might be applied in giving the two younger sons a profession each. The word "profession" was general, and the money belonged to the sons for their benefit if they had no profession at the time. If the executors did not distribute, the whole residue belonged to the sons equally. The words "out of" might mean "by means of." The scope of the will was to give the residue to the three sons, and it might be said that it was the duty of the trustees to put them out in professions. A sum was given to establish the boys in professions and for their benefit, and though they had not gone into professions, the gift to them was still good. There was no condition. The trustees had only discretion as to whether the money was to be applied for the present purposes. They cited

*Cowper v. Mantell*, *sup.*;

*Barton v. Grant*, 1 Vern. 255;

*Palmer v. Flower*, L. Rep. 13 Eq. 250; 25 L. T. Rep. N. S. 816;

*Nevill v. Nevill*, 2 Vern. 431;

*Parsons v. Cook*, 6 W. R. 715;

*Theobald on Wills*, 254.

*J. Pearson, Q.C. and J. E. Woodroffe* for the unmarried daughter.—The testator must be supposed to have intended to dispose of all his property, real and personal, and to provide for all his sons and daughters. The whole of the will must be read, and it would then appear that they were to be provided for independently of the settlement, and that a whole fund was to be formed for the purpose of maintenance and education. If this was not so, an inquiry ought to be directed, what sum ought to have been applied for taking a house for the daughters, and the amount should be paid to them.

*Everitt*, for the unmarried daughters, contended that the trust was for the whole use of the three daughters, and was not confined to their benefit during minority. The word "governess" might mean a *chaperone*.

*J. W. Davenport*, for the trustees of the will.

*Millar* was heard in reply.

*Fry, J.*—The will was made in 1869, and in construing it I am bound to consider the circum-

stances under which it was made. Some of the circumstances appear from the will itself, viz., that the testator was a widower, and that his children were entitled to some property under a marriage settlement. There were six children, and under this settlement each was entitled to a considerable sum. The property of the testator, independently of the settlement, amounted only to about 7000*l*. The first question which arises in the will is as to the meaning of the word "effects." If the words of the will stood alone they would embrace property of all kinds, but they are followed by a gift of "all my other real and personal estate," and must be read *ejusdem generis* with the words immediately preceding them. The second question is as to the meaning of the direction to the executors "to take a suitable house for my three daughters to reside in." The direction was not pursued by the executors, but the young ladies were placed at a school and educated at the expense of the settlement funds. They were entitled to have a home taken for them; there must be an inquiry as to what sums of money would have been annually required, until the youngest attained the age of twenty-one years, to take a house for them to reside in with their governess. The next question is as to the meaning of the gift of "all my other real and personal estate upon trust out of the rent or produce of my said real estate and other moneys on loan or otherwise to form a fund," &c. Afterwards a specific sum is given to Mrs. Anderson Blair and a picture is given to Mrs. Hall. The words include all property except what the testator has specifically given before or specifically given afterwards. The last question is whether the trust as to forming a fund exhausts the whole residue. The heir-at-law contends that a fund never having been formed the trust fails altogether, and there is an intestacy. There are two classes of cases, one is where there is a gift to a person for a particular purpose, and when that gift is for the benefit of the person and held to be so, notwithstanding that the particular purpose fails. The other is where a discretion is given to trustees to apply money to a particular purpose. I have no hesitation in saying that this case belongs to the former class. The subject matter is explicit. It is residue given not for a power, but a trust. The fund may be raised in any manner out of produce, or by sale and loan, or in any manner whatsoever. There is no limit except that it is to be formed out of residue. There is no direction that any portion of residue should be left. There is no limit as to the object of the fund. There is nothing to show that the fund will be too large if it takes all the residue. The contrary in fact is shown. This is a gift of residue subject to a trust which exhausts the whole of it, and if the purpose of the trust fails the gift will not.

Solicitors for the petitioner and the trustees, *Tompson, Pickering, and Co.*

Solicitors for the two younger sons and the unmarried daughters, *Oronin and Rivolta.*

Solicitors for the married daughter, *Lane and Mowro.*

## COMMON PLEAS DIVISION.

Monday, March 3.

(Before Lord COLERIDGE, C.J., and DENMAN, J.)

THE LANCASHIRE WAGGON COMPANY (LIMITED) v. NUTTALL AND OTHERS. (a)

*Contract—Hiring and letting—Sale on payment of instalments—Expiration of term—Payment—Appropriation.*

*The defendants agreed to hire forty-four waggons from the plaintiffs, paying in respect of twenty specified waggons an annual rent of 285*l*. for five years, and in respect of the other twenty-four an annual rent of 249*l*. for three years. It was agreed that the said waggons should, at the expiration of the respective terms of the demise, and after payment of the rents reserved during the said terms respectively, become the absolute property of the lessees without any further payment whatsoever.*

*The defendants, having paid the first two years' rent in respect of the twenty-four waggons, sent to the plaintiffs the whole of the remaining one year's rent, with a letter stating that this sum was paid in discharge of all rent or other payment due in respect of the twenty-four waggons. The rent in respect of the other twenty waggons was then in arrear, and the plaintiffs' agent declined to receive the payment upon the terms of the letter, requesting the clerk who brought it to take it back. The clerk refused to do so, and left the house without taking up the money or the letter. The plaintiffs' agent thereupon retained the money, and entered it in the plaintiffs' ledger as a payment upon the general account.*

*Held, first, that the contracts in respect of the twenty-four waggons and the twenty were separable and distinct; and that the condition as to the expiration of the term on which the twenty-four waggons were to become the property of the defendants was fulfilled when all the rents accruing due under it had been paid.*

*Held, secondly, that the rule solvitur in modo solvituris applied, and that the plaintiffs must be taken to have received the payment on the terms on which it was tendered.*

### SPECIAL CASE.

This was an action set down for trial before Cockburn, C.J., at the Manchester Summer Assizes 1878, when the record was withdrawn by consent, and a special case ordered to be stated, of which the following are the material portions:

2. By articles of agreement, dated the 25th Jan. 1876, and made between the plaintiffs of the one part, and the defendants William Nuttall, Joseph Kay, James Wild, William Taylor, and James Watson (thereinafter called the lessees) of the other part, the plaintiff agreed to let to the lessees, and the lessees agreed to hire from the plaintiffs forty-four waggons, as to twenty thereof for the term of five years from the 1st Nov. 1875, and as to the remaining twenty-four for the term of three years from the 1st Dec. 1875, as to the twenty waggons at the yearly rent of 285*l*. payable quarterly on the 1st Feb., the 1st May, the 1st Aug., and the 1st Nov. in each year; and as to the twenty-four waggons at the yearly rent of 249*l*. payable quarterly on the 1st March, the 1st

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

June, the 1st Sept., and the 1st Dec. in each year.

3. The said articles of agreement were in the words and figures following: [The immaterial portions are omitted.]

That in consideration of the sum of 133*l.* 10*s.* now paid by the said lessees to the said lessors (the receipt whereof the said lessors hereby acknowledge) the said lessors agree to let to the said lessees, and the said lessees hereby agree to hire on the terms following: Forty-four waggons, as to twenty thereof numbered respectively (&c.), for the term of five years from the 1st Nov. 1875, and as to the remaining twenty-four thereof (numbered, &c.), for the term of three years from the 1st Dec. 1875, such waggons having been delivered by the said lessors to the said lessees in good working order, repair, and condition, and fit for immediate use. That the said lessees shall pay to the said lessors as and by way of rent for the hire of the said waggons during the said terms respectively, as and for the said twenty waggons the yearly sum of 285*l.* payable by equal quarterly payments on the 1st day of Feb., the 1st day of May, the 1st day of Aug., and the 1st day of Nov. in each year, the first of such quarterly payments to be made on the 1st day of Feb. next, and as and for the said twenty-four waggons the further yearly sum of 249*l.* also payable by equal quarterly payments on the 1st day of March, the 1st day of June, the 1st day of Sept., and the 1st day of Dec. in each year, the first of such quarterly payments to be made on the first day of March next. . . . That if the said yearly sums hereby agreed to be paid by the said lessees for the hire of the said waggons respectively, or any quarterly payment thereof, shall be in arrear and unpaid for the space of one calendar month next after the day whereon the same ought to be paid as aforesaid, then and in such case the said term for which the same waggons are hereby agreed to be let shall absolutely determine, and the said lessees shall cease to have any right or interest in or to the same respectively or any of them, and shall upon demand, or without any demand being made, forthwith deliver up all the same waggons to the said lessors, and if they shall neglect or refuse so to do, it shall be lawful for the said lessors or their agent or agents to enter into and upon the premises of the said lessees whereon the same waggons or any of them may be, and there or elsewhere to seize and take away the same waggons, and the same respectively to repossess and enjoy as if this agreement had not been made. . . . Provided always, and it is hereby declared and agreed, that the said waggons shall, at the expiration of the respective terms of this demise, and after payment of the rents hereby reserved during the said terms respectively, be and become the absolute property of the said lessees without any further payment whatsoever, who may thereupon remove the said lessors' plates from the said waggons respectively, and the said lessors shall, at the request and cost of the said lessees, execute and do all such acts and things for transferring the said waggons to the said lessees absolutely as may be reasonably required; provided always, and it is hereby agreed and declared, that until full payment of the several rents hereby respectively reserved shall be actually made, the ownership of the said waggons respectively shall remain and continue in the said lessors.

4. Before and at the date of the said agreement, the said lessees were in possession of the said forty-four waggons upon the terms of the said agreement. As to the twenty waggons, they continued in possession until and after the commencement of this action. As to the twenty-four they continued in possession until they assigned and transferred the same to the defendants, the Co-operative Wholesale Society (Limited), at the time and in the manner hereinafter stated.

6. At some date in Jan. 1878 (prior to the 21st), the plaintiffs were paid by the lessees the sums due down to that date in respect of the forty-four waggons.

8. On the 1st Feb. 1878 the sum of 71*l.* 5*s.* became due to the plaintiffs in respect of the

twenty waggons. No part of such sum had been paid on the 16th Feb.

9. On the 16th Feb. a clerk from Messrs. Darbishire and Entham's office called on Robert John Kaye (who was secretary of the plaintiffs' company) at his private house; the said clerk brought with him 249*l.* in cash, and the following letter to the Lancashire Waggon Company (Limited):

Manchester, Feb. 16, 1878.

Gentlemen.—As solicitors acting for and on behalf of Messrs. William Nuttall, Joseph Kay, James Wild, William Taylor, and James Watson, trading as the Main Coal and Cannel Company, and also of the Co-operative Wholesale Society (Limited), we inclose the sum of 249*l.* in discharge of all rent or other payment due to you from the said William Nuttall and his partners aforesaid, in respect of twenty-four waggons, numbered respectively from 3199 to 3206, both numbers inclusive, and from 3250 to 3265, both numbers inclusive, under and by virtue of an agreement, dated the 25th Jan. 1876, and made between you the said Lancashire Waggon Company (Limited) of the one part, and the said William Nuttall and his partners aforesaid of the other part, the same sum of 249*l.* being moneys of the said William Nuttall and his partners as aforesaid, which they have borrowed for the purpose of this payment from the said Co-operative Wholesale Society (Limited), and in respect of which advance and of other valuable considerations they have agreed that the same twenty-four waggons shall become and be the property of the said Co-operative Wholesale Society (Limited). And we as such solicitors as aforesaid request you to transfer the same twenty-four waggons (at the express request and direction of the said William Nuttall and his partners as aforesaid) to the said Co-operative Wholesale Society (Limited).

Signed, &c.

10. The said clerk delivered the said letter to the said Robert John Kaye, and tendered to him the said sum of 249*l.* The said Robert John Kaye refused to receive the same upon the terms stated in the said letter, and requested the said clerk to take back the said sum of 249*l.*, and followed him with the said money and letter to the door, but he refused to take them, and the said Robert John Kaye placed the same on a table in the lobby of his house, telling the said clerk that the money was there at his risk, but he left the house without taking the same; the said clerk had no other instructions from his employers than to deliver the said money and letter together, and had no authority to assent to any other appropriation of the said money than that indicated in the said letter; the said money having been left by him at the house of the said Robert John Kaye in the manner aforesaid, the said Robert John Kaye retained the same and entered the same in the plaintiffs' ledger as a payment made generally on account of rent falling due under the said agreement of the 25th Jan. 1876, in respect of the entire number of waggons which by the said agreement were leased or agreed to be leased.

11. The said Robert John Kaye gave no receipt for the said sum of 249*l.* and did not (otherwise than by his before-mentioned oral refusal to the said clerk to accept the same on the terms of the said letter of the 16th Feb.) give notice to the defendants of the manner in which he had appropriated the said sum.

12. Immediately after the 16th Feb. 1878, the defendants, Nuttall, Kaye, Wild, Taylor, and Watson, assigned and transferred the said twenty-four waggons to the said Co-operative Wholesale Society (Limited), who took possession thereof, removed the plates with plaintiffs' name therefrom, and have since sold a part of the said waggons, and



claim to have been, since the date of such transfer, entitled absolutely to the said twenty-four waggons.

14. The said twenty-four waggons are to be taken as of the value of £30 each at the time of such transfer, and at the commencement of the action. Under an ordinary contract of hiring, they would let for 2s. 9d. per week each.

15. Before action, the plaintiffs demanded from all the defendants the re-delivery of the said twenty-four waggons, which was refused.

17. The plaintiffs contend that they are entitled to recover from all the defendants damages for the refusal to re-deliver the said twenty-four waggons, and also from the first five defendants either the balance of the above account, or a similar or other sum for breach of the said agreement of the 25th Jan. 1876. The defendants contend that the property in the said twenty-four waggons passed to them absolutely on payment in manner aforesaid of the said 249l., but the first five defendants admit that in that case they were at the commencement of the action indebted to the plaintiffs in the sum of 142l. 10s. in respect of the rent of the said twenty waggons falling due on the 1st Feb. and the 1st May 1878.

18. The court is to have power to draw inferences of fact. The question for the opinion of the court is, whether the plaintiffs were entitled to require a re-delivery of the said twenty-four waggons, or are entitled to maintain an action for the appropriation of them by the defendants in the manner aforesaid, and if they are what damages they are entitled to recover. If the court shall be of opinion that the plaintiffs are so entitled, then judgment shall be given for the plaintiffs against all the defendants for such sum or sums as the court shall think fit. If the court shall be of opinion that the plaintiffs are not so entitled, then judgment shall be given for the plaintiffs against the first five defendants only for the sum of 142l. 10s., and in favour of the defendants, the Co-operative Wholesale Society, Limited, against the plaintiffs. In any event the court shall determine all questions as to costs.

*Ambrose, Q.C. (Crompton and G. G. Kennedy with him) for the plaintiffs.*—The contracts were indivisible as to the two sets of waggons. It must be assumed that there was no difference in the value of the waggons, and therefore it is clear that the greater rent nominally assigned to the twenty waggons was in reality partly paid in respect of the twenty-four. Were the defendants allowed to take the property in the twenty-four waggons at the expiration of three years, the plaintiffs would lose for the next two years part of the security for the rent of the twenty. The plaintiffs, therefore, would be entitled to succeed, even if the payment on the 16th Feb. 1878, was made and received as payment of rent due or to become due in respect of the twenty-four waggons. As a matter of fact it was not so made. [Lord COLERIDGE, C.J.—Does not what is stated in par. 10 of the case disentitle you to raise that contention?] The plaintiffs' agent did all he could—he refused to accept the payment as tendered, and followed the clerk who brought it to the door, requesting him to take it back. [Lord COLERIDGE, C. J.—He could have abstained from taking it up afterwards, and entering it in the plaintiffs' ledger.] He did all that could reasonably be expected in telling the clerk that the money was there at his risk.

*Gully, Q.C. for the defendants.*—The money was tendered as a payment of all rent due in respect of the twenty-four waggons, and the plaintiffs, who did in fact receive the money and enter it in their books, cannot be heard to say that they accepted it on their own or any other terms:

*Croft v. Lumley*, 27 L. J. 321, Q. B.

Secondly, the contracts in respect of the twenty waggons and the twenty-four are separable and distinct, and it follows that, inasmuch as all payments in respect of the twenty-four to which the plaintiffs can ever be entitled, have been made, the property in those twenty-four has passed to the defendants. The condition as to the full expiration of the time must be taken to have been waived by accepting prepayment.

*Dacey (C. Russell, Q.C. with him), for the other defendants (the Co-operative Wholesale Society).*

Lord COLERIDGE, C.J.—I am of opinion that our judgment should be for the defendants. This is an action brought on a somewhat inartificial agreement for leasing for two several terms of three and five years two distinct portions or lots of waggons. It is an agreement of hiring and letting in its first intention, but it goes on to say that after a certain lapse of time, and certain payments, the hiring shall be turned into a sale, and the subject-matter of the contract become the property of the purchasers. It is no doubt in one sense an entire and complete agreement for the forty-four waggons; but they are to pass into the possession of the purchasers on the fulfilment of terms which are distinct as to each portion of them. The letting is as to twenty of the waggons for five years at an annual rent or payment of 285l., and as to the other twenty-four for three years at an annual rent of 249l.; and there is a proviso that "the said waggons shall, at the expiration of the respective terms of this demise, and after payment of the rents hereby reserved during the said terms respectively, be and become the absolute property of the said lessees without any further payment whatsoever;" and that "until full payment of the several rents hereby respectively reserved shall be actually made the ownership of the said waggons respectively shall remain and continue in the lessors." These are the words on which the main question in this case turns. It is to be observed that throughout the conditions the words "respective" and "respectively" are used in both branches of the provisoes—those in favour of the vendors and those in favour of the vendees. It appears to me that what has been done here is substantially a fulfilment of all the terms of that agreement. The question arises in respect of the twenty-four waggons only, and what has happened with respect to them is this: The sum of 133l. has been paid, in the first instance, according to the contract, and the annual rents have been paid under the following circumstances. Up to what took place between the end of January and the 16th Feb. 1878 they were paid regularly—or if not regularly, at any rate the irregularity was waived; and on the day last mentioned a sum of money equal to all the rent to become due in respect of the twenty-four waggons was prepaid, and sent by the solicitor for the defendants to the solicitor for the plaintiffs. For the present I assume that it was accepted. Were all the other provisions of the contract fulfilled? I

think they were. The rents had been paid, but it is said the time had not expired. In one sense, no doubt, it had not expired; because the word prepayment implies that the rent was paid before it was due; and I do not mean to say that this question is not capable of fair argument. Minds will vary on such a question, turning on the construction of a document; but I think on the whole that the term was fulfilled when the rents accruing due under it had been paid; and I think that, partly from the words of the proviso which I have cited, and partly because of the words at the end of it, that the waggons shall become the property of the lessees "without any further payment whatsoever," to which I drew attention in the course of the argument. It seems to me that these words may be used to show that by expiration of time was meant the payment of the rents, and I think that is the fair construction of the agreement. There is a previous question on which I will only say that these two contracts are in my opinion several. I draw that conclusion from the general look of the instrument, from the separate reservation of rent, and from the words of the provisos; and also from the other provision as to the re-taking possession of the waggons by the lessors in case of nonpayment of rent. That can only be a separate power—a power of re-taking possession of the twenty-four waggons, if payment in respect of the twenty-four was in arrear, and of the twenty if payment was in arrear in respect of the twenty. That appears to me to be a strong argument for the construction I have indicated. As the other provision, it seems to me that it is neither an unreasonable nor an improbable one. So much as to the contract itself. Then it appears to me that it is impossible to regard the payment and receipt of this money otherwise than upon the terms on which it was tendered. It is perfectly true that the plaintiffs and defendants were at issue on the construction of the contract; one party saying there was a separate contract as to each of the lots of waggons, and the other party denying it. But on the 16th Feb. it appears that 249l. was sent by a clerk, with a letter clearly specifying the terms on which alone that 249l. was sent, and further telling the plaintiffs that if they do not take it, and send back the proper transfer to confirm the transaction between the two sets of defendants, they will be held answerable. No doubt these terms were in opposition to the contention of the other side. It was in one sense a hostile letter, but it was in that way that the 249l. was sent. Then, what does the plaintiffs' secretary do? He says he will not take it, and requests the clerk who brought it to take it back. The clerk refuses, and leaves the money and the letter; and the case goes on to say that the plaintiffs' secretary "retained the same, and entered the same in the plaintiffs' ledger as a payment made generally on account of rent falling due under the said agreement;" and that he did this without giving any further notice or receipt to the defendants. I entertain a confident opinion that this falls within the decisions that have held that when a payment has been made by a debtor to a creditor, there being two debts, the rule *solvitur in modo solventis* applies. It is to be noticed that in cases where there are two debts, the judgment of Crompton, J. in *Croft v. Lumley* (*ubi sup.*) does not dissent from that of the majority of the judges; so that they all concurred in a proposi-

tion that would cover this case, there being two heads of debt, and the 249l. being sent in respect of one of these heads and not of the other. If the money was kept, it was kept on those terms on which it was sent, and on no others. It was contended that the plaintiffs had a right to keep it, and set it off against the general account, but I cannot take that view. Our judgment must be for the defendants.

DENMAN, J.—I am of the same opinion. With regard to the agreement itself, although in its commencement it is one agreement relating to two sets of waggons, yet in the latter part all its provisions are wholly separate, and are so intended to be by the agreement itself. The clauses which the Lord Chief Justice has commented on relating to the re-taking by the lessors on default in the payment is consistent only with this construction; and the recurrence throughout of the word "respective" seems to me to lead irresistibly to the conclusion that the parties meant to deal with the sets of waggons separately. Then comes the clause which is more material to the present case—the proviso that the waggons shall become the property of the lessees under certain circumstances. I must own that the construction of this clause does not appear to me so certainly in favour of the defendants as does the general construction of the agreement. The difficulty appears to me to be that the defendants are not brought into possession of the waggons except at the expiration of the respective terms, and after payment of the rent. It is not an unreasonable contention that until the expiration of the three years this condition cannot be said to be fulfilled, but I do not by any means say that I dissent from the view which the Lord Chief Justice has taken of the clause, taking it together with the other provision as to re-taking and forfeiture. Even, however, supposing that that should not be the true construction of the agreement, there are two other answers of which the defendants can avail themselves. One is this—that even supposing that the expiration of the term were necessary, still, where the whole of the money which is due to the plaintiffs upon these waggons has been paid, and where the provisions as to the twenty and twenty-four waggons are separate and distinct in their nature, it would follow that even if the plaintiffs could recover, the damages to which they would be entitled would be nominal, and they would not get their costs. But beyond that, I think it does not lie in the mouths of the plaintiffs to say that they have a right to sue the defendants, because it would, in my opinion, be inequitable, after receiving prepayment for the waggons, that the plaintiffs should sue for waggons in which they have really no further interest; and that defence is practically set up on the pleadings. That leaves only the question whether this payment was tendered and accepted on behalf of the defendants and plaintiffs respectively as the amount due in respect of these waggons. I think, from the conduct of the plaintiffs' agent, that he did not intend to reject that payment; but that his action in following the man to the door, and requesting him to take the money back, is more than counterbalanced by the fact of his taking it up from the table and afterwards entering it in the plaintiffs' books as a payment in the sense for which they contended. I think he had no right to do that, and the pay-

ment must therefore be taken as a good payment in respect of the twenty-four waggons. On every ground, therefore, the plaintiffs are disentitled to sue.

*Judgment for the defendants.*

Solicitors for the plaintiffs, *Shaw and Tremellen*, for *P. and T. Watson*, Bury.

Solicitors for the defendants, *Cunliffe, Beaumont, and Davenport*, for *Darbishere and Tatham*, Manchester.

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*March 18 and April 7.*

(Before Sir R. PHILLIMORE.)

#### THE MARIA. (a)

*Practice—Discovery—Salvage—Tender and admission of statement of claim—Reply—Amendment.*

*A plaintiff in a salvage action in the Admiralty Division, in which the defendants admit the allegations in the statement of claim, and tender a sum in satisfaction, is nevertheless entitled to discovery and inspection of documents, but at his own risk and cost if such discovery and inspection should be held at the hearing to have been unnecessary.*

*Quere, is a reply necessary in a salvage action where the only defence is admission of the plaintiffs' facts and tender of a sum in satisfaction which is rejected by the plaintiff?*

*Leave given to reply, and claim amended before reply.*

THIS was an action brought by William Brown and thirty-six others, beachmen of Palling, Norfolk, against the Russian barque *Maria*, to recover salvage reward for services rendered to the *Maria* off the coast of Norfolk.

The action was commenced on the 18th Jan. 1879, and the plaintiffs delivered their statement of claim on the 6th Feb. 1879, and thereupon obtained an order for discovery of defendants' documents. The defendants on the 15th Feb. 1879 filed an affidavit of discovery, disclosing the log of the *Maria*, and the protest of her master and crew, and nothing else. The plaintiffs thereupon on the 19th Feb. 1879 gave notice, under Order XXXI., r. 14, to inspect the said documents. On the 28th Feb. 1879 the defendants delivered their statement of defence, in which they alleged as follows:

The defendants on the 28th Feb. 1879 paid into court and tendered to the plaintiffs for their services the sum of £200., and offered to pay the costs; and they submit that such sum was sufficient, and they admit that the statements on the statement of claim are substantially true, and do not put the plaintiffs to proof thereof.

The tender was rejected by the plaintiffs.

On the 8th March the plaintiffs inspected the said log and protest, and then also saw certain surveys which had been held on the *Maria* after the services; these surveys had not been mentioned in any affidavit of discovery; but the defendants refused to allow the plaintiffs to have copies of any of the documents upon the ground that all the facts stated by the plaintiffs in their statement of claim being admitted such copies were unnecessary. The plaintiffs thereupon took out a summons calling upon the defendants to

show cause why they should not be allowed to make copies of the log and protest, and why the defendants should not make a further and better affidavit of documents.

*March 18.*—The summons came on for hearing before the Judge in Court.

*J. P. Aspinall*, for the plaintiffs, contended that the defendants were bound to disclose all documents, and to allow copies thereof to be taken: Order XXI., rr. 12 and 14. The fact of the defendants having admitted the plaintiffs' facts as alleged makes no difference, as upon the documents when disclosed, new facts might be ascertained, which would enable the plaintiffs to amend their statement of claim without leave before reply: (Order XXVI., r. 2.)

*E. C. Clarkson* for the defendants.—The facts being admitted, there can be no necessity for copies of documents, or for further discovery. The plaintiffs knew their own case, and ought not to be allowed to better it by means of defendants' documents.

*J. P. Aspinall* in reply.

Sir R. PHILLIMORE.—I must make the order as asked for by the plaintiffs, but it seems to me to be an oppressive proceeding, and I shall direct the defendants to file a further and better affidavit of discovery, and to allow the plaintiffs to take copies and translations of the documents, but at plaintiffs' own risk as to costs should such translations and copies be decided at the trial to be unnecessary.

The plaintiffs did not get inspection and copies of any of the said documents under this order until the 19th March, and then not of all mentioned, and were unable to do so until after the time for replying (21st March 1879) had expired. The plaintiffs took out a summons, returnable on the 29th March 1879, before the registrar, for leave to deliver reply, notwithstanding the time had expired. This summons the defendants opposed upon the ground that there was no defence, and hence no reply was necessary, and upon their application, the registrar referred the matter to the judge, and it came on before him in chambers on the 1st April 1879; the judge then gave the plaintiffs leave to join issue, but expressed an opinion that as there had been a rejection of the tender, such joinder of issue was unnecessary.

The plaintiffs thereupon on the 1st April, under Order XXVII., r. 2, delivered an amended statement of claim (before the time limited for reply and before replying), and on the following day delivered their reply, merely joining issue upon the defence.

*April 7.*—The action came on for hearing, and the judge awarded 400*l.* to the salvors, and costs.

*Clarkson*, for the defendants, applied for the costs of the discovery after the defendants had admitted their liability and paid into court, pointing out that the amendments on the statement of claim, founded upon such discovery, did not materially strengthen the plaintiffs' case.

*J. P. Aspinall*, for the plaintiffs, opposed the application upon the ground that as a matter of principle the plaintiffs were entitled to inspection, and it was impossible for them to determine whether an amendment was necessary or not until they had had discovery.

(a) Reported by J. P. ASPINALL and F. W. BAKER, Esqs., Barristers-at-Law.

BANK.]

*Ex parte* MONKHOUSE; *Re* WARD—*Ex parte* COCHRANE; *Re* CROSS.

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Sir R. PHILLIMORE.—Without laying down any general rule as to the costs of discovery in such cases, I rule that here the discovery was unnecessary, and I give the defendants the costs incidental to all discovery after defence.

Solicitor for the plaintiffs, *H. C. Coots*.

Solicitors for the defendants, *Thos. Cooper and Co.*

## COURT OF BANKRUPTCY.

(Before the CHIEF JUDGE.)

Monday, March 24.

*Ex parte* MONKHOUSE; *Re* WARD. (a)

Liquidation—Debtors Act 1869 (32 & 33 Vict. c. 62), ss. 11, 16.

*The application of the trustee in a liquidation under sect. 16 of the Debtors Act 1869, for an order to prosecute the liquidating debtor for fraudulently removing his property, ought not to be refused merely upon the ground that the trustee has recovered the property so removed.*

THIS was an appeal from the decision of the judge of the County Court of Westmoreland, holden at Kirby Kendal, refusing to order the trustee to prosecute the debtor for offences committed under the Debtors Act 1869.

William Ward, the debtor, who had carried on business as a builder and joiner at Kendal, in Westmoreland, on the 6th and 15th July 1878, being then hopelessly insolvent, sent away goods to the value of 45*l.* and which were necessary for the carrying on of his business, in part payment of an alleged debt of 300*l.* owing to his brother. About the same time, that being within four months of the presentation of his petition, he removed a part of his furniture from his house at Kendal. The trustee also charged him with having mutilated his books and made false entries therein, within the provisions of the Debtors Act 1869, s. 11, clauses 9 and 10.

The debtor filed his petition on the 20th July 1878, and at the first meeting Mr. Monkhouse was appointed trustee with a committee of inspection. The trustee having discovered these defalcations, subsequently recovered the whole of the furniture and other property which had been removed. The brother did not tender any proof in respect of his alleged debt.

Under the above circumstances the trustee applied to the court under sect. 16 of the Debtors Act 1869 for an order to prosecute the debtor for offences committed under the 11th section of that Act. The learned judge refused the order upon the ground that the property which had been removed had been recovered, and that the trustee by receiving the property back had condoned the criminal acts.

The trustee appealed.

*E. C. Willis*, on behalf of the appellant, cited

*Ex parte Marsden, Re Marsden*, 39 L. T. Rep. N. S. 700; L. Rep. 2 Ch. Div. 786.

The CHIEF JUDGE expressed his opinion that the restoration of the property could not in any way affect the criminal liability of the debtor, and that the order to prosecute ought to have been made upon the report of the trustee then before the court. The order of the court below must be dis-

charged, and leave be given to the appellant to prosecute the debtor.

*Appeal allowed.*

Solicitor: *Sykes*, for *Watson*, Kendal.

Monday, Feb. 10.

*Ex parte* COCHRANE; *Re* CROSS.

*Ex parte* PAYNE; *Re* CROSS. (a)

*Bill of sale—Unregistered—Prior act of bankruptcy—No notice of—Possession taken—Adjudication—Protected transaction—Bankruptcy Act 1869, s. 95.*

*A farmer, who had executed a bill of sale of all his property and effects in favour of A. to secure an existing debt, subsequently executed a similar bill of sale in favour of B. to secure an advance made at the time. Neither of these bills of sale was registered. B., who had no notice of the prior bill of sale, took possession of part of the property comprised in his security, and the property taken was afterwards sold. The grantor having been subsequently adjudicated bankrupt, Held, that the bill of sale to A. was void as an act of bankruptcy, but that B.'s security was a protected transaction within sect. 95 of the Bankruptcy Act 1869, as against the trustee appointed under the bankruptcy.*

THESE were two appeals from an order of the registrar of the County Court of Herefordshire and Shropshire holden at Shrewsbury, made the 21st Dec. 1878; and both being appeals from the same order they were heard at the same time.

John Cross, the bankrupt, who was a tenant farmer at Belton, in Shropshire, on the 29th Dec. 1877, executed in favour of George Payne a bill of sale of all his farming stock, growing crops, furniture, and effects, to secure the repayment of a prior advance of 300*l.*, and a further sum of 22*l.* 10*s.* charged by way of premium.

On the 2nd May 1878 Cross executed in favour of Payne a second bill of sale which resembled the former bill of sale in all respects, and was, in fact, substituted for it.

On the 3rd May 1878 Cross executed in favour of Alexander Sergeant Cochrane a bill of sale of all his farming stock, growing crops, stock, and effects, to secure the repayment of 300*l.* then advanced, and a further sum of 75*l.* by way of premium, making together the full sum of 375*l.* with interest upon that amount.

These bills of sale were not registered.

Cross remained in possession down to the 20th Aug. 1878, when Cochrane took possession of the stock and effects upon the farm; and on the 23rd, Payne also entered into possession.

On the 26th Aug. 1878 Cross filed a petition for liquidation, and on the 19th Sept. 1878 a petition in bankruptcy was presented, the act of bankruptcy relied upon being the filing of the liquidation petition.

On the 1st Oct. Cross was adjudicated bankrupt, and at the first meeting Charles John Harriass was appointed trustee.

Between the 30th Aug. and the 4th Oct. 1878, the growing crops, stock, and effects upon the farm were sold by auction under the joint instructions of Payne and Cochrane, and realised the sum of 508*l.* 4*s.* 10*d.* Of this sum 322*l.* 8*s.* 6*d.*

(a) Reported by A. A. DORIA, Esq., Barrister-at-Law.

(a) Reported by A. A. DORIA, Esq., Barrister-at-Law.

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*Ex parte DITTON; Re Woods.*

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represented the proceeds of the sale of the growing crops. The trustee thereupon applied to the County Court for an order directing the auctioneer to pay to him the sum of 508*l.* 4*s.* 10*d.* realised by the sale, whereupon the registrar, acting under his delegated authority, made the order accordingly, holding that the execution of the bill of sale of the 2nd May 1878 was an act of bankruptcy, to which the title of the trustee related back, and also that the bill of sale to Cochrane was void as against the trustee, the property comprised in each having been in the possession of the bankrupt at the commencement of the bankruptcy.

From this order both Cochrane and Payne appealed.

Cochrane, by his appeal, asked that the order of the County Court might be discharged or varied, and that the auctioneer might be directed to pay to him the sum of 322*l.* 8*s.* 6*d.* as representing the proceeds arising from the sale of the growing crops.

Payne, by his appeal, asked that the auctioneer might be directed to pay to him so much of the said sum of 508*l.* 4*s.* 10*d.* as he might be entitled to under his security.

*Winslow, Q.C.* and *Robson*, for Cochrane, contended that Payne's bill of sale of the 2nd May was an act of bankruptcy to which the title of the trustee related back, and therefore that Payne was not entitled to any portion of the fund in hand. They further contended that Cochrane was entitled to so much of the fund as would satisfy his debt, inasmuch as his bill of sale was a valid security as against the trustee. The transaction between their client and the bankrupt was a *bond fide* transaction, and possession was taken prior to the order of adjudication without notice of any act of bankruptcy committed by the bankrupt. They referred to the Bankruptcy Act 1869, sects. 93-95, and cited

*Ex parte Hoare; Re Walton*, 29 L. T. Rep. N. S. 140; L. Rep. 16 Eq. 625;

*Ex parte Leman; Re Barraud*, 35 L. T. Rep. N. S. 422; L. Rep. 4 Ch. Div. 23.

At any rate Cochrane was entitled to so much of the fund as represented the proceeds of sale of the growing crops, as these were not in any way affected by the Bills of Sale Act 1854:

*Branton v. Griffiths*, 38 L. T. Rep. N. S. 4; L. Rep. 2 C. P. Div. 12.

*Finlay Knight*, for Payne, contended that Cochrane's claim to the fund was not superior to that of his client. The adjudication was founded upon the filing of a liquidation petition by the bankrupt, and not upon the execution of the bill of sale of the 2nd May. Cochrane, by seizing the goods before his client had taken possession, did not thereby obtain priority over him. He cited

*Ex parte Allen; Re Middleton*, L. Rep. 11 Eq. 209.

*De Gez, Q.C.* and *Redman* appeared for the trustee.—They contended that Payne's bill of sale was void as against the trustee as an act of bankruptcy (*Ex parte Stevens; Re Stevens*, L. Rep. 20 Eq. 786) to which the trustee's title related back. Cochrane being a subsequent incumbrancer could take nothing. His bill of sale, being made void by the Bills of Sale Act, was not within the protecting clauses of the Bankruptcy Act 1869. They referred to

*Ex parte Athwater; Re Turner*, 35 L. T. Rep. N. S. 917; L. Rep. 5 Ch. Div. 27.

Vol. XL., N. S., 1016.

*Winslow, Q.C.* in reply.—The *ratio decidendi* in *Ex parte Athwater* did not apply to this case, as Cochrane's bill of sale was given after the act of bankruptcy, whereas in that case both bills of sale were given previously. He also referred to

*Ramsden v. Lupton*, 29 L. T. Rep. N. S. 510; L. Rep. 9 Q. B. 17.

The CHIEF JUDGE.—In this case the two appeals have been heard together, and have not been improperly so treated. The second bill of sale given to Mr. Payne on the 2nd May was as a matter of contract between the parties given for the purpose of neutralising the first. That second bill of sale was an assignment of the whole of the debtor's property, and therefore I need hardly say, was an act of bankruptcy. An adjudication in bankruptcy was subsequently made under which the title of the trustee related back to that second bill of sale. Mr. Payne's securities are, therefore, gone and his appeal must be dismissed with costs. Mr. Cochrane's case is that he advanced his money *bond fide* between the date of the act of bankruptcy and the date of the order of adjudication, and that his claim should be allowed at any rate to the extent of the proceeds of the sale of the growing crops, since they are not within the Bills of Sale Act 1854. In my opinion this claim must be allowed, as must also his claim with regard to the proceeds of the sale of the chattels comprised in his security which are within the Bills of Sale Act. Mr. Cochrane had taken possession of the property before the order of adjudication was made, and such a case as this is, in my opinion, entirely covered by sect. 95, the protecting clause of the Bankruptcy Act. The order of the court below must therefore, so far as it concerns Mr. Cochrane, be discharged with costs. An account must be taken of what is due to him for principal, interest, and costs, and the amount so found due, together with the costs of this appeal, will have to be paid out of the proceeds arising from the sale.

*Order accordingly.*

Solicitors: *J. I. Irving; T. H. Jones; Clarke, Woodcock, and Byland*, for *C. Chandler*, Shrewsbury.

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT LINCOLN'S INN.

*Thursday, Feb. 20.*

(Before JAMES, BRETT, and COTTON, L.JJ.)

*Ex parte DITTON; Re Woods.* (a)

*Practice—Appeal—Locus standi—“Person aggrieved” by order—Alleged creditor—Bankruptcy Act 1869, s. 71.*

*The Comptroller in Bankruptcy reported to the court, under the provisions of the 57th section of the Bankruptcy Act 1869, that in his opinion the trustee in bankruptcy had been guilty of neglect which had resulted in a loss of 4000*l.* to the estate, and applied to the court for an order that the trustee should pay that amount to the credit of the estate. The court having refused the application, the comptroller did not appeal, but an*

(a) Reported by H. PHAT, Esq., Barrister-at-Law.

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appeal was presented by a person who had tendered no proof in the bankruptcy, but who described himself in the notice of appeal as a creditor under the bankruptcy and a person aggrieved by the order appealed from: Held, that the appellant had no *locus standi*, inasmuch as he had not proved his alleged debt in the mode prescribed by the Act and rules.

THIS was an appeal from a decision of Mr. Registrar Hazlitt sitting as Chief Judge in Bankruptcy.

The Comptroller in Bankruptcy reported to the court, under the provisions of the 57th section of the Bankruptcy Act 1869, that in his opinion the trustee in the bankruptcy of Woods had been guilty of a misfeasance, neglect or omission, which had resulted in a loss of 4000*l.* to the estate, and applied to the court for an order that the trustee should pay 4000*l.* to the credit of the estate.

The registrar refused this application.

The comptroller did not appeal from this decision, but an appeal was presented by one Ditton who, in his notice of appeal, described himself as "a creditor under the bankruptcy," and "a person aggrieved by the order appealed from."

Ditton claimed to be an equitable mortgagee by deposit of a lease belonging to the bankrupt. Soon after the adjudication was made, he filed a bill in the Court of Chancery to enforce his alleged security, but an order was made in the Court of Bankruptcy restraining his proceedings on the terms of the trustee in the bankruptcy paying into court a sum sufficient to meet his alleged claim: (See 24 L. T. Rep. N. S. 109; L. Rep. 1 Ch. Div. 557.) The money was never paid into court, but negotiations took place between the trustee and Ditton, with the view of enabling the trustee to complete a contract into which he had entered for the sale of the lease. These negotiations resulted in nothing, and ultimately the trustee, with the leave of the court, given in spite of Ditton's opposition, disclaimed the lease: (See L. Rep. 3 Ch. Div. 459.)

At the time when the comptroller's application was made to the court, the bankruptcy had been pending for three years, but Ditton had never tendered any proof of his alleged debt in the bankruptcy.

Sir Henry Jackson, Q.C. and Lumley Smith, for the appellant.—The appellant is a "person aggrieved" by the registrar's order within the meaning of the 71st section of the Bankruptcy Act 1869. He held a security on a lease for a debt due to him from the bankrupt, and by disclaiming the lease the trustee deprived him of his security. Though he has never proved, he is a creditor of the bankrupt's estate. There is nothing in the Act or rules to show that a creditor is a creditor who has proved. His bill to enforce his security was restrained on the ground that he would have his remedy in bankruptcy. They cited

*Ex parte Thoday, Re Ellis*, 34 L. T. Rep. N. S. 261; L. Rep. 2 Ch. Div. 228;

*Ex parte Learoyd, Re Foulds*, 39 L. T. Rep. N. S. 525; L. Rep. 10 Ch. Div. 3.

Winslow, Q.C. and Bigham, for the trustee, were not called upon.

Finlay Knight, for the comptroller.

JAMES, L.J.—I am of opinion that the appellant in this case has no *locus standi*. There must be

some limit to the persons who can appeal from orders made in bankruptcy. It is not every person who says, "I can put myself in the position of a creditor," who has the right to appeal. The only ground for an appeal here is that the bankrupt's estate ought to be increased by 4000*l.* for the benefit of the creditors. The appellant says that he can put himself in the position of a creditor. He has not pursued the mode prescribed by the Act and rules for proving that he is a creditor. He is nothing more than a person who could tender a proof, which might either be admitted or rejected, and if rejected by the trustee, he might appeal to the court. But he has not such an interest in the assets as to entitle him to appeal from the order from which he has presented this appeal. His case only goes to show that he is aggrieved by another order made in the proceedings. Things done so far back as 1876 must be taken to have been rightly done, and I am of opinion that there has been so much delay on the appellant's part that he is not entitled to have the hearing of the appeal adjourned so as to give him an opportunity of tendering a proof. He has never made an affidavit of his debt. There was a contention about it, and perhaps he is not really a creditor. At all events litigation has been going on between him and the bankrupt's estate since 1875, and he has never taken those steps to prove his debt which would have given him a *locus standi* to appeal. The appeal must therefore be dismissed with costs.

BART, L.J.—We cannot entertain this appeal unless the appellant is entitled to be treated as a creditor. He says that former orders of the court have recognised him as such, and he swears that he is one. But that is not enough to entitle the court to treat him as such. The Act of Parliament has pointed out the mode in which he is to establish his right as a creditor, and until he has done so I am of opinion that the court has no jurisdiction to treat him as a creditor.

COTTON, L.J.—I am of the same opinion. When the 71st section of the Act says that a person aggrieved by an order is entitled to appeal, that must mean a person aggrieved by the particular order from which the appeal is brought. It is said that the appellant was a secured creditor, and that his security has been destroyed; that he had a right to elect to come in and prove against the estate or to stand on his security, and that when the security was destroyed he had still the right to come in against the estate. The security was destroyed in 1876, and he then became an unsecured creditor, if he ever was a creditor at all, and not having come in then, he cannot be allowed to do so now.

JAMES, L.J.—The order will be, the court being of opinion that the appellant has no *locus standi*, and is not a person aggrieved by the order appealed from, let the appeal be dismissed with costs.

Solicitor for the appellant, A. G. Ditton.

Solicitors for the respondents, W. W. Aldridge; Prichard, Englefield, and Co.

Thursday, Feb. 20.

(Before JAMES, BRETT, and COTTON, L.JJ.)

Ex parte CARR; Re HOFMANN.(a)

**Mortgage—Secured creditor—Valuation of security—Proof for balance of debt—Costs of unsuccessful defence of title to part of security.**

A secured creditor who has realised his security is entitled, in proving in the bankruptcy of the mortgagor for the balance of his debt, to bring into account the costs of an unsuccessful defence of the title to part of his security.

A bankrupt, before adjudication, borrowed money from a bank on the security of a deposit of dock warrants for certain goods, part of which was afterwards found to belong to a merchant, who had left the dock warrants in the bankrupt's hands. The merchant sued the bank and recovered judgment for the sum which he had paid for the goods. The bank realised their security, and claimed to prove in the bankruptcy for the unsatisfied balance of their debt, in estimating which balance they deducted from the sum realised by the sale of the goods the costs of both parties in the action and the difference between the damages paid to the merchant, and the amount which his goods fetched:

Held, that in estimating their debts provable in the bankruptcy they were entitled to make these deductions, as the costs of the action were in the nature of salvage reasonably incurred in attempting to protect the title to the goods, and as the loss on the sale was not due to any improper delay on the part of the bank.

Ex parte Stephens (2 M. & Ayr. 31) not followed.

THIS was an appeal from a decision of Mr. Registrar Murray, sitting as Chief Judge in Bankruptcy.

The bankrupt, Hofmann, who was a dealer and broker in tobacco, had, before adjudication, deposited with the *Crédit Lyonnais*, a French bank, as security for advances made to him by the bank, the dock warrants for a quantity of tobacco lying in bond in his name in the St. Katherine's Docks, which he represented to be his own property, though he had really sold part of it to one Johnson who had left the dock warrants in Hofmann's hands to enable him to clear the tobacco when Johnson required it.

Johnson sued the *Crédit Lyonnais*, who, under legal advice, defended the action, and Johnson recovered as damages the sum which he had paid for the tobacco, with costs (see *Johnson v. The Crédit Lyonnais*, 36 L. T. Rep. N. S. 254; L. Rep. 2 C. P. Div. 224), and the judgment was affirmed on appeal (37 L. T. Rep. N. S. 657; L. Rep. 3 C. P. Div. 32).

The *Crédit Lyonnais*, having sold the tobacco for which the dock warrants had been deposited with them as security, realised a sum insufficient to satisfy their debt, and they tendered a proof in the bankruptcy of Hofmann for the unsatisfied balance of their debt. In estimating such balance, they deducted from the sum realised by the sale of the tobacco the costs of the action (both Johnson's and their own), and also the difference between the damages they had paid to Johnson and the amount produced by the sale of his tobacco.

The Registrar having held that they were

entitled to make these deductions, with the exception of the costs of the appeal in the action, the trustees in the bankruptcy appealed.

Winslow, Q.C. and Lane for the appellant.—It is clear that the costs of the action, having been incurred after the adjudication, could not be proved directly in the bankruptcy. Such costs are analogous to interest accrued due after an adjudication, the rule being that, inasmuch as such interest cannot be proved in the bankruptcy until all the debts in respect of principal have been paid in full, a secured creditor cannot, in estimating the balance for which he is to prove, bring into account interest on his debt accrued since the adjudication:

Re Savin, 27 L. T. Rep. N. S. 486; L. Rep. 7 Ch. 760.

Ex parte Stephens (2 M. & Ayr. 31) is a case exactly in point. It was there held, on the petition of an equitable mortgagee for a sale of the mortgaged property, that he was not entitled to be allowed out of the proceeds of sale the costs of successfully defending an extent in aid. [JAMES, L.J.—The report of that case is very imperfect; it merely gives the holding, without any statement of facts, or of the reasons on which the judgment was based.] In *Dryden v. Frost* (3 My. & Cr. 670) it was held that an equitable mortgagee is not entitled to have out of the estate his costs of an unsuccessful attempt to defend an action at law for recovery of the mortgaged premises. (See, too, *Fisher on Mortgages*, 3rd edit. pp. 1016, 1017.) As for the difference between the damages paid to Johnson, and the amount produced by the sale of his tobacco, that loss was caused by the improper delay on the part of the bank in selling it; and, therefore, they cannot be entitled to deduct that difference from the proceeds of sale.

Cookson, Q.C. and S. Woolf, for the bank, were not called upon.

JAMES, L.J.—I am of opinion that the decision of the registrar in this case must be affirmed. The *Crédit Lyonnais* accepted the tobacco as security for advances made by them to a man who represented himself to be the owner of the tobacco. The suggested analogy between interest on a debt and the costs in question in the present case does not exist. The costs were really expenses incurred by the owners of the security in respect of their security. The mortgagees stand on the same footing as if the security had been a house and a fire had destroyed it, and they had laid out money in rebuilding it, or as if a fire had diminished its value. The costs of the action are, in fact, a deduction to be made in estimating the value of the security. The only question is, were the costs reasonably and properly incurred? And I think that, under the circumstances, it was reasonable to defend the action, but, that, when judgment had been given against the bank, it was not reasonable for them to appeal. It was argued that this decision was adverse to that in *Ex parte Stephens* (*ubi sup.*), but that is not an authority that can carry any weight, for the report contains no statement of facts, nor any *ratio decidendi*. I must say that I cannot understand the principle of that decision, and, if necessary, I should be prepared to say that I would not follow it. The costs here, however, are in the nature of salvage money, and as such the bank were entitled to deduct them in estimating the value of their

(a) Reported by H. PRAT, Esq., Barrister-at-Law.



security, that is, the costs of defending the action, but not the costs of the appeal. As to the other part of the case, it appears that the tobacco diminished in value between the time of the sale to Johnson and the sale by the *Crédit Lyonnais*. But there is no evidence to show that there has been any improper delay on the part of the *Crédit Lyonnais*. Therefore we have no materials upon which to differ from the registrar's decision, and I am of opinion that the appeal must be dismissed with costs.

BRETT, L.J.—There was an express representation by the bankrupt that he had a right to give the bank a security upon the tobacco of which he held the dock warrants. When Johnson, to whom part of the tobacco really belonged, sued the bank for the value of it, the bank defended the action. It was held by the registrar that it was reasonable on their part to defend the action, and I agree with him. It is said that they cannot deduct the costs of the action in realising their security. If that contention were right, they could not recover the costs from anybody. If equity allowed that result, it would be an iniquity. As regards the case *Ex parte Stephens*, no decision is an authority unless we can tell what the decision was, and the report of that case does not enable us to do so.

COTTON, L.J.—I am of the same opinion. The appellant says that the estate would be larger if the claim of the bank were disallowed. That is not the proper test of the validity of the claim. The question really is, How are the net proceeds of the security to be ascertained? The costs which the bank seek to deduct in realising their security are the costs of defending the title to mortgaged goods which the bankrupt claimed to have power to dispose of. *Re Savin (ubi sup.)* was quite a different case. There the question was, what was the amount provable? And it was held that the provable debt consisted of the principal debt with interest to the date of the bankruptcy, but no interest which accrued due after the bankruptcy. I am of opinion that the registrar's decision must be affirmed.

*Appeal accordingly dismissed with costs.*

Solicitors for the appellant, *Linklater, Hackwood, Addison, and Brown.*

Solicitors for the respondents, *M. Abrahams and Roffey.*

Dec. 14 and 16.

(Before JAMES, BAGGALLAY, and THESIGER, L.JJ.)  
Re DUCHESS OF WESTMINSTER SILVER LEAD ORE COMPANY. (a)

*Practice—Appeal—Party not served—Rules of Court 1875, Order LVIII., rr. 2, 3—Shorthand notes of evidence—Costs.*

*H., and his two sons, M. and W., agreed to take 1400 l. shares in a company, to be divided equally among them, and H. paid 310l. in respect of the shares. The shares were allotted, 467 to H., 467 to M., and 466 to W. Subsequently the shares were, at the suggestion of the father and his sons, cancelled (but without any authority) with the exception of 310 which were issued to M. for the 310l. which had been paid. The company having been afterwards ordered to be wound-up, the court ordered M. to be placed on the list of con-*

*tributories for 157 (the 467 less the 310 paid for), H. for 467, and W. for 466. W. gave notice of appeal from so much of this order as ordered that he should be included in the list of contributories in respect of 466 shares, serving the notice on the official liquidator only:*

*Held (by James and Baggallay, L.JJ., dissentiente Thesiger, L.J.) that although the order could not be altered as against M., the time for serving him with notice of appeal having expired, a direction ought to be made crediting W. with one-third of the 310l., which the court was of opinion had been paid in respect of all the 1400 shares.*

*The cost of shorthand notes of the evidence in the court below will not be allowed upon an appeal as a matter of course, but only when a case is made out for allowing them.*

THIS was an appeal from an order of the Master of the Rolls.

The Duchess of Westminster Silver Lead Ore Company was a limited company with a capital of 15,000l. in 15,000 shares of 1l. each.

Soon after the formation of the company Henry Walker agreed to take 1400 shares on behalf of himself and his sons, Moses Walker and William Walker, to be equally divided between the three. A few days afterwards, in the presence and with the concurrence of his two sons, Henry Walker gave directions to the secretary of the company that 467 of the shares should be allotted to himself, 467 to Moses Walker, and the remaining 466 to William Walker. Henry Walker had before this paid two sums of 200l. and 110l., making together 310l. in respect of the shares. The shares were entered in the books of the company in accordance with the directions given by Henry Walker, and certificates for them were given out.

Subsequently a proposal was made by the Walkers that the shares should be cancelled, and that 310 shares only should be issued to Moses Walker for the 310l. which had been paid. This was accordingly done, but, as it appeared, without any authority.

The company having been ordered to be wound-up, the official liquidator applied to the court that the three Walkers might be placed upon the list of contributories for 467, 467, and 466 shares respectively. There was a complete conflict of evidence on the affidavits as to the agreement to take the shares, William Walker denying that he had ever agreed to take shares, and both sons denying that they were present when their father gave directions to allot the shares as aforesaid. The Master of the Rolls, therefore, tried the case on oral evidence, and arrived at the conclusion that it was established that the father had given such direction for the allotment of the shares in the presence and with the concurrence of his two sons. His Lordship also held that the cancellation of the shares was invalid, but that nevertheless the 310l. was to be treated as paid in respect of the shares allotted to Moses Walker, making 310 of his shares fully paid up, and leaving him liable only in respect of 157 shares. His Lordship accordingly ordered Moses Walker to be placed upon the list of contributories for 157 shares, William Walker for 466, and Henry Walker for 467 shares.

William Walker gave notice of motion by way of appeal from so much of this order as ordered that he should be included in the list of contri-

(a) Reported by H. FRAY, Esq., Barrister-at-Law.

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butories in respect of 466 shares, and should pay to the official liquidator the costs of the application on which the order had been made. He served only the official liquidator with this notice.

*Marten, Q.C.* and *Yate Lee*, for the appellant, contended that he had never agreed to take shares, and that even if he was liable in respect of one-third of the 1400 he ought to be credited with one-third of the 310*l.* which had been paid in respect of them.

*Ince, Q.C.* and *Lockwood*, for the official liquidator, were called upon as to the latter point only. The notice of appeal does not raise this point, and it cannot now be raised, Moses Walker, who has been credited with the whole of the 310*l.*, not having been served with notice of the appeal. In his absence the order in his favour cannot be altered. They referred to

Rules of Court 1875, Order LVIII., r. 3.

*Marten, Q.C.* in reply.—The appeal is against the whole order. Rule 2 of Order LVIII. shows that a mere notice of motion is enough, and that when the whole order is complained of, it is unnecessary to specify particulars. If the appellant is entitled to be credited with one-third of the 310*l.*, he ought not to lose his right because the order has given Moses Walker a benefit to which he is not entitled.

*JAMES, L.J.*—We see no reason to disturb the decision of the Master of the Rolls, that William Walker was fixed with a liability to take one-third of the 1400 shares, but we think that he was entitled, in justice, to be credited with one-third of the 310*l.* which had been paid on them. He is fixed on the ground of one interview at which he agreed to take one-third of the 1400 shares in respect of which that sum had been paid. He has a right to say that that sum must be taken as paid in respect of all the shares, and nothing has been shown which could have the effect of depriving him of that right. The whole matter has been reheard before us, and we must make the order which, in our judgment, the Master of the Rolls ought to have made. Has the appellant lost his title to have that order set right? The application was made against him along with his father and brother, and he complains that his case was prejudiced by being mixed up with theirs. We have not given much weight to that consideration, but it is the right of the appellant to have his case tried by itself. The other brother has been allowed credit for the whole of the 310*l.* and has thus gained a benefit of which he cannot be deprived, as the time for appeal has passed; but that is the official liquidator's own fault. The appellant gave his notice of appeal in due course against the whole order, and was not bound to give specific notice that he desired the order to be set right in such a particular as this. The order of the Master of the Rolls will, therefore, be varied by giving the appellant credit for one-third of the 310*l.*; but this will not affect the costs of the appeal, which must be paid by him, as he has failed in his main contention.

*BAGGALLAY, L.J.*—The questions we have to decide are, what order ought originally to have been made, and whether, having regard to the way in which the matter is brought before the Court of Appeal, the appellant is entitled to have the variation which he asks made in the order. I

agree with the Master of the Rolls that the appellant was bound by a concluded agreement to take one-third of the 1400 shares; and I also think that he was entitled to have credit for one-third of the 310*l.* Then, as to the way in which the matter is brought before the Court of Appeal. The appellant appeals from the whole order and asks that it may be discharged or varied. That is wide enough to include such a variation as the giving him credit for one-third of the 310*l.* The rights of the appellant cannot, in my opinion, be affected by the circumstance that Moses Walker has obtained something to which he was not entitled, and that it is too late to deprive him of it.

*THESIGER, L.J.*—I agree that the appellant is liable as a contributory in respect of the 466 shares, but as to the subsidiary point, I am unable to agree with the other members of the court. I admit that each of the three contributories was fully entitled to have his case treated separately, and that on this appeal we can only look at the evidence as far as it affects this particular appellant. But in considering whether we ought to interfere with the order of the Master of the Rolls, we must look at the position of the parties. Each party set up that he was not a shareholder, except that Moses Walker admitted himself to be the holder of 310 shares on which 310*l.* had been paid. The Master of the Rolls seems to have treated the parties as bound *inter se* by the arrangement entered into by them when the attempted cancellation took place, though the arrangement was in other respects invalid. I think that he was hardly justified in doing so, and that he ought rather to have held that all parties were remitted to their original position. The point appears not to have been fully argued before the Master of the Rolls, but only touched on; still, if the appeal had been properly instituted, and all parties interested in it had been here, I think that the point might have been raised here. One order was drawn up in which the three cases were dealt with together, and the court therefore purported to do justice between all parties, and I cannot think that the question whether the 310*l.* was properly dealt with is raised by this notice of appeal, which only seems to raise the question whether the appellant is a contributory, and does not bring here all the parties interested in the question, whether he is entitled to be credited with any part of the 310*l.*, which is an entirely separate question. According to Order LVIII., r. 2, the notice of appeal where part of an order is complained of must specify such part, and it appears to me that the appellant ought in this case to have specified that he appealed as to no part of the 310*l.* being allowed him, and ought to have served the other parties.

*Ince, Q.C.* for the official liquidator, asked that the costs of the shorthand notes of the evidence in the court below might be allowed.

*Marten, Q.C.* opposed the application.

*JAMES, L.J.*—I am of opinion that shorthand notes of the evidence ought not to be allowed as a matter of course, but only when a case is made for allowing them. Here no such case is made.

*BAGGALLAY, L.J.*—I am of the same opinion.

*THESIGER, L.J.*—In the Common Law Divisions we have always been in the habit of using the

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judge's notes, and shorthand notes cannot be generally necessary.

Solicitors for the appellant, *Le Riche and Son*.

Solicitors for the respondent, *Layton and Jaques*.

Jan. 31 and Feb. 28.

(Before JESSER, M.R., and JAMES and BRAMWELL, L.JJ.)

CHILD v. STENNING. (a)

*Measure of damages—Breach of covenant for quiet enjoyment—Claim for alternative relief against one of two defendants—Costs of successful defendant.*

A lessor demised a piece of building land to S., and granted him certain rights of way. He afterwards demised an adjoining piece of land to C., and covenanted with him in the ordinary form for quiet enjoyment. S. claimed to be entitled under his lease to a right of way over part of the land demised to C. The lessor alleged that he had granted no such right of way to S. Thereupon C. brought an action against S. and the lessor, claiming an injunction and damages against S., or, in case the court should hold that S. was entitled to the right of way in question, then damages from the lessor.

Fry, J. held that S. was entitled to the right of way, and dismissed the action as against him with costs to be paid by the plaintiff, and gave 400l. damages against the lessor.

On appeal by the lessor as to the amount of the damages:

Held, that, as the plaintiff had not been evicted, he could only recover the damages which he had actually sustained up to the date of the writ in the action, and that as there was no evidence of actual damage, the amount of the damages ought to be reduced to 40s.; but that the lessor must pay the costs which the plaintiff had been ordered to pay to S., as the action had been caused by his erroneous representation that he had not granted the right of way to S.

THIS was an appeal from a decision of Fry, J.

The hearing in the court below is reported in 28 L. T. Rep. N. S. 232.

The Rev. A. D. Wagner, by an agreement dated the 26th Dec. 1865, agreed to demise a piece of building land at Brighton, together with the rights of way thereto belonging, to the predecessors in title of the defendants Messrs. J. and A. Stenning, for a term of ninety-nine years.

By another agreement, dated the 29th May 1874, Mr. Wagner agreed to demise an adjoining piece of land to the plaintiff for a term of ninety-nine years, and on the 24th June 1876 a lease was executed to the plaintiff, containing the usual covenant by the lessor for quiet enjoyment.

Messrs. Stenning claimed a right of way over the land comprised in this lease; but Mr. Wagner assured the plaintiff that he had granted them no such right of way; whereupon the plaintiff brought his action against Messrs. Stenning and Mr. Wagner, claiming an injunction and damages against Messrs. Stenning, or, in the alternative, if the court should be of opinion that they were entitled to the right of way, damages against Mr. Wagner.

Fry, J. held that Messrs. Stenning were entitled

to the right of way, and dismissed the action as against them, ordering the plaintiff to pay their costs, and gave judgment for the plaintiff against Mr. Wagner for 400l. damages.

From this decision Mr. Wagner appealed.

*Kekewich, Q.C. and Fellows*, for the appellant.—The plaintiff not having been evicted, he is only entitled to the amount of damage actually sustained, and the evidence shows no actual damage:

*Dennett v. Atherton*, L. Rep. 7 Q. B. 316.

*Cooke, Q.C. and Morehead*, for the respondent.—*Wall v. The City of London Real Property Company* (30 L. T. Rep. N. S. 53; L. Rep. 9 Q. B. 246) is in favour of the assessment of damages made by Fry, J. But at all events the appellant ought to pay the costs of Messrs. Stenning's successful defence, as the action was caused by his erroneous representations.

No reply.

JAMES, M.R.—This is an appeal from a decision of Fry, J., in which he has given 400l. damages for breach of a covenant for quiet enjoyment. Now the facts of the case, so far as it is necessary to state them, are few. The Rev. Mr. Wagner had granted a lease to Messrs. Stenning of some land, together with the rights of way thereto belonging. He afterwards granted a lease to the plaintiff of some land, and, after the grant of the lease to the plaintiff, Messrs. Stenning alleged that they had a right of way over part of the land. Mr. Wagner denied that they had such right, or that he had granted any such right, and informed the plaintiff, Mr. Child, that Messrs. Stenning were trespassers, and liable as such. Thereupon Mr. Child brought an action against Messrs. Stenning, to restrain them from interfering with or trespassing on his land; and he also joined as defendant Mr. Wagner, asking against him alternate relief—that if it should turn out that Messrs. Stenning were not trespassers, and had a right of way, then that Mr. Wagner should pay damages for the breach of covenant for quiet enjoyment contained in his lease to the plaintiff. When the case came on for trial, Mr. Wagner supported the plaintiff in his contention, but Messrs. Stenning succeeded in proving to the satisfaction of the judge—and there is no appeal from the decision on that point—that under the grant of the rights of way belonging to the land leased to them the right of way in question passed, so that they were entitled to a right of way, and it consequently follows that the plaintiff is entitled to what damages he can prove as against Mr. Wagner under the covenant for quiet enjoyment up to the date of the issuing of the writ, for that is the time up to which the damages are calculated when there is no eviction. It has been held that where there has been an eviction, so that you can never have another action under the covenant for quiet enjoyment, but are ousted once and for ever, there, of course, the damages must be assessed once for all; but where there has been no eviction, the damages, of course, are only the damages actually sustained, because you cannot tell what will happen in the future, you cannot tell how far persons who have a right to interfere and disturb the quiet enjoyment may choose to avail themselves of that right, or whether they will interfere at all. That being so, the evidence should have

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

been directed to show that some actual damage had been sustained by the plaintiff by reason of the interference of Messrs. Stenning by the exercise of their right of way, before the issuing of the writ. On considering the evidence, I can find nothing of the kind. The evidence of the plaintiff shows damage done to him by the stacking of timber on part of the land by Messrs. Stenning, which, of course, was not an exercise of their right of way. If they had no right to do it, it was a mere trespass. But that is not an element of the damage which the plaintiff can recover against Mr. Wagner. Then there is the evidence of the surveyor, as to the diminished value of the land as building land, which would be available, no doubt, if the action had been on a covenant for title, that is, a covenant that the vendor was seised, or that the vendor had a right to lease, but which is not admissible in an action merely for breach of the covenant for quiet enjoyment. Beyond that there is really nothing in the shape of evidence. The result, therefore, must be that the damages will be the usual damages in an action to try a right. That is, they should be reduced to 40s. But the respondent, on appeal, complains that the judge in the court below made him, and made him properly, pay the costs of Messrs. Stenning, against whom the action wholly failed, but did not give him those costs over against the defendant Wagner. I think he is entitled to complain of so much of the decision. Whose was the case of the action? Whose error was it that gave rise to the whole litigation? Clearly Mr. Wagner's. It was his grant to Messrs. Stenning which gave them the right of way of which the plaintiff complained. Who incited the plaintiff to bring an action against Messrs. Stenning? Mr. Wagner. He represented to the plaintiff, and even up to the time of trial insisted upon that representation, that he had made no grant of the right of way to Messrs. Stenning, and that they were mere trespassers. It appears to me on principle that he who was the person who caused the litigation, whose error caused it, and whose representation caused it, ought to be the person to pay the costs of it. There is a somewhat analogous decision in the case of *Williams v. Burrell* (1 C. B. Rep. 402). There there was a tenant for life with a leasing power. He demised for ninety-nine years, if three persons so long lived. There was a covenant which the court held was a covenant for quiet enjoyment. After the death of the tenant for life it was held that the power was badly executed, so that the lease terminated with his life, and then the assignee of the lease having brought an action against the executors of the grantor of the lease, and it having been shown that the executors were cognisant of the defence to the ejectment, which had been brought by the remaindermen, and almost incited the lessee to defend, the Court of Common Pleas unanimously gave as damages, in addition to the value of the property, the costs incurred in defending the ejectment by the lessee, who was evicted by the remaindermen, entirely, as it seems to me, upon the ground that the executors instigated the defence, and insisted upon the thing being tried out to show whether or not this lease was valid. Now that exactly applies to this case. Mr. Wagner insisted upon his right to grant to the plaintiff free from the right of way. He so insisted up to the moment

of trial. He insisted upon that question being decided, and it appears to me on principle that he ought to pay the costs of it; and, therefore, that the order of the judge below should be varied, first of all, by reducing the damages to 40s., and, next, by adding to the costs of the plaintiff the costs which he has paid Messrs. Stenning in the court below. As regards the costs of appeal, it appears to me that in fact both sides have succeeded, and both sides have failed, and that, therefore, there should be no costs of the appeal.

JAMES, L.J.—I am entirely of the same opinion, and I must say I should have struggled hard to sustain the judgment of Mr. Justice Fry for 400l. if I had been impressed more than I have been with the substantial accuracy of the surveyor's evidence, which I am bound to say has not impressed me at all. I may throw out, for the comfort of Mr. Child, who thinks he has been deprived of so much of this property, that the surveyor does not seem to have taken into his consideration what probably Mr. Child will take into his consideration, when I tell him that there is nothing in that right of way that the Stennings have established to prevent Mr. Child from building over this piece of ground, and building any house, warehouse, yard, or store of timber to any height he likes, so that he does not interfere with the passage of the waggons under that covered way through the doorway. In other respects I entirely agree with what the Master of the Rolls has said.

BRAMWELL, L.J.—I have nothing to add. I agree.

Solicitors for the appellant, *Gibson and Stibbard*, agents for *Woods and Dempster*, Brighton.

Solicitors for the respondent, *Smith, Fawdon*, and *Low*, agents for *Lamb*, Brighton.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

March 6, 7, and 19.

(Before BACON, V.C.)

PRESTON v. NEBLE. (a)

*Grant of annuity—Policy of insurance effected by grantees—Redemption—Right to policy.*

*P. and his wife, in consideration of 600l., on the 20th March 1822 granted an annuity to N. during the term of ninety-nine years, if his wife should so long live; and by the same deed the wife granted the rents, issues, and profits of copyhold property to which she was entitled for her separate use, to N. during her life upon trust to pay or retain the annuity thereout and such premiums of assurance as therein mentioned, and subject thereto, to account for the residue to the wife. By this deed P. covenanted for his wife's title, for her appearance at any insurance office selected by N., and that she would not during the continuance of the annuity go beyond the seas without notice to N., to enable him to pay additional premiums, and for payment to N. of any such additional premiums. There was a power of sale and a power to P. to repurchase for 600l. and all arrears of the annuity. On the 19th March 1822 N. had insured Mrs. P.'s life for*

(a) Reported by W. COWELL DAVIES, Esq., Barrister-at-Law.

600*l.* at a premium of 16*l.* 7*s.* 6*d.*, which, with the interest at 8 per cent. on 600*l.*, amounted to the same sum as the annuity, and was alleged to have been charged on the mortgaged property and secured by the annuity. N. and his representatives had been in possession of the mortgaged property from 1822 down to the present time. In a suit by the representatives of P. and his wife against the representatives of N., for accounts of what was due on the annuity, and as against the defendants as mortgagees in possession on the footing of wilful default:

*Held*, on the authority of *Knox v. Turner* (23 L. T. Rep. N. S. 227; L. Rep. 5 Oh. 515), and *Gottlieb v. Cranch* (21 L. T. Rep. 284; 4 De G. M. & G. 440), that the proceeds of the policy effected by N. as indemnity against default of payment did not constitute a security in which the grantor of the annuity had any right or interest, and that the plaintiffs were not entitled to the surplus of the proceeds of the policy after payment of the consideration money and all arrears of the annuity.

*Lawley v. Hooper* (3 Atk. 280), *Bulwer v. Astley* (1 Ph. 422), *Lea v. Hinton* (24 L. T. Rep. 101; 5 De G. M. & G. 823), *Drysdale v. Piggott* (27 L. T. Rep. 310; 8 De G. M. & G. 546), *Courtney v. Wright* (3 L. T. Rep. N. S. 433; 2 Giff. 337) discussed.

In March 1822, Sarah Preston, then the wife of Edward Preston, was entitled, under her father's will, to a life interest for her separate use, in certain copyhold hereditaments at Hornsey, with power by deed or will to surrender or appoint the reversion for an estate of inheritance according to the custom of the manor. By a deed of the 20th March 1822, made between Mr. and Mrs. Preston of the one part and Samuel John Neele of the other part, in consideration of 600*l.*, Edward Preston granted to Samuel John Neele, his executors, administrators, and assigns, an annuity of 64*l.* 7*s.* 6*d.* during the term of 99 years from the date of the said indenture if Sarah Preston should so long live, and by the same indenture Mrs. Preston granted the rents, issues, and profits of the copyhold hereditaments at Hornsey unto S. J. Neele, his executors, administrators, and assigns, during her life, upon trust to retain and pay the annuity thereout, and all costs, charges, and expenses occasioned by the nonpayment thereof, and of such premiums of insurance as therein mentioned, and subject thereto to pay account for and dispose of the residue unto Mrs. Preston, or as she should direct or appoint for her sole and separate use. By this deed Edward Preston covenanted for his wife's title, and for further assurance by her; for her appearance at any insurance office selected by Neele, and to furnish certificates of her place of abode and the state of her health, in order that Neele might, if he should think fit, insure her life; that she should not go beyond the seas without notice to Neele, in order that the additional premiums thereby to be incurred might be paid to the insurance office so as to prevent any loss or damage to Neele by reason of her going beyond the seas; for payment to Neele of all such additional premiums and all such damage as he might sustain by reason of Sarah Preston's going beyond the seas without notice; that Sarah Preston should not do any act which might impeach or make void any policy of insurance already

effected or thereafter to be effected by Neele on her life. The deed also contained a power of sale in case of nonpayment of the annuity, and a power to Edward Preston, after notice in writing to Neele, to repurchase the annuity at any time after the expiration of three years from the date of the indenture on payment to Neele of 600*l.*, together with all arrears of the annuity. And Neele thereby covenanted upon such payment or the extinguishment of the annuity to reassign and surrender the hereditaments thereby assigned in such manner as Edward Preston should direct. On the 19th March 1822 Samuel John Neele effected a policy of insurance in the Provident Life Insurance Office on the life of Sarah Preston for the sum of 600*l.*, at an annual premium of 16*l.* 7*s.* 6*d.*, which with 48*l.*, the interest on 600*l.* at 8 per cent., was alleged by the plaintiffs to have been charged on the mortgaged premises, and secured by the annuity of 64*l.* 7*s.* 6*d.*

S. J. Neele died in 1824, and he and his representatives had been in possession of the premises mortgaged by the indenture of the 20th March 1822 down to the present time.

Edward Preston died in Nov. 1858, and Sarah Preston, in Jan. 1868, filed her bill against the then representatives of the late S. J. Neele praying for an account of what was due in respect of the annuity, and for accounts against the defendants as mortgagees in possession of the property mortgaged as a security for the annuity, on the footing of wilful default.

Sarah Preston died in Jan. 1869, and the bill was subsequently re-amended, and the suit was revived by the representatives of Mr. and Mrs. Preston against the then representatives of S. J. Neele; the accounts and relief claimed by this reamended bill was practically the same as that claimed by the original bill, and the only question argued on the hearing was whether the proceeds of the policy effected by S. J. Neele on Sarah Preston's life formed a part of his personal estate, or whether the annuity having ceased to be payable, such proceeds after deducting all sums which had become due in respect of the annuity and 600*l.* the amount of the consideration money, belonged to the personal representatives of Sarah Preston.

Sir H. Jackson, Q.C., and *Willie Bund* for the plaintiffs.—Where, as in this case, a policy is effected on the life of a person who must have joined in the mortgage as surety only, the presumption arises that the policy was effected for the benefit of that surety, and the tendency of the court is to treat annuities granted as this annuity was with a power of repurchase as redeemable annuities, and to admit the distinction between redemption and repurchase in cases in which, as here, the grant of the annuity and the stipulation for repurchase form part of the same transaction:

*Lawley v. Hooper*, 3 Atk. 280;

*Bulwer v. Astley*, 1 Ph. 422.

The policy is clearly referred to by the form of the deed of March 1822 by the provisions that Mrs. Preston is not to go abroad without notice to Neele; and that any increase of premiums caused thereby are to be borne by the husband: the grantee's representatives are not entitled:

*Ex parte Andrews*; *Re Emmet*, 1 Mad. 573.

This was clearly a mortgage transaction in which Mrs. Preston joined as surety, and, where the relation of debtor and creditor subsists, and a policy of insurance is effected by the creditor, directly or indirectly at the expense of the debtor, under circumstances which show that it was intended as a security or indemnity to the creditor, he is bound on payment of the debt to deliver up the policy, and the same principle applies to the case of a life annuity:

*Courtney v. Wright*, 3 L. T. Rep. N. S. 433; 2 Giff. 337.

Neale was in possession and in receipt of the rents of Mrs. Preston's property, and the premiums of this policy were paid out of those rents; indeed, the annuity included the sums requisite to provide for these premiums, and therefore Mrs. Preston's representatives, not the representatives of Neale, the grantees of the annuity, are entitled to this policy money. They also referred to

*Fisher on Mortgages*, 3rd edit. p. 20, s. 18;

*Knos v. Turner*, 21 L. T. Rep. N. S. 701; L. Rep. 5 Ch. 515; s. c., 23 L. T. Rep. N. S. 228; L. Rep. 5 Ch. 515;

*Gottlieb v. Cranch*, 21 L. T. Rep. 284; 4 De G. M. & G. 440;

*Lea v. Hinton*, 24 L. T. Rep. 101; 5 De G. M. & G. 583;

*Frime v. Brade*, 31 L. T. Rep. 347; 2 De G. & J. 583;

*Drysdale v. Piggott*, 27 L. T. Rep. 310; 3 De G. M. & G. 546.

*Bigby* (North, Q.C. with him) for the defendants.

—The circumstances in *Lawley v. Hooper* and *Bulwer v. Astley* (*ubi sup.*) and the present case are quite different; the annuity never was redeemed or re-purchased in this case; *Lea v. Hinton* (*sup.*) is not applicable. The representatives of the grantor have no right to have the proceeds of this policy paid to them. *Knos v. Turner* (23 L. T. Rep. N. S. 227; L. Rep. 5 Ch. 515) and *Gottlieb v. Cranch* (21 L. T. Rep. 284; 4 De G. M. & G. 440) are distinctly in favour of our contention. I say that "re-purchase" in the mortgage deed means "re-purchase," not redemption; the provisions for payment of extra premiums are only an item in the calculations. The policy was effected as a security for the debt and must follow the debt. *Bashford v. Cann* (9 L. T. Rep. N. S. 43; 33 Beav. 109) is an authority limiting the cases cited by Sir H. Jackson (if they are applicable at all) to cases where an attempt at redemption has been made. *Drysdale v. Piggott* (*sup.*) and the other cases relied on by the plaintiffs are all clear cases of debtor and creditor, and the insurance being only to secure the debt, the creditors, insuring, had no interest after the debt was paid. *Ex parte Varnish, Re Burghart* (1 M. D. & De G. 514) was also referred to.

Sir H. Jackson, Q.C. in reply.

*Our. adv. vult.*

March 19.—BACON, V.C.—The principal question—it may be said the only important question—which has been argued in this case is whether or not the proceeds of a policy of insurance effected by the grantee of an annuity form a part of his personal estate, or whether, the annuity having ceased to be payable, such proceeds, after deducting all sums which had become due in respect of the annuity and the amount of the consideration paid for the purchase of the annuity, belong to the personal representatives of a person who had joined in the grant of the annuity by way of

surety only. The main facts of the case do not differ materially from those which ordinarily occur in annuity transactions. [His Lordship then stated the facts relating to the grant of the annuity, and considered the form of the deed of the 20th March 1822, and continued:] The deed, therefore, it will be observed, is in the form which has become, by long practice, usual and most familiar in such like transactions, and contains no stipulations more onerous upon the grantor, or more advantageous to the grantee than are not only lawful, but are frequent and customary. I say this because in the argument on the part of the plaintiff many observations have been made on terms of the deed which it will be proper to notice hereafter. Such of the facts in the case as are necessary to be considered for the purpose of the decision now to be pronounced are not in dispute. [His Lordship then stated the facts as above, and continued:] Now in this state of circumstances it has been insisted on the part of the plaintiff that he is entitled, as the legal personal representative of the original plaintiff, to have the policy of insurance on her life treated as a security held by the grantee for the payment of the annuity, and that the annuity (with all arrears, if such there be) being satisfied, he is entitled, Sarah Preston having been a surety only, to repurchase or redeem the annuity, and to have all the securities held by the grantee transferred to him; that is to say, that he is entitled to have the proceeds of the policy brought into the account of all that had been received, or, but for their wilful default, might have been received, by the grantee and his successors, and deducting from the amount all that became due in respect of the annuity and the sum of 600*l.* originally paid by the grantee, to have the surplus paid to him, the plaintiff. And for this purpose reliance has been placed upon the principle that, the deed of grant containing a clause of repurchase or redemption, the transaction must be considered as a loan, and not as it purports to be, an absolute sale of an annuity. In support of this assertion, reference is made to a decision of Lord Hardwicke (*Lawley v. Hooper*, 3 Atk. 280), in which it was so held. In considering that decision which (although it has been described by the defendant's counsel, somewhat irreverently, as being "musty") I treat as of unquestionable authority, regard must be had to the actual substance of the case. It was decided at a time when the rigour of the laws against usury had induced the courts to go to all legitimate lengths for the purpose of checking the devices by which dealers in loans had proved themselves too strong for the law. The necessities of borrowers and the greed of dealers in money, had led to the invention of lending upon annuity, the principal feature of which was that the lender, having no means of compelling the repayment of the money lent, was not subject to the heavy forfeiture imposed by the statute upon usurious dealing—a contrivance which had proved practically successful, but which the courts found themselves bound to discountenance and thwart. In the case before Lord Hardwicke (*Lawley v. Hooper*, *supra*), a spendthrift youth less than twenty-two years of age, penniless, and in prison, had been induced, under the pressure of his necessities, to grant an annuity of 150*l.* for his life, at what, in the eye of the law, as it then stood, was thought to be an odious and unlawful rate of usury in considera-

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tion of a present advance of 1050*l.*, by which he was enabled to procure his release from gaol. Upon considering all the circumstances, the provisions of the deed, and especially the stipulation which the grantor had inserted to the effect that if any repurchase of the annuity should be made the grantor should pay him a bonus over and beyond the annuity, the Lord Chancellor was able to come to the conclusion that the transaction was a loan, and was not protected by the mere form on which the security had been taken; and he accordingly decreed that the plaintiff was entitled to redeem the security upon payment of the 1050*l.* with interest from the date of the deed in 1787 (the decree being in 1745), and of all such sums as had been paid by the grantee for insurance of the grantor's life with ordinary legal interest. This is, I believe, the only case in which an annuity transaction has been thus dealt with, and unless it proceeded upon the ground that a fraudulent advantage had been taken of the grantor's youth and indiscretion and necessities (which there is reason, from the terms of the Lord Chancellor's judgment, to believe it did), it seems difficult to reconcile it with any of the principles applicable to contracts not prohibited by the law. Grants of annuities are perfectly lawful in themselves, and there have been many cases in which the right to repurchase or redeem them has been decreed—but the Court of Equity has never, so far as I know, turned a grant of an annuity untainted by fraud into a simple loan of money repayable with simple interest—and in the present case there is no suggestion of fraud or advantage taken of the grantor. The case before Lord Hardwicke was referred to in a more recent case which has been cited in support of the plaintiff's contention, I mean *Bulwer v. Astley* (1 Phillips, 422), in which Lord Lyndhurst noticed the effect of a power of repurchase or redemption as decided by Lord Hardwicke, but he did so for a different purpose and under very different circumstances. An owner of large landed estates had raised money by means of rentcharges, the grants of which contained powers of repurchase and redemption by the borrower. By his will he had directed the payment of all his debts out of his personal estate and by other means; and subject thereto he disposed of the rest of his estate in such a manner as that the plaintiff in the suit was then tenant for life. The question there raised was, whether the tenant for life was bound to pay the annuities or rent charges, or whether the power to repurchase ought not to be exercised by means of the personal estate and such other means as were applicable under the will for that purpose, and Lord Lyndhurst there held that the sums which had been advanced to the testator were to be considered as debts of his which ought to be paid (treating "repurchase" and "redemption" as being synonymous) in compliance with the directions of the will, that the original decree ought to have directed the annuities to be valued, and that the tenant for life was bound only to keep down the interest of the estimated value. None of the annuitants were parties to the suit, and could not be in any degree affected by the decision, nor is there in the judgment any suggestion of a principle upon which the value of the annuity was to be estimated. Neither of these decisions appears to me to have any direct application to the case before me, for not only is there no impeachment

of the original grant of the annuity, but there can be no repurchase or redemption of the annuity granted in 1822 and subsisting till 1869, when it ceased, since the original plaintiff claimed no such right, nor did she in any manner mention or allude to any right of repurchase. It has, however, been insisted that inasmuch as the annuity included the sum requisite to provide for the insurance on her life (as I have no doubt it did, although it is not so expressed), and, as the rent of the mortgaged premises were the separate estate of Sarah Preston, it must be concluded that the annual premiums were paid with her moneys; and that as the additional premiums, if any such arose, were charged upon the same premises, she must in all cases be regarded as a surety only, and therefore entitled, upon the annuity being satisfied, to have the benefit of all the securities held by the grantee. The annuity and the money received by the grantee under it were his money when he received it. He was under no obligation to insure. He might have dropped the insurance, or he might have sold or surrendered the policy whenever he thought fit. For these reasons, as well as upon the facts stated in the answers and deposed to, I do not think it can be said that any person other than the grantee was at any time entitled to the policy. And this being so, I find it impossible to conclude that the original plaintiff could, when alive, or her representative, the present plaintiff, can now, establish any right to the policy on the ground that it was a security, to the transfer of which Sarah Preston—surety though she was—could in any sense be held to be entitled. There have been several cases in which the title to policies of insurance, effected by way of security, have come under consideration, some of which have been referred to in the argument, but none of which appear to me to favour the plaintiff's contention. In *Lea v. Hinton* (24 L. T. Rep. 101; 5 De G. M. & G. 823) the defendant, as surety and creditor, effected an insurance for the purpose of indemnifying himself, and received a larger sum on the policy than was necessary for those purposes. It was there held that he was not entitled to retain more than was sufficient to repay him, and that the surplus belonged to the estate of the debtor, against whom he had charged all that he had paid. In *Drysdale v. Piggott* (27 L. T. Rep. 310; 8 De G. M. & G.) a similar decision was made, although there all the premiums had been paid by the creditor who had insured, and notwithstanding that the debtor had refused to pay the premiums when requested to do so; and *Courtesy v. Wright* (3 L. T. Rep. N. S. 433; 2 Giff. 337) is to the like effect. But in all these cases the relation of debtor and creditor was indisputable, and the ground of the decisions was that, the insurance being only to secure the debt, the creditor insuring had no interest after the debt was paid. In this case it appears to me impossible to say that the relation of debtor and creditor at any time subsisted between the parties to the deed by which the annuity was secured, and therefore impossible to say that the cases referred to in any degree support the plaintiff's contention. The case of *Gottlieb v. Oranch* (21 L. T. Rep. 228; 4 De G. M. & G. 440), often referred to, and as I conceive, never questioned, explains and establishes the principles applicable to cases like the present. And, although in the more recent case of *Knox*



*v. Turner* (21 L. T. Rep. N. S. 701; L. Rep. 9 Eq. 155), *Stuart, V.O.*, expressed considerable doubt as to the grounds upon which some of the preceding decisions had been arrived at, yet, feeling himself bound by those decisions, he dismissed the bill of a plaintiff who, under circumstances not distinguishable from the present (except that he had repurchased an annuity which the grantee had protected by effecting an insurance), sought to compel the grantee to transfer to him the policy. The Vice-Chancellor, in his judgment, so expressed himself as to encourage an appeal, an appeal was brought, and being heard before Lord Hatherley as Chancellor, was by him unhesitatingly dismissed. It must, I think, therefore be considered as fully established upon authority that a grant of an annuity like that in the present case is a transaction perfectly lawful and perfectly plain. That whatever be the right of repurchase, no relation of debtor and creditor is thereby created—that the indemnity which the grantee thinks fit to create for himself does not constitute a security in which the grantor has any right or interest, and that the claim of the plaintiff to have the proceeds of the policy brought into the account as if the original plaintiff could have claimed any interest in it, wholly fails. That she did not claim any such interest I have already stated; that she did not insist on repurchasing is apparent. And even if she had possessed any such right to repurchase as is alleged, it must, to have been effectual, have been asserted in her lifetime while there was existing some subject capable of being repurchased. I think, therefore, that so much of the bill as seeks to have the benefit of the proceeds of the policy, must be dismissed with costs; but at the suggestion of the defendants I direct that their costs be credited to them in the account to be taken. In other respects there will be a direction for the usual account of the rents and profits received by the defendants and their predecessors in possession of the mortgaged estate in the order and form against a mortgagee in possession, and farther consideration and subsequent costs must be reserved.

Solicitors: *H. Dain; W. T. Elliott.*

March 3, 4, 5, 8, 10, 11, 12, and 15.

(Before FRY, J.)

OBE EWING AND CO. v. JOHNSTON AND CO. (a)

*Trade mark—Imitation—Name given by purchasers—Deception of ultimate purchasers—Onus of proof.*

*Where one trader has adopted a trade mark, a part of which has given a particular name to his goods, another trader will be restrained from using a trade mark which is calculated to cause his goods to be known by the same name.*

*Where one trader has taken a substantial part of another's trade mark, the onus of proving that purchasers would not be deceived rests upon the former.*

THIS was an action to restrain an infringement of the plaintiffs' trade mark.

The plaintiffs were manufacturers of Turkey red yarn which they exported to Aden, Bombay, and other places. On the bundles in which this yarn was made up they had for many years affixed a ticket which they alleged caused it to be known

in the Bombay market as "Bhé Hathi" (i.e., two elephants) yarn. This ticket was of triangular shape, and of a green colour. On it was embossed, in gold, a triangular banner supported at two corners by an elephant, and between the two elephants was a crown. On the banner the name of the plaintiffs' firm was printed in Guseerattee characters.

The defendants were also manufacturers of Turkey red yarn which they exported to the same places as the plaintiffs, and recently commenced using a ticket which was similar in shape and colour to that of the plaintiffs. It also had two elephants on it in the same places as in the plaintiffs', but turned in the opposite direction, and between them, instead of a crown, was the figure of a Hindoo idol called Gunputty. The banner was also represented on the defendants' ticket as on the plaintiffs', and on it was the name of the defendants' firm in English letters.

The plaintiffs had applied, under the Trade Marks Registration Act 1875, to have their ticket registered as a trade mark, but their application was refused by the committee of experts, and their decision was affirmed by the Court of Appeal: (*Re Orr Ewing's Trade Marks*, 38 L. T. Rep. N. S. 695; 8 Ch. Div. 704.) An appeal to the House of Lords is, however, pending.

The plaintiffs now claimed an injunction to restrain the defendants from using the ticket above described, or otherwise imitating the plaintiffs' ticket.

There was no evidence of actual deception by the defendants' ticket; but it appeared from the evidence of several witnesses in Bombay that, though the dealers in Bombay would not be deceived, yet that the native weavers in the country, who were the ultimate purchasers of the yarn, would probably be deceived.

The evidence taken by a commission in Bombay was read, and a large number of witnesses were now called by both sides. The effect of the evidence and the further facts of the case are fully stated in the judgment.

*North, Q.C. and Giffard* for the plaintiffs.—The fact that the committee of experts has refused to register the plaintiffs' trade mark, and that their decision has been upheld by the Court of Appeal, does not make any difference in this action, as by the Trade Marks Registration Act of 1876 (39 & 40 Vict. c. 33), the right of traders to take proceedings to protect their trade marks, which had been in use previously to the passing of the Act of 1875, are left just as if the Trade Marks Registration Acts had not been passed. Our ticket is known in the markets as the "Bhé Hathi" or "Two Elephant" ticket, and that of the defendants is likely to obtain the same name. The issue to be tried in this action is whether a certain mark, having for many years been used in a certain trade, coupled always with a particular class of goods, has or has not in that particular trade, and coupled with that particular class of goods, become so identified with those goods, that what the defendants have done in this case is an invasion of that mark. [FRY, J.—The case, in my mind, separates itself into two distinct heads—one is the simple question of the likeness of the two tickets, and the other is with regard to fraud.] There is so much common to both tickets, that the distinguishing characteristic must

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

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be the stronger. No one can be heard to defend his design if it is calculated to deceive, not the immediate wholesale purchasers, but anyone who in the course of the transmission from the original manufacturer or merchant to the ultimate consumer may have the mark before him. In *Wotherepoon v. Currie* (27 L. T. Rep. N. S. 393; L. Rep. 5 E. & I. 508) the only similarity in the two labels was the word "Glenfield" and the make up. [FRY, J.—There was distinct evidence of fraud in that case.] In *Edelsten v. Edelsten* (10 L. T. Rep. N. S. 780; 1 De G. J. & S.) Lord Westbury said, you need not prove deception, if the mark is in itself of such a kind as that it will probably deceive. Here both tickets are the same shape and colour, and have two elephants in them. The plaintiffs' yarn has obtained the name "Bhé Hathhi" in the markets, and the dealers and weavers in the up country would think they were buying the plaintiffs' yarn when they saw the two elephants on the defendants' ticket. The defendants' name, like the plaintiffs', is on the ticket, but the plaintiffs' name is in Guzerattee, which the natives could read, while that of the defendants is in English, which the natives could not read and would not pay any attention to. [FRY, J.—I have no evidence that the defendants sell yarn up the country. There is no deception at the place from which we have evidence.] That point arose in *Ford v. Foster* (27 L. T. Rep. N. S. 219; L. Rep. 7 Ch. App. 611). James, L.J. in his judgment (p. 624) deals with the unsuccessful defence of *publici juris*. Mellish, L.J., in his judgment (p. 629) adverts to the fact that, as between the wholesale manufacturer and the buyers, there was no deception, the term was *publici juris*—that is to say, the term "Eureka" had become a term signifying, not a shirt made by one person, but a shirt of a particular shape. There was no evidence at all in that case of anybody having been deceived, and the inference the court drew was that it was the ultimate purchaser and not the wholesale buyer who was likely to be deceived. In *Seiao v. Provezende* (14 L. T. Rep. N. S. 314; L. Rep. 1 Ch. App. 192) Lord Cranworth says (p. 196) that the question in these cases is always a difficult one as to the amount of resemblance which the court can seize upon in the absence of actual deception. It is not a question whether purchasers with the marks side by side would be deceived, but it is a question of the resemblance of the two marks. The effect of the evidence of the native witnesses is this. If there is someone to point out the distinctive marks of the two labels it is possible to prevent deception, but otherwise deception will naturally arise. The similarity between the tickets is so great that not only the up-country buyers, but the dealer who sells to the up-country buyers, and even the broker is liable to be deceived, though it is true that by taking sufficient precaution, and by adopting safeguards to prevent such a result, you may prevent it. As to the ticket called the "Egg" ticket, it was not intended in any way to supplant, nor does it supplant, nor from its size or conformation could it supplant, the elephant ticket; but it is put on the outer brown paper cover, in order to show that the plaintiffs' goods are inside. It is an extra safeguard.

*Aston, Q.C. and J. Culler*, for the defendants.—The defendants' ticket is distinct from the plaintiffs' upon the face of it, and there is no evidence of any purchasers, immediately or ultimately,

having been led to take the defendants' ticket for the plaintiffs'; and, assuming that the plaintiffs may claim an exclusive right in a name which grows out of this ticket, that name must, in the first instance, be specific. The name they claim is "Bhé Hathhi." [FRY, J.—No; they claim that you shall not use a ticket which shall allow your goods to be sold as "Bhé Hathhi."] They must found that upon some allegation that their goods are known as "Bhé Hathhi." There is no specific name that the plaintiffs have made out as being a name which is applied to their goods in the market. Then the name must not be known in any one place only; it must be a general name for the goods, not only a common one. In this case, the name only arises from local causes, and not from anything inherent in the ticket. There must be a general use of the name far beyond what has been proved. It must be a name which arises from something in the ticket to which the proprietor of the ticket can claim a right. In this case the yarn is sometimes called "Hathi" (Elephant) yarn. That must arise from some notion that the plaintiffs have a right to a ticket with one elephant on it, and they clearly have not. Inasmuch as the purchaser calls it the "Hathi" ticket, he sees on it that which is common property, and the holder can have no right in that name. If the plaintiffs' crown and elephant ticket were sent to the Fiji Islands and the islanders chose to call it "Crown" yarn, and the defendants having used a crown for fifty years, had not traded with the Fiji Islands before, could they be precluded from using their crown ticket when trading with them? Then the habit of dealing of the plaintiffs in this case precludes them from any right to such a trade name as that which they are setting up, as they use several tickets to designate precisely the same yarn. They also authorise other people to put their own tickets on the yarn, which has been a serious objection to a right to a name. Then the "Egg" ticket is always used in conjunction with the ticket now alleged to be infringed. There are two questions to be discussed on behalf of the defendants: yes or no have the defendants used the plaintiffs' label? Have they fraudulently represented by themselves or their agents any goods that have been sold as being the goods of the plaintiffs? [FRY, J.—Is not the question really this: Have the defendants enabled or induced other persons to make representations which would be false in fact? It is not suggested that the defendants have themselves made a fraudulent representation, but that they have, by adopting a particular ticket, induced and enabled other people to do so.] In that case, the plaintiffs can only charge the defendants with the use of the trade mark, which is really all they do. The statement in the pleadings that "The said mark or label was used by the defendants, and is calculated to deceive," does not amount to a charge of fraud, but only that the defendants have used a ticket which is like that of the plaintiffs. "Bhé Hathhi" is a subsidiary term, and has always been associated with the name of some firm. The use by the defendants of two elephants is quite natural, as the goods were to go to the Indian market, where elephants were in general use as trade marks. The triangular-shaped labels and the figure of an elephant are respectively, so far as regards the use thereof with Turkey red yarn, things *publici juris*. If the defendants are

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restrained from using two elephants, they must be restrained from using any elephants at all, or anything which might cause the yarn to be called "Hathi" yarn. A part of the plaintiffs' trade mark has given a name to their goods, and they therefore contend that no one else is entitled to use that part of the trade mark. They claim an exclusive right to an element of their combination. In *Ford v. Foster* (*ubi sup.*) the facts were different to those in this case. [FRY, J.—In that case the court restrained the use of the word "Eureka" in a manner which might enable the word to be addressed to the public, and not to the trade. The court came to the conclusion that deception might arise, though there was no evidence that the public had been deceived. They thought the name would travel with the goods beyond the knowledge of the distinction. It appears, therefore, exactly parallel with this case. The dealers in Aden and Bombay will not be deceived, but the purchasers in the Ghauts and Abyssinia will be.] The court will not be anxious to extend the principle of that case. In this case the deception is too remote; and if there is deception because of the incapacity of the persons deceived, then the court will not take notice of it. The persons deceived must be of reasonable intelligence. There is no evidence of a single up-country buyer being deceived, save as a speculative opinion. In *Seiso v. Provezende* (*ubi sup.*), as in *Ford v. Foster* (*ubi sup.*), the name by which the goods were sold was put on the goods themselves. In this case the seed of deception is not in the defendants' ticket, and there must be stronger evidence of deception than has been offered. In the *Glenfield Starch case* (*Witherspoon v. Currie*, 27 L. T. Rep. N. S. 393; L. Rep. 5 E. & J. 508) there was evidence of great fraud. In the case of *Braham v. Bustard* (9 L. T. Rep. N. S. 199; 1 H. & M. 447) it was held that a man had a right to call his goods by a particular fancy name; but in *Raggett v. Findlater* (29 L. T. Rep. N. S. 448; L. Rep. 17 Eq. 29) it was held that the plaintiff had no right to the name "Nourishing," although his stout was known in the market by that name. [FRY, J.—In the case of *The Linoleum Manufacturing Company v. Nairn* (38 L. T. Rep. N. S. 448; L. Rep. 7 Ch. Div. 834) I did not grant an injunction, as the word "linoleum" was only a name for a substance.] *Cope v. Evans* (30 L. T. Rep. N. S. 292; L. Rep. 18 Eq. 138) is in my favour; for, comparing that case with the present, there is more reason for saying that a considerable portion of the plaintiffs' brand, "Flor Fina Prairie Superior Tabac," was taken in the defendants' brand "Flor de la Prairie," than there would be in this case. Here all that is alleged is that the use of the two elephants generates the excrescence upon the plaintiffs' trade mark of a peculiar name arising from the presence of the two elephants. The elephants are only one element in the plaintiffs' combination, which consists of two elephants, a crown, banner, and name. *Cope v. Evans* also shows that where there is no identity of trade mark, the court will not rely upon speculative opinion upon either side, but will require proof of actual deception. So in the case of *Woollam v. Radcliffe* (1 H. & M. 259); that shows that where a material part of the trade mark is omitted there must be proof of actual deception, and it is impossible for the plaintiffs to say that the crown is not a material part

of his ticket. [FRY, J.—The pinch of the case against you is that, there being a part of the plaintiffs' mark which has given a name to their goods, it is said you have taken that part.] The part taken was common property. Our trade mark is not "Bhé Hathi;" it is "Gunputty." In all the cases mentioned by the plaintiffs the defendants used the very thing complained of *ipseissima verba*. The plaintiffs charge the defendants with fraud, but the charge is not specially pleaded. They charge one kind of fraud and prove another, which is not sufficient (*Webster v. Power*, L. Rep. 2 P. C. 69, 81). The right of the plaintiff to use one elephant is material, as, if the owner of a trade mark cannot claim exclusive property in any emblem alone, he cannot claim the exclusive property in that emblem when used in duplicate, and the plaintiffs do not claim one elephant. Where there is an emblem common to a trade no person in that trade can acquire any exclusive title to use that emblem, whether he uses it once, twice, thrice, or any number of times on his trade mark; and an elephant is a common device on yarn tickets in the Indian markets. The judgment in *Re Orr Ewing's Trade Mark* (*ubi sup.*) is in my favour, and also *Re Hyde and Co.'s Trade Mark* (38 L. T. Rep. N. S. 777; 7 Ch. Div. 724). The onus of proof is on the plaintiffs. There is no evidence to show the probable user by the up-country people of the name "Bhé Hathi" with reference to the plaintiffs' goods, nor that the defendants' goods have obtained the name "Bhé Hathi," but, on the contrary, it proves that they are called, "Gunputty."

*North, Q.C.* in reply.—If the plaintiffs' yarn is known as "Bhé Hathi," it does not make any difference if it is also known by another name. No actual deception has been proved, but there is reasonable probability of deception. In *Kinahan v. Bolton* (15 Ir. Ch. 75) the defendant was restrained from using the name "L.L." for his whisky, even in conjunction with his own name; and the present case is stronger, as the manufacturers' name is on one ticket and not on the other. Where there are certain things common to both tickets, greater care must be taken to prevent them resembling one another. The judgment of James, L.J. in *Ford v. Foster* shows that the onus of proof is on the defendant. The commencement of Lord Cranworth's judgment in *Seiso v. Provezende* is in my favour. In *Edelsten v. Edelsten* (*ubi sup.*) the plaintiff marked his goods with an anchor, and the defendant adopted an anchor and a crown, and the defendant was restrained from using his device. There the anchor gave the name to the plaintiff's goods. Here the elephants have done so. There was no proof of actual deception in that case. The judgment of Lord O'Hagan in *The Singer Machine Manufacturing v. Wilson* (L. Rep. 3 App. 376, 395; 38 L. T. Rep. N. S. 303) points out that it is the duty of the defendant to justify the use of the trade mark, and not of the plaintiff to prove deception. The defendant must take care that a reasonable probability of deception does not arise. In *Woollam v. Radcliffe* (1 H. & M. 259) the "St. A \*\*\*" which was the essential thing in the plaintiff's trade mark was not taken by the defendant. When the defendants' witnesses say that people who had not deceived they refer to people who had both marks before them. [FRY, J.—Where am I to restrain the use of the ticket except in Bombay?]

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It is not usual to limit an injunction in that manner. [FRY, J. referred to the form of the decree in *Seiso v. Provezeade* in "Sebastian on Trade Marks," p. 203.] The onus of proof is not on the plaintiffs, but, if it is, they have carried it out.

FRY, J.—In this case the plaintiffs sue the defendants for an injunction to restrain the use of a ticket which the plaintiffs allege to be their trade mark, and which the defendants deny to be a trade mark. It appears that in the year 1850 the plaintiffs introduced the ticket in question, for the purpose of affixing it to some bundles of Turkey red yarn which they were in the habit of exporting, and that ticket I will presently describe more in detail. It appears that in the year 1865 they introduced an additional ticket, which has been known as the egg ticket, because it has upon it the figure of an egg, and which figure they marked as their trade mark. Now the plaintiffs have been in the habit of exporting these Turkey red yarns to Bombay, to Aden, and to Madras, and no doubt to many other places. It appears that with regard to Bombay their course of trade was twofold. They sometimes sold their yarns for shipment to Bombay, and they sometimes shipped the yarn themselves to Bombay, and when they exported them direct they placed on their Turkey red yarns the ticket which is now in controversy, which I will call ticket A, and on the outer wrapper they placed the egg trade mark, whereas when they sold goods for exportation to Bombay they placed outside the same egg trade mark, and they placed inside a label having upon it not the elephants, but two peacocks. It appears that with regard to Aden the course of trade is somewhat different. They did not export thither themselves directly, but they sold for export thither Turkey red yarn, having upon it two elephants and the egg trade mark. It appears that the same course was pursued with regard to Madras, viz., that when they exported to Madras they put upon it the elephant ticket and the egg ticket, and when they sold to merchants they put upon it the egg ticket, and such special tickets as the merchants might desire. That appears to be shortly the course of trade of the plaintiffs with regard to the three ports to which I have referred. Now it appears that in July 1875, the defendants shipped to Aden three bales of Turkey red yarn, and that from that time down to the present they have shipped to Aden some fifty or sixty bales of Turkey red yarn. With regard to that, the question arises in the first instance which I am about to refer to, as to the identity of the trade mark. It appears that about the end of 1876 they shipped to Bombay one consignment consisting of ten bales of Turkey red yarn. That red yarn was sent to a merchant of the name of Shapoojee, and was sold to a person of the name of Vishal Gadewjee through the intervention of a broker or dealer whose name is Thergoonan. Now it appears that the goods so shipped were dyed by Mr. Miller, certainly not by the plaintiff, and were made up originally in consequence of an order received in the early part of 1875 by the defendants from a correspondent of theirs, Abdul Ali Hoosam, in Aden. The history of the subsequent shipments to Bombay is not so fully before me; but the fact is that these shipments came to the knowledge of the plaintiffs about the middle of the year 1876, and thereupon this action was

brought. Now I will inquire, in the first place, how the plaintiffs' goods and the defendants' goods were made up. They were made up in similar bundles. That was a matter of course, because it appears Turkey red yarn is always made up in similar bundles. The outside of the bundles of the goods supplied by the defendants had upon it a certain outside red mark. With regard to that mark, it is material to observe that the defendants put upon it a shield, on which was a certain goddess, Minerva or Britannia, for their trade mark. They had previously used the Gunputty. It appeared that the plaintiffs' goods shipped to Aden were shipped by a firm who also put a red mark outside the bundle; but it appears that the plaintiffs' goods had certain figures stencilled upon them, the like of which does not appear upon the defendants' goods. It appears, also, when the outer wrapper is taken off, a blue or grey wrapper is found underneath, and at the end of that wrapper there is placed the plaintiffs' ticket, upon which they are now suing, and upon the defendants' goods the ticket which is now impeached. Further than that, it is to be observed that inside the whole of the wrapper there is a piece of card-board or mill-board, on which the plaintiffs' goods had a certain white label or ticket not repeated on the defendants' goods. There are, therefore, considerable differences between the get up of the two goods. Then I come to the comparison of the tickets which were actually placed upon the goods, those tickets being known respectively as A and B. The first question I have to ask myself with regard to these tickets is this; judging them as an Englishman and knowing the habits of the English people, whether the one would be taken for the other by the dealers or purchasers of ordinary prudence? Now the two tickets may shortly be described in this way. They are both triangular; that is immaterial, because these tickets always are triangular, being always adapted for the purpose of fitting on to the flap at the end of the parcel. They are both in green and gold; that is a common mode of making up these tickets. They have both what is called a banner, occupying the middle of the ticket. That is not claimed by the plaintiffs exclusively as their own, because it has been used in other cases. But the plaintiffs' ticket has that banner supported by two elephants. Above the banner and in the middle line of the ticket the plaintiffs have a crown, and in the middle and in a similar position of the defendants' ticket we find the hideous figure of an idol said to be called Gunputty, and which, undoubtedly, had been adopted as early as the year 1874 by the defendants as their trade mark upon the goods which they had shipped to Bombay. The plaintiffs' ticket has the words "Prime Turkey Red" on the banner, and the defendants have the same underneath. Then there comes the number in each case; below that on the plaintiffs' ticket comes the name of the firm in Guzerattee, and below that the name of the manufactory or dyeing place, "Leven Bank," in old English; whereas in the defendants' ticket you have "R. Johnston and Co., London," printed in English. Having described the tickets, I repeat the question, Should I be deceived so as to take the one ticket for the other, even if the two tickets were not before me, supposing me to be a purchaser of ordinary caution and ordinary intelligence? I answer I should

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not, and for this reason, that the two tickets certainly do not impress the eye throughout as being the same. There is a great similarity undoubtedly; but more than that I am bound to observe in the one there is a name I can read, and in the other there is a name which I cannot read, therefore there is a very strong difference between them. I can understand from whom the one emanated, but I cannot tell from whom the other came. I can read the place of manufacture upon both, and I can see they are different; and, further than that, that the plaintiffs always used this green ticket with a trade mark, which trade mark the defendants have not imitated, and which trade mark they have challenged the attention of the reader by marking it as their trade mark. That question, therefore, I should have to answer in the negative. But then arises the second question, Have the defendants taken a material and substantial part of the plaintiffs' ticket? For this purpose it seems to me immaterial to consider whether the ticket is justly entitled to be called a trade mark strictly or not, for the reasons which appear in the course of what I am about to say. Before I can answer the question as to materiality of the parts taken I must have regard to two things. In the first place, I must look at the tickets and inquire whether a large part which impresses the eye has been taken, whether a significant characteristic of the ticket has been taken; and I answer that it has. I find that the two elephants in the two top corners of the plaintiffs' triangular ticket are repeated by two elephants in the two top corners of the defendants' ticket. It is quite true that the elephants are in a different position; one set of elephants have howdahs upon them, and the others have not, and the trunks are turned in different directions; but still in each corner there is an elephant that impresses the eye with a considerable amount of similarity. Then, I must next inquire the mode in which the plaintiffs' goods have been accustomed to be sold and what people have called those goods. It is in evidence before me that the plaintiffs' goods have been sold in the Bombay market for a number of years under the name of "Bhé Hathi" which means two elephants. There is undoubtedly a very considerable conflict of evidence, but it appears to me to result in this that the name "Bhé Hathi" has been used, and that for a very considerable number of years, as designating the plaintiffs' goods in the Bombay market. A good many years ago, some twenty years ago, a firm of Crawfords acted as the consignees in Bombay of the plaintiffs' goods, and it is evidence before me that the plaintiffs' goods were known as "Crawford's Bhé Hathi." They were succeeded by a firm of Graham and Co., who down to a few years ago acted as the consignees of the plaintiffs' goods. It appears to me the common name of the goods was "Graham's Bhé Hathi." Now I will take the evidence of one of the important witnesses of the defendants who when asked by what name ticket A was known in the Bombay market said, "Bhé Hathi" or "Asul Graham" from the fact of the tickets having been placed in the first instance on the market by Graham and Co. a few years ago. That is not very likely, it having been introduced by Crawford. There is a great deal of other evidence to which it is not necessary to call attention which goes to support that statement. It is quite true that it was sometimes called "Bhé Hathi" or "Two Elephant"

ticket, sometimes the "Golden Elephant" or "Golden Two Elephants," sometimes "Graham's Hathi," sometimes "Asul Graham," or the "Original or genuine Graham"; but still I come to the conclusion as a matter of fact that the goods were known in the Bombay market by the description which Mr Wadia has given as the "Bhé Hathi" goods, and further than that, that no other goods were ordinarily known in the Bombay market as "Bhé Hathi." I will refer to the same witness as proving that part of the case. He is asked this, "Do you know any Turkey red yarn called "Bhé Hathi," except the plaintiffs' yarn, bearing the ticket A?" And Mr. Wadia, who was the salesman to Messrs. Graham, evidently a very competent witness, answered "No." That witness appears to be substantiated by the preponderating evidence in the case. I come to the conclusion, therefore, that that was the name by which the plaintiffs' goods were sold in the Bombay market. There are two suggestions which it is necessary for me to advert to before passing on, which are these: In the first place, it is said that there is a great deal of evidence to show that other tickets besides the plaintiffs' were used, which bear two elephants upon them, and that those, therefore, would be "Bhé Hathi" tickets, and the goods would be known as "Bhé Hathi" goods. In addition to the evidence which I have read from the defendants' witness, Mr. Wadia, there is a great deal of evidence to show that no tickets bearing two elephants were ever habitually or familiarly known to the Bombay market. I will refer only to the evidence of two witnesses. Mr. Graham's assistant, Mr. McKenzie, says that he knows no other ticket in the Bombay market but the plaintiffs' having two elephants on it, and that evidence is confirmed by the assistant of Messrs. Framjees. Therefore, you have two large firms both agreeing that that is the only ticket habitually known in the Bombay market as bearing two elephants. I have attended carefully to the tickets which are produced as bearing two elephants, and as having been used in the Bombay market. They are no less than ten in number; but having attended to the evidence with regard to all of them, I am not able to find that there is a trace of evidence of anything like extensive use of any one of them in the Bombay market. There is first the ticket "C" amongst the Bombay exhibits, which was used for a short time by Messrs. Graham and Co., and was then abandoned at the plaintiffs' instance. We have next the ticket No. 11 in that series of exhibits, and it consists of two elephants' heads and a clock between them. It is in evidence that the clock was cut in Sept. 1872, but it has not been seen in Bombay during the last two or three years, and one witness says for the last three or four years. Of the exclusive user of that I have no evidence. The next ticket is No. 13 in the Bombay evidence, which is two elephants' heads, and is used by Messrs Watson and Co. Mr. Ennos says he has seen it in one place in Bombay, and Mr. Wadia says he has seen it somewhere, but he does not know where; but other witnesses, who are likely to have known it, have not seen it, and Mr Miller, the dyer who has been employed by Messrs. Watson and Co., says he has not used it for the last twelve or eighteen months, and whether it was sent to Bombay or where it was sent to does

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not appear. The next ticket is the one known as No. 15 in the Bombay exhibits, that is, two elephants' heads in a different position indeed to the plaintiffs' elephants, because they are standing in the middle of the ticket with their trunks intertwined, and it bears on it the word "Yards." From the evidence before me, it appears that was only used on one small order, and as a secondary or outside ticket as long ago as Michaelmas 1875, and has never been used since. It is clearly proved that that was not a ticket made for the purpose of Turkey red yarn, but for Turkey red piece goods. The ticket is one which is similar to that, and was made for Messrs. J. Orr Ewing and Co., and bears their name upon it in Guzerattee. There is no evidence of the extent of its use, or of any shipment to Bombay, and it does not appear to have been used in any way since March 1875. There is a third ticket very similar, which was prepared for Messrs. John Orr Ewing and Co., and bears the name of their correspondents, Schmidts and Co. With regard to that it appears to have been engraved in March 1868, and it has not been printed in large quantities, and there is no evidence that it has gone to Bombay or Aden at all. Then there are some tickets produced by Mr. Reid as used by Monteith and Co. The first of all was only used on one occasion for a very small consignment, and appears to have been sent to Messrs. Wright and Newsome on this small parcel of goods. Then there are two others which are really hardly at all similar to the present, because they have four elephants upon them arranged in the form of an armorial bearing, and with regard to them there is nothing before me but the mere fact of the existence of the tickets and the evidence that they have been used on fifty or sixty bales, but where sent to I do not know. Then, lastly, there is a red ticket which has been stopped at the instance of Framjee, but that evidence does not in any way shake the conclusion I come to on the statement of Graham's assistant and Framjee's assistants, that no two elephant tickets have been known in the Bombay market. It appears to me there is nothing in that to deprive the plaintiff of any benefit resulting to him from the fact that his goods were known as "Bhé Hathi" yarns. Another argument has been addressed to me which requires attention. It is this: It has been proved that the name "Bhé Hathi" is not the sole name which has been used for the plaintiffs' goods in the Bombay market. His goods are known as "Hathi" yarn, "Bhé Hathi," "Asul Graham," and various names, and it is argued that where goods bear a number of names another manufacturer may introduce a trade mark, and may appropriate to himself one of those names, though he could not do that if the goods bore one name only. In my opinion no such argument ought to prevail for a moment. If goods are sold in the market as A. or B. by a particular maker, in my judgment no rival manufacturer has the right to appropriate to himself either the name A. or B. Therefore that does not in any way shake the conclusion which I have come to. Now, having arrived at the conclusion that the goods of the plaintiffs which bore the trade mark in question were known as the "Two Elephants," or "Bhé Hathi" goods, it follows in my judgment that two elephants were a material and substantial part of the plaintiffs' ticket,

because they were that part of the ticket which communicated this name to the goods. Lord Westbury, in the case to which my attention has been drawn (*Edelsten v. Edelsten, ubi sup.*), observed upon the fact that the goods derived their trade name from that particular part of the ticket. I think, therefore, that where the defendants did take these two elephants they took that which was a material and substantial part of the plaintiffs' ticket. Now, what is the result of that? It appears to me that the result of that is this, to throw upon the defendants the burden of proving that their ticket did not deceive purchasers, so that they should believe that the defendants' goods were the plaintiffs' goods. In the case of *Ford v. Forster*, James, L.J. makes this observation: "The plaintiff makes this *prima facie* case, that he has a plain trade mark, a material and substantial part of which has been taken by the defendants. Then the onus is, under those circumstances, cast upon the defendants to relieve themselves from that *prima facie* liability." It appears to me to be in accordance with the view of the Lord Justice that Lord O'Hagan made the observations in the case of *The Singer Machine Manufacturing Company v. Wilson*, in the House of Lords (p. 395), to which my attention has been drawn this morning: "If one man will use a name the use of which has been validly appropriated by another, he ought to use it under such circumstances and with such sufficient precautions that the reasonable probability of error should be avoided, notwithstanding the want of care and caution which is so commonly exhibited in the course of human affairs. I do not say that the mere possibility of deception should suffice to make appropriation improper, but the chance of misleading should be jealously estimated with a view to this consideration, even though ordinary attention might have been enough to protect from mistake." It appears to me that I ought, therefore, to hold that, if one man will appropriate to himself a material and substantial part of the ticket of another man, which has been used for the purpose of indicating his goods, he ought so to appropriate it with such precautions, that reasonable probability of error should be avoided, and therefore I proceed to inquire whether the defendants have in this case so appropriated that material part, which I hold that they have appropriated, with those due precautions to prevent error. Now, it strikes one at first, in considering and answering that question, that the defendants have thought fit to print the name of their firm upon the ticket B. in a language which would be read undoubtedly by the original purchasers of the goods, but which will not be read by the ultimate purchasers in the Indian markets, and therefore the protection which would be given by a name capable of being read wherever the goods go is not afforded by their ticket. To explain that, it is necessary I should observe that, according to the evidence before me at present, when those goods reach Bombay they pass generally into the hands of merchants dealing in a wholesale manner, that they are then distributed through the intervention of a series of middle-men, and Mr. Dick has explained clearly that there are numerous classes of middle-men employed in the distribution of these goods over the country. Now, the first class of customers would probably, in my judgment, not be deceived; but I think, upon the whole



of the evidence before me, that there is a strong probability that the ultimate purchasers, the weavers who buy these goods in the villages, probably also the retail dealers who sell to them, would be deceived by the defendants' ticket, and the grounds upon which I have arrived at that conclusion are put as forcibly as they can be by Goolalehund, who is a dealer in English yarn in Bombay, who says that in his opinion the native buyers would be deceived because they would ask for "Bhé Hathi, and there," he continued, referring I understand to the defendants' ticket "are Bhé Hathi." It appears to me that there is a great deal of evidence to which I attach weight to show that these goods are sold largely by name, and that, although the first dealers no doubt look at the tickets, and the brokers in Bombay probably look at the tickets, yet that the ultimate purchasers and the purchasers from the dealers in Bombay probably do not look at the tickets, and at any rate are liable to be deceived by the name by which the goods are sold. In coming to that conclusion, I do not forget that there is a conflict of evidence upon the point; that there are those who say that native buyers will not be deceived, and there are many who say that the ticket would be known as the Gunputty ticket, that there are those who say that the goods exported by the defendants have received the name of the Gunputty; but it seems to me that the burden resting, as I hold that it does, on the defendants to show that they have used all due precaution to prevent deception and error, they have failed to discharge that burden. It is desirable that I should say a word or two with regard to the evidence tending to show that the ticket has been called Gunputty. With regard to that I am bound to say that it appears that the first shipment to Aden was described in the bills of lading of the defendants as Gunputty. The second was not. By what name those goods were shipped to Bombay I do not know—that is not in evidence before me; but only a small parcel, ten bales, has ever gone to Bombay. The defendants have said very fairly, in my judgment, that, in their opinion, that would not be enough to give a distinguishing name to their goods in the Bombay market. It appears that the whole of these goods were sold to one merchant, who has not been called. By what name he sold them, or how he sold them to the native dealers, I do not know. The goods have not been traced in India. There is considerable evidence that people call it Gunputty, but the greater portion (not the whole) of that evidence relates to conversations which have taken place long since this action had begun, a good deal of it in the immediate expectation of the pending commission at Bombay, and I am bound to say a good deal of it appears to me to be conversation between persons likely to be witnesses before that commission. Then there is one witness who would have one believe that a number of native dealers came into the market asking for the Gunputty ticket. If I could have placed reliance on that I might have come to a different conclusion upon this point; but I do not think there is evidence to prove any name had got attached to the defendants' ticket which would safely distinguish it from the "Bhé Hathi" ticket of the plaintiffs. In coming to this conclusion I have not failed to bear in mind that I am ignorant of the habits and customs of the natives of India. I do not know

their movements, their language, or their habits, and I have great difficulty in concluding from the mere *evidentia rei* that the deception would take place; but I have come to the conclusion that the burden of showing that there would not be deception rests upon the defendants, in a case in which the defendants have taken a substantial part of the plaintiffs' ticket, especially where that part is the elephant, which has given the name to the goods, or a part of it. On this ground I think the plaintiffs were justified in coming to this court. The plaintiffs have endeavoured, undoubtedly, to bring home to the defendants what would be called a personal design to deceive. If I was bound to consider the question whether the defendants have satisfied me as to the history of that ticket, I should say that they had not, because, looking at the two tickets, I cannot but believe that there is some connection between the plaintiffs' ticket and the defendants'. According to the defendants' history it would seem that they are totally independent, and that, although the defendants were familiar with the plaintiffs' ticket, that is, they knew of it, although they were referred to it by the letter which set the whole of this matter in motion—I mean the letter from the correspondents in Aden—they never looked at it either for the purpose of imitation or of avoidance, and that no other person whom they consulted, as far as they know, looked at it or consulted it, either for the purpose of avoidance or imitation. And yet when I look at the resemblance between the two tickets, I find it so striking that I think there must have lurked in the mind of some person connected with the origination of the ticket the appearance at least of the plaintiffs' ticket. It may be that the resemblance existed in the mind of the young man who, the defendants say, was the author of the two elephants, and of this ticket. I can only say it would have been made much more satisfactory to me if that had been made more plain, and I do not feel able to place implicit reliance on the history of that ticket as detailed to me by the defendant; but at the same time, if the case had rested on the personal fraud of the defendants in concocting that ticket, I should not have held that the plaintiffs had made out their case. The result is, I come to the conclusion, which I have already expressed, that the defendants have taken a substantial and material part of the plaintiffs' ticket, that it is not shown that that substantial and material part will not produce the result which it seems to me would be likely to be produced by it, namely, that the goods of the defendants may acquire the name of "Bhé Hathi," which down to this time has signified the plaintiffs' goods in the Bombay market. The form of injunction which I grant must I conceive be this: "An injunction to restrain the defendants, their servants and agents, from affixing or causing to be affixed to any Turkey red yarn not dyed by the plaintiffs the ticket B, and from using two elephants on any ticket used on Turkey red yarn without clearly distinguishing such ticket from the plaintiffs' ticket A, and from employing any mark or words which shall be calculated to cause any Turkey red yarn not dyed by the plaintiffs to be known in Bombay as 'Bhé Hathi' or 'Do Hathi' yarn, or to represent or induce the belief that any of the said yarn was dyed by the plaintiffs." Of course I need hardly say, having come to the conclusion that the plaintiffs are right,



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this judgment must be with costs against the defendants.

Solicitors for the plaintiffs, *Phelps, Sidgwick, and Biddle*.

Solicitors for the defendants, *A. Hindson, Miller*.

March 6 and 19.

(Before FRY, J.)

SANEH v. BILTON. (a)

*Costs—Dismissal of action and counter-claim.*

*Where the plaintiff's action and the defendant's counter-claim were both dismissed with costs:*

*Held, that the general costs of the proceedings were not to be apportioned, but that the plaintiff must pay the general costs of the action, and that the defendant must only pay that sum by which the costs of the proceedings had been increased by the counter-claim.*

THE hearing of this case is reported in 38 L. T. Rep. N. S. 281; L. Rep. 7 Ch. Div. 815. Fry, J. then dismissed the action and counter-claim with costs.

The costs were taxed, and the defendant, being dissatisfied, delivered to the plaintiff certain objections in writing to some of the items allowed, and applied to the taxing master to review his taxation. The latter ultimately assessed the amount payable for the defendant's costs of the action at the sum of 957l. 18s. 5d., and the amount payable for the plaintiff's costs of the counter-claim at the sum of 786l. 18s. 11d.

The defendant then took out a summons at V.C. Hall's chambers for an order to review the taxation, and the summons was referred to Fry, J.

North, Q.C. and MacNaughten for the defendant, and Kekewich, Q.C. and Hornell, for the plaintiff, cited

Order XIX., r. 3;

*Corporation of Arundel v. Holmes*, 4 Beav. 325;

*Blake v. Appleyard*, L. Rep. 8 Ex. Div. 195.

FRY, J.—This is a question of costs, and two points have been raised upon it. The first is one more of general principle, and the second one of amount. This action was an original action, and there was a counter-claim. The original action was dismissed with costs to be paid by the plaintiff. The counter-claim was dismissed with costs to be paid by the defendant, the counter-claimant. Now the first question is, whether the defendant, who is directed to pay the costs of the counter-claim, is to pay part of the general costs of the action, or whether he is to pay only the amount by which the costs of the action have been increased by reason of the counter-claim—in other words, whether all the costs of the proceedings which relate to the plaintiff's claim and the defendant's counter-claim are to be apportioned, or whether the defendant is to pay only so much of the plaintiff's costs as were occasioned by the defendant's counter-claim. Now, in the first place, it appears to me that very little light is thrown upon this matter by the Judicature Act or the Orders. The only clause which bears upon it in any way appears to be the 3rd rule of Order XIX., which provides that "a defendant in an action may set off or set up, by way of counter-claim, against the claims of the plaintiff, any right

or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross claim." It appears to me that does not throw any light upon the question of how costs are to be dealt with. The next question which arises is this: does the old practice throw any light by way of analogy upon the question which I have to determine? The analogy which has been presented to my attention is that of bill and cross bill. With regard to that, it appears there were three modes in which the evidence might be taken. In the first place, the evidence might be taken in both the suits, and in that event the costs of the evidence so taken in each suit were of course dealt with without difficulty by the judgment in that suit. In the second place, the evidence might be taken in one of the two suits which was first at issue, and an order obtained in the second or other suit to read it with such further evidence as might be necessary. Now in that event the costs of that evidence were costs in the action or suit in which it was taken, and the costs of the order were costs of the suit in which the order was made, and there was therefore in that case again no apportionment between the two suits. Thirdly, the evidence was sometimes taken by arrangement or order in both suits, and, in that case, and in that case only, there was an apportionment in respect of the costs of the evidence which was common to the two suits. Now I am bound to say it does not appear to me that that former practice throws much light upon the present question, because the question is, to which of those proceedings is the present one most analogous? That can only be answered by considering the nature of the present proceedings. Therefore, really, I have to consider the question of expediency, so to speak, on general principles. It appears to me upon the whole that it is most convenient to conclude that the whole evidence, except so far as it is required for the purpose of the counter-claim, is to be deemed evidence in the original action, and therefore I think this case is most analogous to the second of the three modes of taking evidence under the old practice. Therefore it appears to me the proper course will be this: The plaintiff in the original action shall pay the general costs of that action, and the defendant, who is to pay the costs of the counter-claim, shall only pay the costs of the proceedings as far as they have been increased by reason of that counter-claim. The principal reason which leads me to that conclusion is this, that the plaintiff in the original action is the person who first commences litigation. It is after he has stirred up litigation, and not till then, that the defendant has made his counter-claim. The plaintiff in the action first lets out the waters of litigation; and it is impossible to say how far the counter-claim ever would have been agitated if he had not begun that litigation. That appears to me to furnish a reason why, as a general rule, it should be treated as if the action stood by itself, and the counter-claim should only bear the amount by which the costs of the proceedings are increased by it. I need not add that in every case the court can give special directions which may vary the rule, but all I decide now is this, that in a case in which both action and counter-claim are dis-

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

missed with costs, the general costs of the proceedings are not to be apportioned, but the defendant who bears the costs of the counter-claim has only to pay that sum by which the costs of the proceedings have been increased by the counter-claim. Determining the question in that way, no question with regard to the quantum arises. The matter must go back to the taxing master. I ought to add that I had the assistance and advice of four of the taxing masters, and they agree in the view which I take, that, as a general rule, the one which I have laid down is the expedient and proper one. The observations have been written and have been furnished to me by Mr. Bloxam, and he states that they have been concurred in or agreed on by Mr. Shadwell and Mr. Skirrow. I have myself seen Mr. Wainwright, who also agrees with them. I will read the observations and so embody them in my judgment. Mr. Bloxam says: "In this case the defendant put in a counter-claim and the court dismissed the action with costs to be paid by the plaintiff to the defendant, and dismissed the counter-claim with costs to be paid by the defendant. The question is, whether all the proceedings which relate to the plaintiff's claim and the defendant's counter-claim are to be apportioned, or whether the defendant is to pay only so much of the plaintiff's costs as were occasioned by the defendant's counter-claim. As this practice is introduced by the Judicature Act, this is an entirely new question. It is a long settled practice in Chancery that, when a plaintiff institutes a suit for two objects, and succeeds upon one and fails on the other, the costs are apportioned thus: all the pleadings which apply exclusively to one object are considered costs relating to that, and the costs of so much of the pleadings as is common to both are apportioned between the two, and so are the general costs, such as a term fee: (see *Heighington v. Grant*, 1 Beav. 228.) The mode of apportionment sanctioned in that case is complicated and need not be considered; the objectant does not complain in this case of the mode of apportionment, but of any apportionment being made. I had lately to consider this question, and came to the conclusion that the above rule as to apportionment does not apply to this case. There is not a partial failure on the part of the plaintiff, but entire failure, and consequently there is no settled practice upon the point. I, however, after much consideration, consider that where the plaintiff succeeds in all that he claims he is, notwithstanding the defendant succeeds on a counter-claim, entitled to his full costs, except in so far as they are occasioned or increased by the counter-claim, and so, if the plaintiff's action is dismissed with costs, the defendant is entitled to full costs against the plaintiff, except such additional costs as are occasioned by the counter-claim. The plaintiff commences litigation, and it seems to me his costs should depend upon his failure or success. The defendant under the power given by the Act superadds a claim of his own, and I think the additional costs occasioned thereby should abide the event. I have consulted two common law masters who agree in this view, but it is only a matter of opinion, there having been no decisions. The proceeding is analogous to the old practice of bill and cross bill, but as these were distinct suits and full costs allowed in both, there was no apportionment.

There were three ways of taking the evidence. First, it might be taken in each suit; secondly, the evidence might be taken in the one first at issue, and then an order obtained in the other to read it with such further evidence as might be necessary; thirdly, the evidence might by arrangement or order be taken in both suits. In the two first cases the proceedings in each suit would be allowed as costs in the suit in which they were taken. In the third case only there would be an apportionment. The result is that, in my opinion, in the case under consideration there ought not to be an apportionment, and the objection should be allowed, but being an undecided question it is for the court to settle the practice. Mr. Shadwell and Mr. Skirrow agree in this view."

His Lordship refused to give either party the costs of this application.

Solicitors for the plaintiff, *Gregory, Bowditch, and Bawle*, agents for *B. S. Wilson*, Hull.

Solicitor for the defendant, *A. R. Oldman*, agent, for *Lowe, Moss, and Moss*, Hull.

Thursday, March 27.

(Before FRY, J.)

Re RICHARDS AND COMPANY (LIMITED); Ex parte CRAWSHAY. (a)

*Company—Winding-up—Sanction of compromise under the Joint Stock Companies Arrangement Act 1870—Execution creditor—Priority—Applying rule in bankruptcy—Companies Act 1862, ss. 85, 87, 163; Bankruptcy Act 1869, s. 87; Judicature Act 1875, s. 10.*

*The court will not sanction a compromise under the Joint Stock Companies Arrangement Act 1870, when the effect of such an arrangement, if sanctioned, would be to affect a non-assenting creditor, who has a preferential right, which would have been respected if a winding-up order had been made.*

*Where a petition for winding-up has been presented, whether by the company or by creditors thereof, the court will not allow a judgment creditor, who has been induced by the representations and prayers of a company for delay of execution not to issue execution, to be deprived of the benefits which he would otherwise have obtained.*

*The rule in bankruptcy as to an execution creditor under the 87th section of the Bankruptcy Act 1869 is not extended by the 10th section of the Judicature Act 1875 to a company in liquidation.*

*Re Albion Steel and Wire Company (38 L. T. Rep. N. S. 207) and Ex parte Railway Steel and Plant Company (Id. 75) followed.*

*Re Printing and Numerical Registering Company (Id. 676) not followed.*

THE company was registered under the Companies Acts 1862 and 1867 on the 3rd Oct. 1874, as a limited company with a nominal capital of 150,000*l.* in 15,000 shares of 10*l.* each.

On the 4th Nov. 1878 Robert Crawshay commenced an action against the company to recover 1260*l.* 2*s.* 3*d.* for coals supplied to the company, and for interest and costs; and on the 18th of the same month obtained an order, under Order XIV., r. 1, to sign final judgment for the amount claimed, but directing that execution on such judgment should not issue for a week. The latter

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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part of the order was inserted on the request of the company's solicitors.

On the 19th Nov. 1878 judgment was signed for 126l. 1s. 9d., and for costs, which were taxed at 7l. 4s. 8d.

Execution was not issued, on account of certain negotiations, which are noticed in the judgment of Fry, J. (*post*).

On the 27th Nov. a petition to wind-up the company was presented to Malins, V.C., by the Aberdare Rhondda Steam Coal Company (Limited), who were creditors of the company.

On the 28th Nov. the company themselves presented a petition to the same Vice-Chancellor, stating that they had raised money to a very large amount on mortgage of their property, that they were indebted to judgment and other creditors to a very large amount, and that their entire assets were insufficient to meet their debts and liabilities; that Crawshay threatened to sue out execution against them, and that they were unable to pay his judgment debt or their other debts, and that the company might be wound-up.

Another petition for winding-up was subsequently presented to the same Vice-Chancellor by another creditor. The petitions to wind-up were partly heard before the Vice-Chancellor, and several times ordered to stand over. A provisional liquidator was appointed, but no order for winding-up was made.

On the 13th Dec. Crawshay gave notice of motion for leave to issue execution; but this motion and the petitions for winding-up were ordered to stand over in order that a meeting of creditors might be called and an arrangement made under the Joint Stock Companies Arrangement Act 1870 (33 & 34 Vict. c. 104).

A meeting was held on the 28th Feb. 1879, at which a compromise was agreed to be prejudicial to Crawshay's rights, and on the 20th March he issued a writ of execution in his action, and lodged it with the sheriff. On the 22nd March, on an *ex parte* application on behalf of the provisional liquidator and some creditors, Fry, J. (sitting for Malins, V.C.) made an order restraining Crawshay over the 27th March from taking, or remaining in possession of, or removing or selling any of the goods or chattels of the company, or otherwise interfering with the possession of the provisional liquidator, the latter undertaking not to remove the goods off the company's premises except in the ordinary course of business, and to keep an account of those removed, and the proceeds of those sold.

An application was now made that the compromise might be sanctioned by the court, and also that Crawshay might be restrained from proceeding with his execution in the terms of the order of the 22nd March.

Crawshay at the same time moved that the last-mentioned order might be discharged.

*Gosse, Q.C. and Maclean* for Crawshay.—The court is asked to sanction an arrangement, under the Act of 1870, and finds there is a creditor in possession. [FRY, J.—He is restrained from acting.] The creditor was induced to withhold his arm and postpone the exercise of his rights, on the faith of representations that he would be paid, and he ought not to be prejudiced by the winding-up petition or any compromise made during the winding-up. This resolution for arrangement is

not even so fair to Crawshay as to other creditors, for he is the only creditor whose costs are not provided for. Under the law as it existed prior to the passing of the Judicature Act 1875, Crawshay's rights would not have been prejudiced, and the 10th section of that Act makes no alteration. This has been decided by Malins, V.C. and Hall, V.C., and also by the Master of the Rolls, though the last-named judge has subsequently arrived at a different decision. They cited

*The Companies Act 1862*, ss. 85, 87, 163;

*The Bankruptcy Act 1869*, s. 87;

*The Joint Stock Companies Arrangement Act 1870*, s. 2;

*The Judicature Act 1875*, s. 10;

*Re Great Ship Company*, 9 L. T. Rep. N. S. 432;

*Re London Manufacturing Cotton Company*, 14 L.

T. Rep. N. S. 135; L. Rep. 2 Eq. 53;

*Dublin Exhibition, Palace, and Winter Garden Company*, 1. Rep. 2 Eq. 158;

*Imperial Steam Coal Company*, 18 L. T. Rep. N. S. 390;

*Bastow's case*, 16 L. T. Rep. N. S. 788; L. Rep. 4 Eq. 635;

*Re Albion Steel and Wire Company*, 38 L. T. Rep. N. S. 307; L. Rep. 7 Ch. Div. 547;

*Ex parte Railway Steel and Plant Company*, 38 L. T. Rep. N. S. 475; L. Rep. 8 Ch. Div. 183.

*Pearson, Q.C. and Trevor*, for some creditors and shareholders, asked that the compromise might be confirmed by the court. The Master of the Rolls had explained his decision in *Re The Albion Steel and Wire Company* (*sup.*), in the case of *Re Printing and Numerical Registering Company* (38 L. T. Rep. N. S. 676; L. Rep. 8 Ch. Div. 535). They also cited

*Re Coal Consumers Association*, 35 L. T. Rep. N. S. 729; L. Rep. 4 Ch. Div. 625;

*Re Westbourne - grove Drapery Company*, L. Rep. 5 Ch. Div. 248.

*Speed (Higgins, Q.C. with him)* for the company.

*Bristowe, Q.C. and Cozens-Hardy* for the Aberdare and Rhondda Steam Coal Company.

*Millar and H. O. Deane* for debenture holders.

FRY, J.—The question which I have to determine now is, whether I should sanction a certain arrangement or compromise which has been come to between the company and its creditors, or rather, I should say, certain of its creditors, the application being made under the Joint Stock Companies Arrangement Act 1870. Now the facts of this case are shortly these: Mr Crawshay was a creditor of this company, and on the 18th Nov. in last year he obtained an order under the XIVth Order of the General Rules, under which he was at liberty to sign final judgment in the action for the amount indorsed upon the writ, together with costs, to be taxed. It was made a term of that order that execution was not to issue upon such judgment for a week. It is in evidence, and not disputed, that that last term of the order was only in great indulgence granted to the company, and that it was inserted upon the express request of the company. The result of that order was this, that Mr Crawshay was at liberty to sign judgment upon the 26th Nov., and proceed immediately to execution. Now, it appears that the company were very anxious to prevent his putting in force the power which that order gave him, and accordingly on the 21st Nov. Mr. Todd, who was the agent for the solicitors of the company, called upon Mr. Wrentmore, the agent who was acting for the solicitors in the country of Mr. Crawshay, and

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said that a board meeting had been held, that the company could not pay the money, the amount of the judgment, on the 26th Nov., that being the day on which execution for the judgment might be issued; but offered, if Mr. Crawshay would abstain from issuing execution upon his judgment, which he was entitled to do on the 26th Nov., to pay 500*l.* on that day, and to pay the balance within one month after that date. The result of that interview was this: it was arranged that a letter should be written, which should embody the terms of the proposed arrangement between the parties; and accordingly on that day Messrs. Todd and Dennes wrote a letter, which was in these terms: "We regret to say that we have to-day seen our clients in reference hereto" (that is the action), "and that they inform us that they will be unable to pay the whole amount of the debt and costs on Monday next. They will, however, be prepared to pay 500*l.* in cash on Tuesday next, and the balance of the debt and costs, together with interest and whatever additional costs may be incurred by the extension of time, within two months from that date." Then, undoubtedly, there was a term imposed, that a reply should be given on the following day, and it was said that it would be assumed the offer had not been accepted unless they heard from them, but it appears to me that the subsequent course of negotiation between the parties makes the matter clear. What followed was this: On the 26th Nov. another interview took place; on the 22nd Nov. another letter was received from Messrs. Todd and Dennes by Mr. Wrentmore, who was acting for Mr. Crawshay. That letter said: "As we have not heard from you agreeably to ours of yesterday's date, we assume that you are without instructions. Kindly send us a line by bearer stating whether this is so, or not." Mr. Wrentmore replies that he sent down a copy of the letter into the country, but that he had not received any instructions. Then it would appear from the evidence of Mr. Wrentmore, that on the 23rd Nov. Mr. Todd called again upon him, and appeared very anxious to have an answer to his firm's letter of the 21st Nov. 1878. Then he says: "I arranged with him that he should telegraph to the said Messrs. C. F. and G. James [Crawshay's solicitors in the country] himself, and later on the same day another gentleman called upon me, who I understood and believe was Mr. Dennes, the other member of the said firm of Todd and Dennes, when he informed me his said firm had received no answer from the said Messrs. C. F. and G. James, and urged me to give them a day's notice before issuing execution." It appears to me that that communication was very important, and for this reason, that I think it shows that the terms which had been arrived at on the 21st were still considered as subsisting between the parties, and not put an end to by the mere fact that they had not been formally accepted by a letter on the 22nd. Then Mr. Wrentmore goes on to say: "On the 25th Nov. Mr. Todd called upon me, and said that he had heard from Messrs. James assenting to the company having the two months required for payment of the balance"—and it is proved by the evidence before me that Messrs. James had so agreed—"and promised I should have the 500*l.* in cash the following day, and that he would at once make inquiry as to who he could offer as surety." Now, there is a controversy between the parties as to whether

during the course of the negotiations the statement was made that the company did not intend to present any petition for winding-up, and upon the balance of the evidence before me I think that such a representation was made, and I think that, if the company intended to present a petition, Mr. Crawshay should have been informed that their original intention had been altered. It appears to me that that was never done. What took place was this: The 26th Nov. was the day on which payment ought to have been made of the 500*l.* according to the bargain come to between the parties. No payment was made on that day. On the 27th the company resolved that they could not make the payment, and that they could not go on. Upon that day a creditor—the Aberdare company—presented a petition for the winding-up of the company, and on the following day the company itself was put into liquidation. Now, on the 13th Dec. Mr. Crawshay gave notice of motion that he might be at liberty to issue execution upon the judgment, which he was entitled to do under the order of the 18th Nov., and on the 14th Dec. the creditors of the company, or the company itself, applied that the petitions which had been then presented together with the motion, which it appears had been agreed should come on with the petitions, should all stand over to enable the company to call a meeting under the Joint Stock Companies Arrangement Act 1870, to see whether any compromise or arrangement could be come to between the company and its creditors. That application was acceded to, and accordingly Mr. Crawshay's motion for leave to issue execution stood over, together with the petitions. It appears to me that his rights were not in any way prejudiced by what then took place. The meeting was then held on the 28th Feb., and resulted in the acceptance, by a fair majority of the creditors, of a composition of 4*s.* 6*d.* in the pound in favour of the creditors. The question therefore comes before me under the clause which makes that arrangement or compromise binding on all the creditors in case the same shall be sanctioned by an order of the court. I have therefore to consider under what circumstances that sanction ought to be withheld. Now, without laying down any general rule with regard to that important question, it appears to me to be clear that I ought not to sanction an arrangement under this Act where it will bind a creditor, whose preferential right would have been respected if a winding-up order had been made. To apply that general observation to the particular case I have before me, I think I ought not to bind Mr. Crawshay to this arrangement if I am convinced that, if a winding-up order had been made, the court would have allowed Mr. Crawshay to put his judgment into execution; and therefore I approach this question—ought the court, under the circumstances which here exist, supposing a winding-up order to be made, to have permitted Mr. Crawshay to have the benefit of the judgment he had obtained by means of an execution?—and that question divides itself into two. In the first place, how would that question have stood if the Judicature Act 1875 had not been passed? and, secondly, how does it stand, seeing that that Act has been passed? Now, with regard to the first of these two questions, it appears to me that a series of decisions have shown this, that whether the petition be presented by the company or by the creditors, the court will not allow a

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person who has been induced by the representations of the company, or by the prayers of the company for delay or indulgence, not to issue execution, to be deprived of the benefit of the execution which he would otherwise have obtained, and I think that that is a just and fair course to be pursued. A judgment creditor, who may issue execution, can deal with and arrange and give indulgence to the company, and no one else. The creditors of the company may be many with whom he could not possibly bring himself into communication, and I think it would be an evil day for the creditors of a company and for the company itself if it was held that arrangements come to between a judgment creditor of the company and the company itself for indulgence to the company should not affect the creditors, who, in some certain events, might claim the property. There is a course of decisions which has been brought to my attention, from the case of the *Great Ship Company*, where a petition was presented by the creditors, down to the more recent case of the *Railway Steel and Plant Company* before Hall, V.C., and where he said with regard to the discretion of the court to be exercised under the 167th and 87th sections of the Companies Act 1869, "it is a discretion which makes it most difficult to find a case to apply to it, but it appears to me to be plain in this case that the creditor in question was one who could over and over again have realised his judgment and execution had he not been persuaded not to do so by applications for indulgence made by the company;" and he thought that where these applications had been made the company were bound to put the creditor in the same position as if they had not craved for that indulgence. It appears to me, therefore, that this is a case in which, independently of the Judicature Act 1875, I should say that the company has induced Mr. Crawshaw not to put in force his judgment in a way which renders it unfair that that judgment should be intercepted or interfered with by the winding-up order and the fruits of it taken away by that order, and that whether the winding-up order was made upon the petition of the company or the petition of the creditors, it would be unjust to deprive him of the rights which he would have had but for the representations and prayers of the company. I may observe that it appears to me to be immaterial upon principle whether the petition is presented by the company or by a creditor, and for this simple reason—that the estate is administered for the benefit of the creditors on either of those petitions, and it would be equally prejudicial to allow execution, whether the petition had been presented by the company or the creditors themselves, and therefore I see no distinction really between the two petitions. Then I proceed to the second inquiry, which is this: Has the matter been altered by the effect of the 10th section of the Judicature Act 1875? Now, that section provides that, "In the winding-up of any company under the Companies Acts 1862 and 1867 whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up" (which cannot be ascertained until the winding-up comes to an end), "the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for

the time being, under the law of bankruptcy, with respect to the estates of persons adjudged bankrupt." Now, by the 87th section of the Bankruptcy Act 1869 it is enacted that "where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding 50*l.* and sold, the sheriff, or, in the case of a sale under the direction of the County Court, the high bailiff or other officer of the County Court shall retain the proceeds of such sale in his hands for a period of fourteen days, and, upon notice being served upon him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee"—at the end of the fourteen days he is to know whether he holds on that trust or not—"but if no notice of such petition having been presented be served on him within such period of fourteen days, or if, such notice having been served, the trader against whom the petition has been presented is not adjudged a bankrupt on such petition or any other petition of which the sheriff, high bailiff, or other officer has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served upon him." Now I would observe that there the latest period during which the sheriff can be in uncertainty as to how he is to deal with the proceeds of the execution is the date of the hearing of some petition of which he had notice during the fourteen days. Therefore, it would be fourteen days, together with the period which may elapse before the hearing of the petition presented within the fourteen days. It is said that the 10th section of the Judicature Act 1875 has this effect, that it substitutes a notice of a winding-up petition for the notice of a bankruptcy petition, and that therefore, if the sheriff takes in execution, under a judgment exceeding 50*l.*, the goods of a company, the sheriff must hold the proceeds of the sale for a period of fourteen days, and if he receives, during the fourteen days, notice of a winding-up petition being presented, he must hold the proceeds in trust for the liquidator, and if the company is not wound-up on that petition or on some other petition of which he has received notice, then he may deal with the proceeds in the same way as if he had not received such notice. Now, there appears to me to be an initial difficulty in applying the one section to the other, which is this—that the 10th section of the Judicature Act 1875 only applies to the winding-up of a company whose assets may prove—that is do prove—in the particular case to be insufficient for the payment of its debts and liabilities and the costs of winding-up. That is a matter which cannot be ascertained until the winding-up has come nearly to an end; that is to say, it may not be ascertained until then. Of course it may be capable of being ascertained at an earlier period, but there is no certainty by which it can be ascertained that the winding-up has approached its end. It appears to me, therefore, that a notice of a winding-up order itself is not equivalent to a notice of bankruptcy, because it is not every winding-up order that is to have the same effect as a bankruptcy. It is only a winding-up order where the particular contingency happens of the insufficiency of the assets to meet the debts and liabilities, and where the sheriff cannot be expected to receive notice during the fourteen days, and I think a

great practical inconvenience would arise if the sheriff were required to hold the proceeds in the event of his receiving notice during the fourteen days—not until the petition should be heard and adjudicated upon, but until it should be ascertained whether the particular contingency of the assets being, or not being, sufficient to meet the debts and liabilities and the costs had been ascertained by the process of winding-up. It appears to me, therefore, that I should have great difficulty in applying the words of the 10th section of the Judicature Act to the 87th section of the Bankruptcy Act 1869; but it does also appear to me that this further observation is well founded, that the language of the 10th section of the Judicature Act 1875 merely applies to the rules for the administration of the assets in the hands of, or under the power of, the court—that it is merely, to use the language which the Master of the Rolls himself used in the somewhat peculiar case which came before him, “that the right construction of the section is nothing more than this, that persons may, in the winding-up of a company, make such claims against the assets of the company as are provable under the law of bankruptcy. I see no reason for extending the words of the section beyond that.” In coming to this conclusion, I am aware that I am at variance with the view which the Master of the Rolls has expressed in the more recent case before him of *The Printing and Numerical Registering Company*, and I need not say that, whenever I differ from the Master of the Rolls, I do so with great doubt and hesitation; but in this case I find that there are earlier authorities, one before Malins, V.C., and the other before Hall, V.C., both of which seem to me to put the same construction upon the 10th section of the Judicature Act 1875 which I have put upon it; and I find also that the Master of the Rolls, in the earlier case before him, adopted that same construction, and seeing that that construction commends itself to my mind, I feel bound on the balance of authority to act in accordance with my view of what is the better reading of the words. The result is, that I have come to the conclusion that the 10th section of the Judicature Act has not altered the rights of Mr. Crawshaw in this case; that if the case had come before the court upon an application to allow Mr. Crawshaw to proceed with his execution, he ought to have been allowed so to proceed, and, that being so, that this is not a case in which I ought to bind him by the resolution of the majority, and I therefore decline to sanction the resolution.

The petition to sanction the compromise was therefore dismissed; an order to wind-up was made on the petition of the Aberdare Rhondda Steam Coal Company (Limited); and leave was given to Crawshaw to execute his judgment, notwithstanding the winding-up order.

Solicitor for Crawshaw, *I. H. Wrenthmore*, agent for *G. F. and G. James*, Merthyr Tydvil.

Solicitor for creditors, *Speckley*.

Solicitors for the company, *Banisters and Co.*

Solicitors for the Aberdare Rhondda Steam Coal Company, *Whites, Renard, and Co.*

Solicitors for debenture holders, *Ingledeu, Ince, and Greening*, and *Lyns and Holman*.

March 28 and 29.

(Before FRY, J.)

Re BANISTER; BROAD v. MUNTON. (a)

Conditions of sale—Sale under the direction of the court.

*A vendor who intends, by his conditions of sale, to exclude a purchaser from his right to have a good title shown, must do so by explicit and clear words.*

*If the vendor seeks so to exclude the purchaser by a statement of fact, the vendor must prove the fact to be true, and such statement must be honest and fair, and convey the whole of the truth.*

*In sales under the direction of the court, the court requires the utmost good faith and honesty on the part of the vendor.*

*In a sale under the direction of the court, one of the conditions of sale required the purchaser to assume the truth of a certain statement of facts. Other facts were subsequently discovered by the purchaser, which tended to throw doubt on the title to the property, but the Court, being of opinion that the vendor had fairly stated the facts as they were known to him, and that there was still a fair holding title shown, refused to rescind the contract of sale or to direct an open reference as to the title.*

On the 9th May 1877 an order was made in this action, which was for the administration of the estate of Lucy Banister, deceased, for the sale of freehold estates known as Frankland's Farm and Frankland's Wood, in Wivelsfield and Lindsfield, in the county of Sussex.

On the 16th June 1878 the property was offered for sale by auction under this order, and one of the conditions of sale under which it was sold was as follows:

10. A declaration will be produced and handed over to the purchaser that the farm mentioned in the particulars of sale was taken by the decedent of Esther Banister in Oct. 1835, and has since been held by the decedent of her, and those claiming under her, in succession to the present time, and the same declaration will state that the adjoining wood mentioned in the particulars has been enjoyed as one property with the farm for the like period, and each purchaser shall be satisfied with the title so made, as showing a good and sufficient title, without the production of any other document of title whatsoever previous to the will of the said Esther Banister in 1860, who shall be assumed to have been seized of and entitled to the entire property in fee simple in possession, free from incumbrances, at the time of letting the farm in 1835, and up to and at her death. It is not accurately known, and cannot be now satisfactorily explained, how she acquired the property, and it is expressly stipulated that no other title than as above shall be required or inquired into, whether in the vendor's possession, power, or knowledge, or not, neither shall he be bound to answer any requisition relative thereto. If any liability to succession duty shall appear, the same shall be settled or provided for as the court shall direct.

The property was sold at the auction for 4250*l.*, and the purchaser paid a deposit of 500*l.* on signing the contract.

The following documents were abstracted in the abstract of title delivered to the purchaser's solicitors:

1. Will of Esther Banister, dated the 24th Aug. 1860, devising all her real estate generally to Thomas Banister.

2. Settlement by Thomas Banister, dated the 13th Sept. 1867, of all his real estate in the parishes of Lindsfield and Wivelsfield, upon trust,

(a) Reported by FRANK BURNS, Esq., Barrister-at-Law.

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after his decease (which had occurred), for his widow, Lucy Banister, in fee.

3. Will of Thomas Banister, dated the 11th Feb. 1871, giving all his property to Lucy Banister absolutely.

4. Will of Lucy Banister, dated the 21st March 1876, devising all her property to the vendor as trustee.

5. Declaration by one John Chatfield, the tenant of the farm, in accordance with the 10th condition of sale.

The purchaser's solicitors, on making inquiries, discovered that no succession duty had been paid in 1861, when Thomas Banister succeeded to the property, but that, in the succession account which had been rendered, no reference was made to the property.

In Sept. 1878, on a summons issued at the instance of the purchaser, asking that the question of succession duty might be settled by the court, and that thereupon the balance of purchase money might be ordered to be paid into court, the vacation chief clerk simply ordered the balance to be paid into court without prejudice to the questions between the parties. And in pursuance of this order the money was paid into court.

On the hearing of another summons on the 9th Nov. the vendor's solicitor informed the purchaser's solicitors that Esther Banister was a mortgagee in possession, and that a return of the property as a mortgage debt had been made by Thomas Banister in his residuary account, and that on this account duty had been paid by him.

On further inquiry being made, it was discovered that the property was mortgaged in 1822 to William Ellis for 8000*l.*, that John Banister, Esther Banister's father, a former incumbrancer of a life estate, was then partly paid off and took a second mortgage for the remainder of his debt; that a policy of assurance for 6000*l.* on the life of two reversioners interested in the equity of redemption was assigned to Ellis by way of collateral security, and that a receiver was appointed by the mortgage deed; that the property remained in the hands of receivers acting under the deed till Dec. 1844, and that in 1845 a bill in Chancery was filed by Esther Banister, as the executrix and one of three legatees of her father, against Ellis, in order to have her rights as such executrix declared to the proceeds of the policy moneys which had been paid; that the suit was revived against the representatives of Ellis on his death in 1847, and that in April 1847 an order was made, on the hearing of the suit, which affected the policy moneys, but did not purport to foreclose or to affect the existence of the equity of redemption.

After discovering these facts the purchaser, on the 22nd Nov. 1878, took out the following summons:

That, having regard to the mis-statements as to the vendor's title contained in the 10th condition of sale, the contract may be rescinded with costs, and the purchaser's purchase money returned to him with interest, and that he be awarded compensation in respect of the costs and expenses to which he has been put by such mis-statements, or, if the court should be of opinion that the purchaser is not entitled to such relief, then that an open reference may be directed whether or not the vendor can make a good title to the premises, and that in case a good title shall be made, the purchaser may, upon the completion of the purchase, be awarded compensation in respect of the costs and expenses to which he has been put by reason of such mis-statements, but that in case a good title cannot be made, the contract may be rescinded

with costs, and like compensation and the purchaser's purchase money be returned to him with interest, and that in the meantime, pending the result of the investigation or reference as to title, the purchase money shall not be paid out of court.

*J. Pearson, Q.C. and E. T. Holland* for the purchaser.—The declaration states that Chatfield took the farm from Esther Banister in 1835, whereas at that time it was not in her possession, but in that of a receiver. The 10th condition is improper in requiring the purchaser to assume Esther Banister to have been seised or entitled in fee-simple in possession free from incumbrances from 1835 till her death, when the facts were that she was only the executrix of a second mortgagee, and it was only by arrangement that the receiver accounted to her for the rents. If she had been in possession in 1835 her title by prescription would have been clear in 1861, when she died, but after that date we find her legatee, Thomas Banister, treating the property as personalty, and including it as such in his account of her residuary estate. Moreover, she was not solely entitled even, for her sisters had each an interest, and there was a charge on the property under the will of John Banister in favour of two other daughters. The 10th condition is both erroneous and misleading, and this was either to the knowledge of the vendor, or would have been if he had made proper inquiry. A person cannot be asked to assume that to be a fact which is known to be untrue. The purchaser has not by his conduct waived his title to relief in one of two alternatives. They cited

*Blacklow v. Laws*, 2 Hare, 40;

*Hume v. Bentley*, 5 De G. & Sm. 520;

*Edwards v. Wickwar*, 13 L. T. Rep. N. S. 428; L. Rep. 1 Eq. 68;

*Beioley v. Carter*, 20 L. T. Rep. N. S. 381; L. Rep. 4 Ch. 230;

*Eles v. Eles*, 25 L. T. Rep. N. S. 927; L. Rep. 13 Eq. 196;

*Harnett v. Baker*, 32 L. T. Rep. N. S. 362; L. Rep. 20 Eq. 50;

*Jones v. Clifford*, 35 L. T. Rep. N. S. 937; L. Rep. 3 Ch. Div. 779;

*Manson v. Thacker*, 38 L. T. Rep. N. S. 209; L. Rep. 7 Ch. Div. 620.

*Glasse, Q.C. and H. B. Buckley*, for the vendor, were not called upon.

*FRY, J.*—In this case the applicant asks for the rescission of a contract for sale entered into by him for the purchase of an estate; or, in the alternative, for the delivery to him of an abstract wider and more extended than he is entitled to have under the conditions of sale. In other words, he seeks to put the vendor to his election, either to furnish a better abstract or to have the contract rescinded. There are several things which are quite clear with regard to a contract on conditions of sale. One of those is this, that the vendor who means to exclude the purchaser from his common law right to have a good title shown must do so by explicit and clear words. Another thing is plain, that, if he seeks to exclude him by a statement of fact, he must prove the fact to be true, and the statement of fact must be an honest and fair one; it must not, for the purpose in hand, be a part of the truth only—it must, so far as that purpose is concerned, be the truth and the whole truth. It must therefore not mislead an ignorant person. One of the main reasons why the court have treated conditions of sale in this way is, that the vendor is a person who knows,



and he is stipulating with the purchaser, a person who does not know. It is therefore, of course, fair that the person who does know should express his meaning so as to be perfectly intelligible to the person who does not know. Another thing is equally plain, that where the conditions of sale are framed in bad faith so as in effect to trap the purchaser, the court will not hold him to be bound. It is also perfectly plain that, where the sale is under the direction of the court, the court will lean, if possible, to a more exact requirement of good faith and honesty on the part of the vendor; it will endeavour to insist upon that fair, straightforward, honest, open dealing which ought to characterise transactions between vendor and purchaser. Therefore, if it were shown in this case that there had been bad faith, that there was anything like a trap, if the reasons stated on the conditions were false, or probably even if it had been shown that I should be forcing upon the purchaser that which was really no title at all, I should have felt bound to accede to the application; but I find in this case none of those circumstances which would in my opinion justify me in releasing the purchaser from the contract into which he has entered. Now the controversy arises on the 10th condition of sale, which is in these words: [His Lordship read the 10th condition.] Now I pause here to observe this, that the purchaser is required to make a certain assumption, and that it is expressly provided that he shall be satisfied with the title being shown in a particular manner, that those conditions are imposed upon him as the result of two things, the one the production of a declaration, the other a certain state of facts which refer to knowledge and ignorance stated in the condition. The declaration is to be produced, showing that there was a payment of rents to Esther Banister from Oct. 1835. That is a condition precedent to the assumption being made, and that condition has been performed. Over and above that there is a statement of fact, or allegation of fact, on which the purchaser is asked to adopt the assumption. Although from its position it follows after the condition, it is evidently that which has been called the condition precedent, and that statement of fact is this: "It is not accurately known, and cannot be now satisfactorily explained, how she acquired the property." Was that statement of fact true? That is a very important inquiry. Now what I find is this: that the vendor in this case was the trustee under the will of Mrs. Lucy Banister, that a suit was instituted for the administration of the estate, that a sale took place under the direction of the court, that the devisee in trust accordingly laid before the conveyancer of the court all the documents which were in his possession relating to this matter, that he commenced with the will in 1784, that it appeared Esther Banister had become entitled as executrix of her father to his real and personal estate; it also appeared that she was in possession of this land, that in 1860 she made her will devising all her real and personal estate to Thomas, and that Thomas entered upon this land on her death in 1861, that in 1867 Thomas made a marriage settlement of this land, under which the property ultimately came to his widow, Lucy Banister, in fee, that she enjoyed the land, and that in 1876 she died, having so enjoyed the land during her lifetime. It appears to me that the whole of the

information which was in the possession of the vendor which appeared to bear upon the title to this real estate was placed by him before the conveyancing counsel, and that the conveyancing counsel having had two or three conferences with the vendor, who appears also to have been a solicitor, came to the conclusion that he did not accurately know, and that he could not then satisfactorily explain, how she acquired the property. That appears to have been a perfectly true and honest statement of the position of the land by the vendor and his adviser. Nor is that altered now; after the industry exhibited by the purchaser with a view of getting out of this contract, he has not been able to explain satisfactorily how Esther Banister acquired the property, and the manner in which she acquired it is not known. It appears to me, therefore, that the two conditions, if I may say so, upon which the assumption was to be made, have been satisfied—the production of the declaration and the truth of the statement of title. But it is said that there were circumstances in the knowledge of the vendor from which he must have known that the assumption that Esther Banister was seized in fee of the property in 1835 could not have been true, and that no vendor can ask a purchaser on any statement of truth to assume that which he knew to be false. Now the circumstances do not seem to me to justify that suggestion. It appears to be perfectly true that, when Esther Banister died in 1861, Thomas elected to treat the money as mortgaged property, and to pay the legacy duty upon it, and not the succession duty; but it appears to me to be equally plain that that would not, in the natural course of things, be known to the vendor of the estate, because no person who investigates the title to real estate naturally looks into the residuary estate of the deviser; and as a matter of fact, judging from the evidence before me, I have come to the conclusion that the vendor had no knowledge whatever, at the time when those conditions were drawn, that in 1861, or shortly afterwards, the legacy duty had been paid. It appears to me, therefore, that there was nothing whatever in the assumption which he asked the purchaser to make which was inconsistent with his knowledge at the time he asked the purchaser so to make it, and therefore that there was no want whatever of good faith in imposing that condition. Then I proceed further to inquire this: Is it clear that the purchaser will obtain no title whatever to the property? So far from that being the case, it appears to me that in all probability the purchaser will acquire a good holding title. I say nothing about a marketable title, and for this reason, that there is distinct evidence that from the year 1835, between forty and fifty years ago, the receipt of the rents and profits of this property has gone in precise accordance with the statement made, which is true. The industry of the purchaser has discovered another fact, which does not appear to have been known to the vendor at the time of the sale, viz., that in 1845 Esther Banister brought a suit in the Court of Chancery against the first mortgagee and also against the mortgagors, the object of which was to settle the priorities between the first and second mortgagees, and to enforce the satisfaction of the first mortgage by means of certain policy money which the first mortgagee had received. It appears that that resulted in the success of the second

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mortgages and the satisfaction consequently of a prior mortgage, which existed before the mortgage under which it is stated that Esther Banister claimed, and under which no doubt she did originally claim, but whether or not that bill amounts to an acknowledgment of the mortgagor's title, I do not think it necessary now to determine. It does not appear to me that the fact of the pendency of the suit was known at the time of the preparation of the conditions of sale, but even if it were, what is the subsequent history? A decree which satisfied the first mortgage was made as far back as 1847, now thirty-two years ago, and from that time to the present the property has been enjoyed without acknowledgment. That is a title which may very probably turn out to be a perfectly good holding; it is one on which it is impossible for me to conclude that the purchaser has got nothing from his bargain. Under these circumstances I feel myself bound to hold that there has been no want of good faith, that there has been no falsity in the statement of fact, that it has not been shown that there is any trap in the conditions, that it has not been shown that the purchaser will not get a good holding title. Therefore I think the case before Sir James Parker, V.C., of *Hume v. Bentley*, was one which ought to govern in this case, and that there has been nothing whatever to discharge the purchaser; and therefore I must refuse this application with costs.

Solicitors for the purchaser, *G. A. Crawley and Arnold*.

Solicitors for the vendor, *Munton and Morris*.

#### QUEEN'S BENCH DIVISION.

*Wednesday, April 2.*

(Before COCKBURN, C.J. and MELLOR, J.)

NEW RIVER COMPANY (apps.) v. ISLINGTON ASSESSMENT COMMITTEE (resps.). (a)

*Metropolitan rating—Valuation list—Increased value of hereditaments—Supplemental list—32 & 33 Vict. c. 67, ss. 43-47.*

*The second Metropolitan quinquennial valuation list under the Valuation (Metropolis) Act 1869, s. 43, came into force in April 1878. During the year following some new houses were built, to which the appellants' mains in existence before the beginning of the year were connected by means of service pipes belonging to the owners of the houses.*

*Held, upon a case stated, that the increased rents thereby receivable by the appellants constituted an alteration which had taken place in the matters stated in the valuation list within sect. 46, so as to increase the valuation list for the following year.*

The Governor and Company of the New River duly appealed against the Supplemental Valuation List for the parish of St. Mary, Islington, which was made and deposited on the 31st May 1877 under the Valuation of Property (Metropolis) Act 1869 (32 & 33 Vict. c. 67), and the Court of General Assessment Sessions, held at the Guildhall, Westminster, on the 14th Feb. 1878, on the trial of the appeal, ordered the said supplemental list to be altered by reducing the gross value of the company's property in the said parish from 23,250*l.* to 22,612*l.*, and the rateable value from 20,700*l.* to

20,100*l.* subject to the opinion of the High Court of Justice (Queen's Bench Division) on the following case:

1. In 1875, pursuant to the Valuation of Property (Metropolis) Act 1869, the overseers of the parish of St. Mary, Islington, duly made their second quinquennial valuation list in which the land occupied by the water mains, pipes, and reservoirs of the said New River Company in the parish of St. Mary, Islington, were assessed as follows:

Gross value as estimated by overseers, and finally determined by assessment committee .....	232,500
Rate of deduction per cent. ....	11½
Rateable value .....	20,000

2. That list duly came into force on the 6th April 1876, and the company have since paid the rates made in conformity with such list.

3. Between the 6th April 1876 and the 6th April 1877 a certain length of new mains had been laid by the company.

4. Between the 6th April 1876 and the 6th April 1877 a number of new houses had been built, many of which had, in that interval, been connected by means of service pipes with mains in existence prior to the 6th April 1876.

5. The service pipes from the mains to the houses belong to the owners or occupiers of the houses.

6. All houses in the parish of Islington are supplied with water by the New River Company, which is empowered by Act of Parliament to charge the occupiers at the rate of 4*l.* per cent. upon the annual value of the respective houses.

7. A large number of new houses are built and connected with the mains every year within the said parish.

8. In Feb. 1877 the overseers of the parish made, pursuant to sect. 47 of the said Act of Parliament, a provisional valuation list containing the gross and rateable value of the company's property as increased in value, being 23,250*l.* gross and 20,700*l.* rateable.

9. The company in due course objected to such provisional valuation list, but the assessment committee confirmed it.

10. On the 31st May 1877, the supplemental valuation list now in dispute was made and deposited by the overseers pursuant to sect. 46 of the said Act, and in it was embodied the provisional valuation list referred to.

11. The company also duly objected to the supplemental valuation list, which objection was however disallowed, and the list finally approved by the assessment committee.

13. The figures of the supplemental valuation list show an increase of 750*l.* upon the gross, and of 700*l.* upon the rateable value.

14. A portion of this increase, viz., 112*l.* gross, and 100*l.* rateable value, relates to the rating of the land occupied by the new mains, and is not now in dispute.

15. The remainder represents the increased value of the water mains, pipes, and reservoirs derived from the connection of the mains existing prior to the 6th April 1876 with houses built between the 6th April 1876 and the 6th April 1877.

16. It was arranged between the parties that the General Assessment Sessions should not be asked to settle the amount of the assessment to

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

Q.B. Div.] NEW RIVER COMPANY (apps.) v. ISLINGTON ASSESSMENT COMMITTEE (resps.). [Q.B. Div.]

be entered in the supplemental valuation list, but simply to determine the basis upon which such amount should be calculated, as the parties would have no difficulty after the decision of the question of law in agreeing to the amount thereof.

17. The company contend that they are not liable to have their assessment increased by reason of the increase of their gross receipts in the parish arising from the additional water rentals derived from connections of new houses with mains which were in existence prior to the year which the supplemental list of 1877 was made to cover, and that the mains being in existence before the 5th April 1876, the assessment of the company could not be increased by reason of such mains being made to supply additional houses between the 6th April 1876 and the 6th April 1877.

18. The assessment committee contend that the rateable hereditaments of the company had under the circumstances mentioned increased in value by reason of the mains being connected with the new houses during the year which the supplemental valuation list in dispute was made to cover, viz.: from the 6th April 1876 to the 6th April 1877; and that a tenant would pay more for the company's property after such connections had been made than before; and, further, that there had been a structural alteration in the property during the said year ending 6th April 1877 by tapping the mains in front of the houses for the purpose of connecting the pipes from the houses with the mains; that there was both an alteration in the company's property and an increase in the value thereof within the meaning of sect. 47, and that the increase of the assessment was not to be limited to the value of the new mains put in the land since the commencement of the year (6th April 1876) which the supplemental list in dispute was made to cover.

The Court of General Assessment Sessions decided in favour of the company, and ordered the supplemental valuation list to be reduced as before-mentioned.

The question for the opinion of this court was whether the increase in the value of the company's property by reason of the increase in the gross receipts derived from the new connections mentioned in paragraph 4 is such an increase as is within the meaning of sections 46 and 47 of the said Act.

If the court shall answer this question in the affirmative, then the order of sessions is to be quashed and the supplemental valuation list to remain as originally approved by the assessment committee or to be altered as agreed between the parties.

If the court shall answer this question in the negative, then the order of sessions is to be confirmed.

By the Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67), s. 43:

The valuation list as approved by the assessment committee, and if altered on any appeal under this Act to any sessions or a superior court, as is altered, shall come into force at the beginning of the year (commencing on the 6th April) succeeding that in which it is made, and shall last for five years, subject to any alterations that may be made by any supplemental or provisional list as herein-after mentioned.

By sect. 45:

The valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall for

all or any of the purposes in this section mentioned (amongst them, for all rates made in the metropolis on the basis of value) be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been as inserted.

By sect. 46:

Every valuation list shall be revised in manner directed by this Act, and such revision in every period of five years (the first of such periods beginning with the 6th April 1871) shall be conducted as follows:

1. In each of the first four years of such period, a supplemental list shall, if necessary, be made out, in the same form as the valuation list, and shall show all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list, but shall contain only the hereditaments affected by such alterations.

4. A supplemental list and a new valuation list shall come into force at the beginning of the year succeeding that in which they are respectively made, in the same manner and subject to the same conditions as the valuation list made in the first year after the passing of this Act.

5. In each of the last four years of such period the valuation list which was in force on the day before the commencement of each such year, together with and as altered by the supplemental list, if any, which comes into force at the commencement of such year, shall be the valuation list which is in force during that year.

By sect. 47:

If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect:

1. The overseers of the parish in which such hereditament is situate may, and on the written requisition of the assessment committee, or of any ratepayer of the union, or of the surveyor of taxes for the district, shall send to the assessment committee a provisional list containing the gross and rateable value, as so increased or reduced, of such hereditament.

8. A provisional list, signed as aforesaid, shall have operation from the date of the service by the clerk of the assessment committee of a copy of the list and notice on the occupier, and shall continue in force until the first list (supplemental or other) which is subsequently made, comes into force.

10. A provisional list during the time that it is in force shall be deemed to form part of the valuation list for the time being in force, and shall (so far as is necessary) be substituted for so much of that valuation list as relates to the same hereditament, and every rate and tax in respect of which the valuation list is conclusive, which are respectively made or charged after the provisional list comes into force, and the proportion of the current rate charged as before provided in this section, shall be levied accordingly.

*A. Wills, Q.C. and Clerk*, for the respondents, the Assessment Committee, were stopped by the Court.

*Webster, Q.C. and Russell Griffiths*, for the appellants, the New River Company.—The valuer at the commencement of each quinquennial period ought to take into consideration the probable increase of value during the period in those hereditaments which continue without alteration. We do not dispute the increase upon the new mains; but the connection of service pipes to the old mains is not "an addition thereto or erection thereon of any building" in the words of sect. 47, which justifies an increase in a provisional or supplemental valuation list. The whole object of a quinquennial valuation list will be lost if every alteration in the value of unaltered hereditaments is to affect the rateable value; and the inconvenience in arriving at the probable rent of the

hypothetical tenant must be greatly increased thereby.

COCKBURN, C.J.—We need not trouble Mr. Wills again. Mr. Webster has given us a very ingenious argument, and has pointed out the inconveniences of a plain construction of the statute. We cannot, however, provide for the consequences of the manifest aim of the Legislature, and cannot avoid the effect of the words which have been used. The provision is clear; the supplemental list is to be made to "show all the alterations which have taken place during the preceding twelvemonths in any of the matters stated in the valuation list;" it is, indeed, more intelligible than such provisions always are. It must be intended that injustice should be remedied, if by extraordinary or unlooked-for circumstances any great addition or reduction of value may take place. Not, perhaps, that every minute detail need be considered when the question of retaining or altering the valuation is to be determined; but if there be a substantial change in the value of a hereditament, such as there is found here to be the case with respect to these mains, then effect must be given to it in the valuation for the remainder of the period. There is but one interpretation for the words of the 46th section; and the 47th merely affords a means by which the 46th is to be carried out.

MELLOR, J.—I am of the same opinion. I can only give the 46th section the interpretation which my Lord applies to it. There is no other possible meaning to the words.

*Judgment for respondents.*

Solicitors for the appellants, *Thompson and Debenham.*

Solicitor for the respondents, *John Layton.*

#### EXCHEQUER DIVISION.

*March 28 and April 1.*

(Before KELLY, C.B. and HAWKINS, J.)

COOPER v. THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. (a)

APPEAL FROM INFERIOR COURT.

*Railway company—Season ticket—Conditions on purchase of—Deposit—Non-return of ticket on expiry—Reasonable time—Forfeiture of deposit—Condition precedent to return of deposit—"Penalty or liquidated damages"—Construction of contract.*

*Where, on the purchase of a season ticket on a line of railway, the purchaser, in addition to the sum paid by him for the ticket, deposits with the railway company a sum of 10s., and agrees to and signs several conditions, amongst which are the following, viz., that "the ticket is to be considered as the property of the company, to be delivered up on the day after expiry or on forfeiture," and also that "the ticket and all benefit and advantage thereof, including the deposit, shall be absolutely forfeited to the company if it shall be lost, or in case of any breach of any of the above conditions," the observance and fulfilment by the purchaser of each and every one of the conditions is a condition precedent to his right to a return of the deposit on the expiry of the ticket; and therefore, if he fails to return the ticket "on the day after*

*its expiry," the company are entitled to retain the deposit as forfeited; and although he returns the ticket a few days afterwards, and no damage be shown to have accrued to the company through the delay in returning it, he cannot maintain an action against them for the recovery of the deposit, which is to be treated as liquidated damages and not as a penalty.*

*So held by the Exchequer Division (Kelly, C.B. and Hawkins, J.) in this case.*

CASE ON appeal.

1. This was an action which was commenced in the City of London Court to recover the sum of 10s. deposited by the plaintiff with the defendants under the circumstances hereinafter mentioned.

2. On or about the 30th Sept. 1876 the plaintiff applied at the season-ticket office of the defendants for one of their season tickets, to entitle him to travel for one month to and fro between London and Brighton. He thereupon signed a memorandum agreeing, as the holder of his then present or any future main line season ticket, to abide by and conform to the following conditions:

Conditions upon which main line season tickets are issued and accepted.

1. That it is to be used subject to and in conformity with the company's bye-laws, rules, regulations, and time tables from time to time in force.

2. That it is available only at and between the two stations named thereon, including intermediate stations, but no others.

3. That it is not to be transferred to or used by any person other than the person named thereon, and who has signed these conditions.

4. That on every demand it is to be shown to any officer or servant of the company, and that it is to be considered as the property of the company, to be delivered up at the secretary's office on the day after expiry, or on forfeiture.

5. That the company are not to be liable for any stoppage, hindrance, or delay, in respect to the starting, speed, or arrival of the train, whether arising from any accident, negligence, or other cause.

6. That the ticket and all benefit and advantages thereof, including the deposit, shall be absolutely forfeited to the company if it shall be lost, or in case of any breach of any of the above conditions.

7. If the holder wishes to perform any other journey than that for which the ticket is available, he must, before starting, pay the excess or other proper fare, and take a ticket as an ordinary passenger; failing which he must pay the full fare from the point of starting.

3. The plaintiff at the same time paid to the defendants the usual charge for the said season ticket, and also the usual deposit of 10s. thereon.

4. The season ticket applied for by the plaintiff was then filled up and handed to him by the defendants. On the back thereof was indorsed a copy of the aforesaid conditions, with the words "I agree to the above," signed by the plaintiff.

At the foot of the said indorsement, below the plaintiff's signature, there is also the following note on the said ticket:

In the event of this ticket being lost, a reward of 10s. will be given to any person who brings it to the Secretary, London Bridge Station.

5. At the expiration of the month for which the said season ticket was available, the plaintiff returned the same to the defendants, and upon the same conditions obtained from the defendants another similar season ticket, indorsed and signed as before.

6. It is the practice of the defendants, and, as a fact, the defendants, on or about the 24th Nov. 1876, sent by post to the plaintiff a printed notice

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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reminding him that the time for using the said season ticket would expire on a day therein mentioned, and that, if he did not wish to renew it, he ought to return it immediately upon expiry, in order that the deposit might not be forfeited, according to the conditions indorsed thereon.

7. The said season ticket was returned to the defendants, as stated by the plaintiff, "some few days" after its expiration, the plaintiff at the same time requesting the return of the 10s. deposit, which was refused by the defendants on the ground that the ticket was not returned on the "day after expiry," as required by the conditions.

The Court found as a fact that the said ticket was returned within a reasonable time in that behalf.

8. The action was tried on the 15th Oct. 1878 when the Court gave judgment for the plaintiff, but, at the request of the defendants, gave them leave to appeal.

9. The question for the Divisional Court is whether or not under the circumstances aforesaid the plaintiff is entitled to recover.

*Jeune* (with him was *B. L. Moseley*) for the defendants, the appellant company.—The whole question is, what was the contract between the parties? This is not a bye-law, nor is it a contract under sect. 7 of the Railway and Canal Traffic Act 1854 17 & 18 Vict. c. 31, and therefore the question of reasonableness does not arise. This is not a case of a penalty, but an action to recover a deposit, which means that it is a case of liquidated damages. *Hinton v. Sparkes* (17 L. T. Rep. N. S. 600; L. Rep. 3 C. P. 111; 37 L. J. 81, C. P.) is an authority in favour of the defendants on that point. In cases of penalties equity no doubt grants relief under certain circumstances, but this is not a case of that kind. [HAWKINS, J.—I have never been able to see why persons should not be allowed to make their own contracts and be bound by them. Your point is, that if a man contracts to do a certain thing, he must do it if he possibly can?] That is so; the plaintiff here entered into a certain contract, and he is bound by it.

*Anderson* (with whom was *Bremner*) for the plaintiff, respondent, *contra*, contended that this was a penalty and not liquidated damages. The defendants (the company) might have a counter-claim for any damages that they could show they had actually sustained by reason of the non-return of the ticket at the appointed time, but they were not entitled to anything more. The distinction between a "penalty" and "liquidated damages" in such a case, and the equitable doctrine of relief against a "penalty" to secure the due performance of a contract, are well stated in 2 Story's Equity Jurisprudence, 12th edit., sects. 1314, 1315, and 1316. In sect. 1316 it is said: "The true foundation of the relief in all these cases is that, as the penalty is designed as a mere security, if the party obtains his money or his damages, he gets all that he expects, and all that in justice he is entitled to. . . . In reason, in conscience, and in natural equity there is no ground to say, because a man has stipulated for a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act), that if he omits to do the act he shall suffer an enormous loss wholly disproportionate

to the injury to the other party." In the present case the 10s. is a penalty. It is to be retained upon the breach of any one of the several conditions, including the bye-laws. The cases are overwhelmingly strong to show that this is to be looked upon as a penalty and not as liquidated damages. *Betts v. Burch* (4 H. & N. 506; 28 L. J. 267, Ex.) is a strong authority in favour of the plaintiff. In the *Dagenham (Thames) Dock Company, Ex parte Hulse* (L. Rep. 8 Ch. App. 1022; 43 L. J. 261, Chan.) there was a deposit of 2000*l.*, which was to be forfeited if 2000*l.* more were not paid on a certain day, which was not paid, and the Court of Appeal (James and Mellish, L.J.J.) held that this was a mere device for the recovery of a penalty, and that the dock company were entitled to be relieved on payment of the unpaid balance and interest. [HAWKINS, J.—The present is an action to recover back the whole of the 10s. deposited, and not a suit in equity for relief.] This court is now a court of equity, as well as of law, and so, therefore, the case of the *Dagenham Dock Company* is applicable. In *Ex parte Capper, Re Newman* (35 L. T. Rep. N. S. 710; L. Rep. 4 Ch. Div. 724; 46 L. J. 57, Bank.), again a penalty of 10*l.* per week for default in not completing the work by a certain date was held to be a penalty which equity would relieve against. That was precisely the present case. [HAWKINS, J.—If persons are not at liberty to enter into such a contract as the present, the argument is intelligible; but if they are, I cannot understand it. The company say they ought not to be called on to prove damage. They may not be able to do so. The object in getting back the ticket is to prevent fraud.] I submit that I am entitled to assume that the company have not sustained sixpennyworth of damage by the non-return of the ticket on the day, and it would be highly inequitable and unrighteous for them to retain the 10s., and the court, as a court of equity, will relieve the respondent. *Hinton v. Sparkes* (*ubi sup.*), which was decided before the Judicature Acts, and when the court was limited to the provisions of 8 & 9 Will. 3, c. 11, as to the relief in such cases, was relied on by the defendants as deciding that in the case of a deposit the question whether "penalty" or "liquidated damages" did not arise; but that is an erroneous view, and the *Dagenham Dock* case is directly to the contrary. Further, the delivery up of the ticket on the particular day was not a condition precedent to recovering the deposit. In *Woolfe v. Horne* (36 L. T. Rep. N. S. 705; L. Rep. 2 Q. B. Div. 355; 46 L. J. 534, Q. B.) the plaintiff purchased goods at an auction by the conditions of which his deposit was to be forfeited in case the lot was not cleared away within three days, which the plaintiff failed to do, and the defendants, the auctioneers, refused to return the deposit, and in an action to recover damages for non-delivery of the goods it was held that this stipulation was not a condition precedent to plaintiff's right to claim delivery, on the ground that it did not go to the root of the consideration. That is a stronger case against me than the present case, for there the deposit was a part of the consideration, whereas here it was wholly collateral, and to secure the performance of a collateral act, and had nothing to do with the carriage of the plaintiff to and from Brighton, which was the main object of the contract.

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In *Bettini v. Gye* (34 L. T. Rep. N. S. 216; L. Rep. 1 Q. B. Div. 183; 45 L. J. 209, Q. B., C. P. & Ex.), the distinction between a condition precedent and a mere collateral act which can be compensated for in damages is clearly drawn, and the present condition is just one of the cases put by Blackburn, J. in his judgment there, as not going to the root of the contract. Where time is of the essence of the contract, it goes to the whole of the consideration, and there no damage need be proved. But that is not the case here. Lastly, the court will, on an equitable view of the matter, strike out from the fourth condition the words "on the day after the expiry thereof," and substitute for them the words "within a reasonable time after the expiry thereof," within which reasonable time the court below found that the ticket was delivered up.

*Jones* in reply.—The plaintiff is in truth endeavouring to make this a strange sort of bill in equity. It is only in a few specified cases that equity gives relief; for instance, it will relieve in a case of forfeiture on a breach of covenant to pay rent, but not on a breach of covenant to repair; and there is not a particle of authority that it would relieve against the forfeiture of the deposit in the present case. All the courts, both of law and equity, hold that where a deposit is made the parties are presumed to have intended what they agreed to. This is a case of liquidated damages, and if so, it is not one for equitable relief. The case of the *Dagenham Dock Company* does not apply, for there the aid of a court of equity was sought, but here that is not the case. Nor has the question of "condition precedent" any application. Here is a specified agreement that if a certain thing is not done the deposit shall be forfeited. *Woolfe v. Horne* (*ubi sup.*) is not in point. The purchaser's right to the goods there was an absolute one, which was held not to be destroyed by his not having sent for them on the Saturday instead of the Monday following. The company's case here rests on *Hinton v. Sparkes* (*ubi sup.*); on *Lea v. Whitaker* (27 L. T. Rep. N. S. 676; L. Rep. 8 Q. B. 270); a more recent and even stronger case in their favour than *Hinton v. Sparkes*; and on *The London Tramways Company (Limited) v. Bailey* (87 L. T. Rep. N. S. 499; L. Rep. 2 Q. B. Div. 217; 47 L. J. 3, M. C.), a case subsequent to the Judicature Acts, and also a "hard" case, and yet it was there held that the defendant, having entered into an agreement by which the company in the event which had happened might retain the deposit money paid by him, was bound by the terms of his contract. The plaintiff here, in fact, is attempting to get back a sum of money which he agreed should only be returned to him on the happening of an event, which event has not happened.

*KELLY, C.B.*—The contract in this case is really very plain and clear. The plaintiff, it seems, purchased of the defendants a monthly season ticket for travelling over their line between London and Brighton, and at the time of the purchase he deposited with the company, over and above the price he paid for the ticket, the sum of 10s., a very small sum, and one in respect of which we can hardly imagine the interposition of a court of equity being required to settle the question whether or not the plaintiff is entitled to recover it back, and whether it is to be treated as liquidated

damages or a penalty. At the time of the purchase of the ticket and the deposit of the 10s. the plaintiff entered into the following agreement. First of all, the ticket was to be "subject to and in conformity with the company's bye-laws, rules, regulations, and time-tables;" then it was to be available only at and between the two named stations, including intermediate ones, but no other, and it was not to be transferred to or used by any person other than the one named thereon who had signed these conditions. Now, stopping there for a moment, it is quite clear that, if this latter stipulation be broken on the part of the ticket holder, great frauds may be practised upon the company. If, for example, a person be so minded and chooses, if his face be not well known at all the stations, to lend his ticket to a friend, the company is defrauded of the fare for the journey over so much of the line, from the one station to the other, as the person so using the ticket may choose to pass. Then the agreement continues, that "at every demand the ticket is to be shown to any officer or servant of the company;" and then comes the part of the agreement which is in question in the present case, "and that it is to be considered as the property of the company, to be delivered up at the secretary's office on the day after expiry or on forfeiture." Now it has been contended by the learned counsel on the part of the plaintiff that we are to strike these words "on the day after expiry" out of the clause, and to substitute for or to add to them the words "within a reasonable time afterwards." But what is a reasonable time, and who is to determine what is a reasonable time? It may be reasonable or unreasonable, according to the case of the non-delivery of the ticket. A ticket holder may lose his ticket out of his pocket, and then he could not deliver it up at all. The agreement further goes on to say that "the company are not to be liable for any stoppage, hindrance, or delay," and so forth; and then, which is also an important clause in the present case, "that the ticket and all benefit and advantages thereof, including the deposit, shall be absolutely forfeited to the company if it shall be lost, or in case of any breach of any of the above conditions." But, if we are to strike these clauses out altogether, or to hold them to be void or not binding upon the parties, let us see what would be the probable consequence in case the ticket holder were, as before suggested, to lose the ticket out of his pocket. There is an indorsement on the ticket to the effect that, in the event of the ticket being lost, a reward of 10s. will be given by the company to anybody bringing it to the secretary at the London Bridge station; so that, if the losing of the ticket is not to amount to a forfeiture of it, and consequently also to a forfeiture of the 10s. deposit, the company would not only have to pay 10s. to the finder of the ticket, but would be liable, in an action like the present one, to pay the loss over again to the ticket holder. That possible consequence is, I think, conclusive as to the construction to be put upon this contract, and as to the necessity under which the court is placed of giving effect to every word and letter of the contract literally as it is here expressed. Then there comes a clause as to the holder's desiring to perform any other journey on the line, which I need not further refer to. The case then states the payment by the respondent of the price of the ticket as well

as of the 10s. deposit, whereupon the ticket was handed to him, and that on its back was indorsed a copy of the aforesaid conditions with the words "I agree to the above," which he signed, and that beneath his signature there was the note or memorandum on the ticket with regard to its being lost and found, to which I have already adverted, and which, I think, standing alone, is sufficient to decide the present question. We cannot release the plaintiff from any one of the stipulations to which he has here agreed, or hold that the breach of any one of them will not incur the forfeiture of the deposit, without holding that every one is void; it would, in fact, go to the avoidance of the entire contract. For I need hardly say that, if in an action like the present one the plaintiff is to be entitled to set up the equitable doctrine that this deposit is to be treated as a penalty and not as liquidated damages, and the court is to hold that equity would interfere to relieve him against the forfeiture of this sum of 10s., then, if that be so in respect of one breach, it must be so in respect of any breach throughout the whole of the contract; as, for instance, in the case of the ticket being lost, and the finder getting 10s. from the company for finding it, or in the case of its forfeiture by the holder's lending it to another person, who uses it and defrauds the company thereby, or indeed in the case of the breach of any other of the several conditions or stipulations in the contract. There was apparently some little difficulty in this, that the statement of the contract referring to the September purchase of the season ticket really applies to the October or November purchase; but the difficulty is removed by the paragraph in the case, which states that, "at the expiration of the month for which the September season ticket was available, the plaintiff returned the same to the defendant, and upon the same conditions obtained from the defendants another similar season ticket, indorsed and signed as before." That includes, I apprehend, the deposit of the 10s., and the signature by the plaintiff to the whole of the conditions—the entirety, in fact, of the contract. If that be so, the plaintiff is in this dilemma: if he seeks to recover that 10s., having deposited it over again, why then all the observations which I have made apply, and the breach of any one of the conditions involves a forfeiture of the 10s. If he did not renew the deposit, then there is nothing for him to recover. Taking it, therefore, to be that this deposit was made, we come to the simple question, are we to hold this contract void with reference to the forfeiture of the 10s., in any of the events which have occurred by reason of the breach of the contract? If we are to hold it as to one we must hold it as to all, and we are therefore compelled to determine whether there is anything illegal or void in a contract of this nature. No purchaser of a season ticket can possibly know or determine, or even with certainty speculate upon, the mischievous consequences which may result to a great company like this from the breach of any one, however unimportant it may seem to be, of these conditions. I think, therefore, that the equitable doctrine as to the non-forfeiture of deposit money laid down in the cases which Mr. Anderson has cited to us, where equity has interposed and relieved one of the two parties against forfeiture, has really no

application to a case like the present. Every case, of every kind, in which a question arises whether a court of equity would relieve against a forfeiture, whether it be in the very common case of nonpayment of rent, or in any other case, must be determined upon its own circumstances; and, looking to the particular circumstances of this case, in which there is really no hardship whatever upon the plaintiff, but in which there would be the greatest hardship and the greatest peril to the defendants unless the contract be enforced and strictly performed, I have no hesitation in saying that every word and every letter of the conditions of that contract should be strictly observed by the plaintiff, and that, not having observed them, but having violated them, he has incurred the forfeiture of the 10s., and therefore this action was not maintainable. Judgment will therefore be for the defendants, the appellant company, reversing the decision of the court below.

HAWKINS, J.—I am of the same opinion, and think that our judgment should be for the defendants who are appealing. When the contract itself which was entered into between the plaintiff and the defendants is carefully looked at, it seems to me to make it perfectly clear that the plaintiff is seeking to recover back the sum of 10s. which he deposited with the railway company at the time of their issuing to him a season ticket entitling him to travel on their line for one month, and which sum he deposited subject to this express stipulation, that it should be returned to the plaintiff in the event of his observing and fulfilling all and every the conditions upon which the ticket was issued; and the observance and fulfilment of each and every of those conditions is, in my judgment, a condition precedent to his right to bring his action to recover that money. Now it is quite clear that one of the conditions upon which the ticket was issued had not been fulfilled, because by the fourth condition, which has been so often referred to, it appears that upon every demand the ticket is to be shown to the company; it is to be considered to be the property of the company, and this condition makes it an imperative part of the stipulation between the plaintiff and the defendants that it should be "delivered up at the secretary's office on the day after expiry." Mr. Anderson says that we are to read that fourth condition as if those words "on the day after expiry" were not in it, and as though in substitution for them the words "within a reasonable time after the expiration of the ticket" had been inserted there. I confess I can see no ground for any such reading of that condition. It is clear, therefore, that that stipulation has not been fulfilled. Then the sixth condition says—and this is the agreement between the parties—that "the deposit shall be absolutely forfeited to the company in case of the breach of any of the above conditions." It strikes me that we have only to read these words to see that what I stated a minute ago is correct, viz., that the agreement between the parties was that the 10s. should not be recovered back until each and every one of the stipulations mentioned in these conditions had been fulfilled. We are not concerned here to-day to inquire as to whether it was a reasonable or an unreasonable stipulation that the ticket should be delivered up on the day after that on which it



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expired; but I confess, if I were bound to form an opinion upon the subject, I should come to the conclusion that it was a very reasonable condition to impose upon those to whom the company granted the privilege of these season tickets, for I can conceive myself that it would create an enormous amount of inconvenience to the company if such a stipulation were not made, and I can see that a very great danger, at all events, might arise of old season tickets being fraudulently used if the company did not require their immediate delivery up upon their expiration. However, we are not now concerned to inquire more into that, but, were we bound to do so, I should certainly express my opinion that the stipulation is a most reasonable one. My judgment, however, is based entirely upon the terms of the contract between the parties, which contract stipulates for the return of the deposit only upon certain conditions being fulfilled, which conditions were not fulfilled. Therefore I think that our judgment ought to be for the company.

*Judgment for the defendants, reversing the decision of the court below.*

Solicitor for the plaintiff (respondent), T. G. Russell.

Solicitors for the defendants (appellants), Norton, Rose, Norton, and Brewer.

Tuesday, March 25.

(Before KELLY, C.B. and HAWKINS, J.)

DEARDS v. GOLDSMITH AND WIFE. (a)

APPEAL FROM INFERIOR COURT.

*Turnpike Act, construction of—"Town"—Definition of—Turnpike gate in the town—Exemption of inhabitants of town from toll—Question of fact for the determination of the magistrates—Omission to demand toll for forty years—No right to exemption established thereby.*

A Turnpike Act passed in 1815 provided that "no toll should be demanded or taken of or from any of the inhabitants of the town of S. at any toll gate or toll bar to be erected in the said town." In 1838 the turnpike trustees removed a turnpike gate, which since 1815 had stood in the town, to a site without the town, and 1200 yards distant from its old position. At that time and for several years afterwards there was not any house on either side of the road between the old and the new site of the gate; but within the last few years some fifty or sixty detached or semi-detached houses had been built, some on one and some on the other side of the road, between the two sites, but the houses were not contiguous or continuous, there being arable and other fields, and a reservoir, &c., intervening. From 1838 until June 1878 the inhabitants of the town of S. had been in the habit of passing through the gate without paying toll, and on the appellant, an inhabitant of the town, driving through the gate in Aug. 1878, toll was demanded from him by the respondents, the toll collectors, and was paid under protest by the appellant, who subsequently laid a complaint before the magistrates against the respondents for unlawfully demanding and taking toll from him as an inhabitant of the town of S.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

*The magistrates, after hearing the evidence on both sides and personally inspecting the locus in quo, found, as a fact, that "there was not any collection of houses at the said toll gate, nor a continuous series of houses from the old to the present site of the gate, and that the gate did not, at the time of its erection or of the complaint, stand within the town of S.," and they accordingly dismissed the complaint; and on appeal therefrom it was*

*Held, by the Exchequer Division (Kelly, C.B. and Hawkins, J.), dismissing the appeal, that the question, whether within a town or not within a town was a question of fact for the determination of the magistrates, and that the magistrates having found that the gate was not within the town, the court were not at liberty to go behind that finding, but must treat it as a question of fact on which the magistrates had jurisdiction to determine, and had determined, for themselves. But the Court also expressed their opinion that, having regard to the facts of the case, the finding of the magistrates was right in point of fact.*

*Held, also, that the omission of the trustees to demand toll for a period of forty years established no right in the public to exemption, which nothing but an Act of Parliament could create or sanction; nor had the trustees any right or power to exempt any person, or class of persons, from payment of the toll except those expressly exempted by the Act.*

*Per Hawkins, J.: Had the effect of the building operations been such as to bring the toll gate within the "town," though it was not so in 1838, the appellant, as an inhabitant of the "town," would have been entitled to exemption from toll, on the ground that at the time the exemption was claimed, the gate was within the "town," though it was not at the time of its removal. In my opinion a "town" grows with the buildings, and wherever it can be said that the latter have advanced to such an extent as that that which was formerly without is now within the "town," the exemption will apply to such newly added part of the "town." The definition of a "town," given by Russell Gurney, Q.O., Recorder of London, in Reg. v. Cottle (16 Q. B. 412; 20 L. J. 162, M. C.), and by Alderson and Parke, B.B., in Elliott v. The South Devon Railway Company (2 Ex. 725; 17 L. J. 262, Ex.) approved and acted upon.*

CASE stated by magistrates for the opinion of the court, at the request of the appellant, on an appeal by him from their decision dismissing his complaint against the respondents for having unlawfully demanded and taken toll from him at a certain turnpike gate under the circumstances set forth at length in the case, of which the following is a statement of so much as is material for the purpose of this report.

The appellant was an inhabitant of the town of Sutton, in the county of Surrey, and the respondents were the collectors of the tolls at a turnpike gate in the parish of Sutton, called the Sutton Lane-gate, on the turnpike road leading from Sutton to Reigate. The complaint against the respondents before the magistrates arose under a Turnpike Act (55 Geo. 3, c. xlviii.), "for repairing the road from Sutton, in the county of Surrey, through the borough of Reigate by Sidlow Mill to Povey Cross, and several other roads therein mentioned in the same county," whereby it was

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enacted in sect. 32 of the same Act, amongst other things, as follows:

Provided also, that no toll shall be demanded or taken by virtue of this Act of or from any of the inhabitants of the town of Sutton at any toll gate or toll bar to be erected in the said town, or for any horses, cattle, or carriages belonging to such inhabitants passing through the same.

The toll gate in question formerly stood close to a tavern, called the Cock Inn, in the High-street of the town of Sutton. But about forty years ago, namely, some time in the year 1838, the trustees of the said turnpike road, under and by virtue of the powers vested in them by the said Act of Parliament, removed the said toll gate from its then position, which was admittedly within the town of Sutton, to its present site, where it has ever since stood and now stands in Sutton-lane within the parish of Sutton, a distance of about 1200 yards, or rather more than five-eighths of a mile in a southwardly direction from the Cock Inn aforesaid.

At the time of such removal there was not any house between the Cock Inn and the present position of the toll gate in Sutton-lane, but since the said removal, and within the last few years, some thirty-seven detached or semi-detached houses have been erected on the west side of the road, but they are not contiguous or continuous, there being a reservoir with a frontage of 92 feet to the said road, and a large arable field intervening in which there are no houses, and which has a frontage to the turnpike-road of rather more than one-eighth of a mile, and which field is in the market for building purposes; and on the east side of the said road from the said Cock Inn to where the gate now stands in Sutton-lane there are seventeen villas or detached houses, the railway station, and an iron church, but they are not contiguous or continuous, there being on the same side also a field of about six acres, another field of about twenty acres, both having a frontage to the said road, a third field (arable) having a frontage of 107 feet to the said road, and a meadow having a frontage of nearly one-eighth of a mile to the said road, lying between the Cock Inn and the said toll gate.

On the west side of the said road, beyond the said toll gate, there is a row of eleven houses in the parish of Sutton, beyond which the land is all farming land, and on the line of the said road there are new roads being formed on which are already built, or in course of building, nineteen houses in the aggregate. A farmhouse building and premises of a Mr. Burton are near to the said toll gate, on the east side of the said road, but immediately at the rear of and surrounding the said farmhouse and buildings there is nothing but agricultural land, and in fact the said toll gate is surrounded by such land on its north, south, and east sides. The average rental of the houses along the line of the said road from the Cock Inn to the Sutton-lane gate is 70*l.* per annum, and the houses in such line of road are rated at over 3000*l.* Some sixty or seventy years ago the rateable value of Sutton was 5000*l.*, and the population about 800; and while twenty years ago the whole rateable value of Sutton was 8300*l.*, it has now a rateable value of 43,000*l.*, the total rateable value of property on the south side of the Cock Inn alone being upwards of 8650*l.*

In the preamble to the said Act, and in the Vol. XL, N. S., 1016\*.

several sections therein up to and inclusive of sect. 4, the words "Sutton" and "Sutton aforesaid" only are used, without distinguishing the place called "Sutton" from the "town of Sutton;" and in sect. 5 the "town of Sutton" is first mentioned in the words there, "leading from the 12th milestone in the town of Sutton;" and when Sutton is afterwards referred to in the same section it is mentioned as "Sutton aforesaid," and in various other sections, up to sect. 32, the word "Sutton" only is used; and in the before-mentioned proviso in sect. 32 the words "town of Sutton" and "the said town" are again and for the only other times made use of; in all other instances throughout the Act where Sutton is mentioned therein it is referred to as "Sutton" only or "Sutton aforesaid."

Until the month of June 1878 the inhabitants of the said "town of Sutton" had been in the habit of passing and repassing through the said toll gate at Sutton-lane aforesaid without paying toll; and on the appellant driving through the said gate on the occasion in question, the 14th Aug. 1878, toll was demanded from him by the respondent Ann Goldsmith, the wife of the toll collector at the said gate, when the appellant, having first claimed exemption from toll as an inhabitant of the town of Sutton, paid the toll under protest.

On the hearing of the complaint before the justices, it was contended, on the part of the appellant that the "town of Sutton" extended to and beyond the site of the present toll gate in the town by reason of there being houses on both sides of the road, and on adjacent roads, so situated as to constitute a town, and to be part of the "town of Sutton;" and that the present site of the gate was within the "town of Sutton," within the meaning of the exempting proviso in sect. 32 of the said Act; and that the removal of the said toll gate to its present position by the trustees some forty years ago was subject to the rights, remedies, and restrictions imposed by the said statute, and that the removal of the gate from its former site to its present site did not confer upon the trustees the right to impose a toll on the inhabitants of Sutton.

On the part of the respondents it was contended that the words "town of Sutton" in sect. 32 were words of restrictive limitation, and that by using them in that section the intention was to restrict the exemption to inhabitants of the town on passing through any toll gate to be erected in the said town. That it was a question of fact, to be determined by the justices, whether or not the said toll gate was within the "town of Sutton;" that it was not within the said town, and accordingly that the inhabitants were not, nor were the appellants, exempted from the payment of tolls.

The justices inspected the position of the Sutton-lane toll gate, and, upon such inspection and the evidence, they found as a fact that there was not any collection of houses at the said toll gate, nor a continuous series of houses from the Cock Inn to the said toll gate, and that the said gate did not at the time it was erected, nor at the time of the said complaint, stand within the "town of Sutton," and they also, upon the construction of the statute, and of the decisions in the cases cited by counsel for the complainant and the solicitors for the defendants, came to the same conclusion that the Sutton-lane toll gate did not stand within the said "town of Sutton;" and they accordingly dis-

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missed the complaint, with costs against the said complainant, the present appellant, and, upon his application, they stated the present case, in which the questions for the opinion of the court were:

1. Whether, under the circumstances, the removal of the toll gate from the town of Sutton to the present site outside the town, but within the parish of Sutton, conferred a right on the trustees of the road to exact a toll from the inhabitants of the town of Sutton?

2. Whether the words "town of Sutton" are to be held to be co-extensive with the word "Sutton," as used in the said Act, or must be limited to the exemption clause of the said Act?

3. Whether by custom or usage the inhabitants of the town of Sutton are entitled to exemption from tolls at the said toll gate?

If the court should be of opinion that these questions should be answered in the negative, then our said determination is to be enforced; and if in the affirmative, our determination is to be reversed and our decision quashed.

*Kydd*, for the appellant, contended that the decision of the magistrates was erroneous, and should be reversed. Three times only in the Act was the "town" of Sutton mentioned: viz., in the 5th section, where the words, "twelfth milestone in the town of Sutton" were, it is submitted, descriptive only, and not words of limitation; and immediately afterwards, in the same section, the place "Sutton" was mentioned as "Sutton aforesaid;" and in all the subsequent sections of the Act, where the place was mentioned or referred to, it was mentioned as "Sutton" only, or "Sutton aforesaid," except in the exempting proviso in sect. 32, on which the question here turned, where the word "town" was again twice used. [HAWKINS, J.—Do you say that the justices as a matter of fact ought to have found that this spot where the gate now stands was town?] The justices have misapprehended the cases cited before them, and the construction of the Act of Parliament, and the proper legal definition of the word "town;" and it is a question for the consideration of the court on the facts as found. The justices, having an anterior or foregone impression in their minds, inspected the *locus in quo*, and under that impression, and not from any *a posteriori* reasoning, said, "This is not a town." They have gone wrong in point of law in attempting to define a town as "a continuous series of houses" merely. There is no such thing as a "continuous series of houses" without qualification contemplated by the cases which were cited before the justices, and on which the latter appear to have based their decision. It is the continuous growth of the town, and the gradual extension and expansion of its limits, that is to be looked at, as in *Reg. v. Ootile* (16 Q. B. 412, 20 L. J. 162, M. C.); where the late Recorder of London, Mr. Russell Gurney, having directed the jury "to consider whether the gate in question in that case was situated within the town of Taunton, and told them that the word 'town' was to be taken in its popular sense of a collection of houses, where people congregate, and that they were to consider whether the spot in question was so surrounded by houses that the inhabitants might fairly be said to dwell together, and that the fact of the houses being separated by gardens would not prevent them from being said to lie together," that direction and definition were approved of by Lord

Campbell, C.J. and the rest of the Court of Queen's Bench. Subsequently, also, in the House of Lords, in the case of *The London and South-Western Railway Company v. Blackmore* (23 L. T. Rep. N. S. 504; 39 L. J. 713, Ch.; L. Rep. 4 E. & I. App. 601), the Lord Chancellor, Lord Hatherley, referred to that definition approvingly, and said: "It amounts to this, that where there is such an amount of continuous occupancy of the ground by houses that the inhabitants may be said to be living, as it were, in the same town or place continuously, there, for the purposes of the Railway Acts, and according to the popular sense of the word (not the legal sense, which would not give at all a sensible definition), the place may be said to be a town." In *The Commissioners of Milton v. The Faversham District Highway Board* (10 B. & S. p. 548, n.), the court intimated its opinion to the justices, in accordance with *Reg. v. Ootile*, that "the proper definition of the word 'town' was a continuous series of houses not necessarily contiguous, but sufficiently so to form a congregation of human habitations." The description of the locality in the present case shows it to be clearly "town" within the definitions of that word in the above-named cases. Again, the rule of construction of an Act of Parliament like the present one is thus laid down by Bailey, J. in *Waterhouse v. Keen* (4 B. & C. 425): "Acts of Parliament such as those now in question" (a Turnpike Act) "must be construed with reference to the particular language in which they are expressed; but where there is any ambiguity in the language used the construction must be in favour of the public, because it is a general rule that where the public are charged with a burden the intention of the Legislature to impose that burden must be explicitly and distinctly shown." So also in *The Leeds and Liverpool Canal Company v. Hustler* (1 B. & C. 425), the same learned judge says, with reference to a question of toll under a Canal Act: "Those who seek to impose a burden upon the public should take care that their claim rests upon plain and unambiguous language." And in *Bussey v. Storey* (4 B. & Ad. 98; 2 L. J. N. S. 166, K. B.) Parke, B., delivering the judgment of the Court of King's Bench, on a question arising under a Turnpike Act, says: "But as this statute does impose a tax, the usual rule of construction must be applied to it which is adopted in similar cases, and the subject must not be charged unless the intention to charge clearly and distinctly appears." The same doctrine, that there must be no ambiguity in order to make the subject liable to a tax or burden, is laid down in *Dwarris on Statutes*, 2nd edit., p. 646, and 2 *Chitty on Statutes* (2nd edit. 1851, p. 531, note b., Highway and Turnpike). The appellant here, therefore, is entitled, it is contended, to exemption if there be any doubt whether this gate be within the town of Sutton or not. But further, for forty years, from 1838 to the summer of last year, no toll was ever demanded at this gate. The trustees, therefore, having stood by and permitted the public to use this gate toll free for so long a period of time, and having thereby caused to grow up in the public mind an idea that they intended to let these inhabitants pass toll free, cannot now impose a toll upon them:

*The Surrey Canal Company v. Hall*, 1 Scott N. R. 264; 9 L. J. N. S. 329, C. P.;  
*Hill v. Smith*, 10 East, 475.

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At all events, the trustees not having been reasonably vigilant and diligent, the equitable doctrine of acquiescence will apply as against them.

Fitzgerald (with him was *Grantham, Q.C.*), for the respondents, *contra*, supported the decision of the justices. — The only real question here is, whether or not the appellant is within the exempting proviso in sect. 32 of the Act? To bring himself there he must show that the *locus in quo* is within the town of Sutton, using the word "town" in the popular sense of the term, and that he has not done, and cannot, it is submitted, properly do, having regard to the various authorities on the question. In addition to those which have been cited for the appellants it may be added that, in *Elliott v. The South Devon Railway Company* (2 Ex. 725; 17 L. J. 202, Ex.), Alderson, B. defines a town as follows: "It is where a great body of people within a township are congregated together in houses. It means land continuously built upon. There can be no doubt that the green of Grosvenor-square is in 'town.'" So a railway passing through the Temple-gardens would be passing through a "town;" and Parke, B., in the same case, says: "It would appear that the word 'town' is not to be understood in its strict legal interpretation as a township having a church or a constable, but a place containing a number of houses congregated together, an inhabited spot where the occupation is continuous." In *The Commissioners of Milton v. The Faversham Highway Board*, cited on the other side, and which is reported more fully in 31 Justice of the Peace, p. 341, Cockburn, C.J., says, "All that the court can do is to lay down the rule or principle founded upon the definition already laid down, that is, that the houses must be part of a series of houses sufficiently contiguous to form part of the town. The application of this rule raises a question of fact far better determined upon the view by the magistrates than it possibly can be by this court upon any statement." Now here the justices have found as a fact, after hearing both sides and a personal inspection of the spot, that this gate is not within the town, and the court will not interfere with their finding on a matter of fact within their jurisdiction. [He was stopped.]

KELLER, C.B.—The question here depends entirely upon the construction of the proviso at the end of the 32nd section of the Turnpike Act (55 Geo. 3, c. xlvi.), and its application to the unquestioned facts of the case. It appears from the case that a turnpike gate formerly stood within the town of Sutton, and close to a very old and celebrated inn in that town called the "Cock," and that, some forty years ago, namely, in the year 1838, the trustees of the Sutton turnpike road, under the powers vested in them by the last-mentioned Act of Parliament, removed that turnpike gate from its then site close to the "Cock" inn, within the town, to its present position in Sutton-lane, within the parish of Sutton, and about 1200 yards, or five-eighths of a mile in a southerly direction from its original position; and the question is whether, under the proviso in the Act to which I have already referred, the inhabitants of the town of Sutton, who were undoubtedly exempted by that proviso from the payment of toll at the gate in its former position, are also exempted from the payment of toll at the gate in its present position? Now the words of the ex-

empting clause of the Act are, that "no toll shall be demanded or taken by virtue of this Act, of or from any inhabitant of the town of Sutton, at any toll gate or toll bar to be erected in the said town. The question, therefore, is whether this new toll gate, erected in 1838, was at the time of its erection, or has since become, and now is, within "the town of Sutton." To arrive at a decision in this matter, we must look, not only to the position of the gate, but to the statements and findings in the case. The gate was, it appears, upon a spot marked upon the Ordinance map as "Banstead Downs," on the high road from Sutton to Reigate and more distant places, within which district roads were to be made or to be preserved, and turnpike gates to be erected under the Act at one place and another, according to the judgment of the trustees. The case finds that in 1838 there were not any houses between the Cock inn and the said toll gate in Sutton-lane; that is to say, there was not a single house to be found on either side of the road for a distance of 1200 yards from the site of the old gate in the town to that of the new gate in Sutton-lane, the town being 1200 yards to the north of the new gate. Further the case finds—[His Lordship here read from the case the description of the locality and the erection of new houses there since the removal of the gate in 1838 up to the present time, and then proceeded as follows:] Now, looking at the definition of a "town" in the various cases that have been cited, I think as the result of the whole it may be said that to constitute a "town" there must be a *continuity*, though not necessarily an absolute *contiguity* of buildings; that is to say, a spot to be said to be within a town must, in the language of Alderson, B. in *Elliott v. The South Devon Railway Company*, be "where a great body of people are congregated together in houses;" or, as Parke, B. said, in the same case, "a place containing a number of houses congregated together, an inhabited spot where the occupation is continuous." Those expressions correspond with the definition of a "town" given by the late Mr. Russell Gurney, the Recorder of London, in the case of *Reg. v. Cottle*, which was quoted with approbation by Lord Hatherley as Lord Chancellor in the House of Lords, in the case of *The London and South-Western Railway Company v. Blackmore*, in terms which have already been referred to; and surely no one who had to determine the question in this case could say that the description, given in the case of the locality in which this gate is situated, comes at all within either of the definitions of a town as given by either of these learned judges in either of the before-mentioned cases. Clearly this gate is not surrounded by a congregation of houses, nor in point of fact is it surrounded by houses at all; but there are merely here and there a few detached or semi-detached villas throughout a distance of some 1200 yards, with fields of many acres and a reservoir and so forth intervening. I am therefore of opinion that this toll gate was not at the time of its erection at its present site forty years ago, and is not now, within the town of Sutton, and that consequently the respondents are entitled to the judgment of the court. Independently, however, of any conclusion at which we have arrived on this point, I think the cases which have been cited go to show that the

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question whether a particular spot is within a town or not within a town, is a question of fact to be determined by a jury under the superintendence and with the assistance of a judge, where the case comes before a judge and jury, or by the magistrates where the case comes before them as this case did; and therefore, looking at the terms of this case, and finding that the magistrates, who were a tribunal of judge and jury together, have treated the matter as a question of fact for their consideration, and have found in clear and precise terms that this gate is not within the town of Sutton, I do not think we are at liberty to go further, but that we must treat it as a question of fact, upon which the magistrates had jurisdiction to determine and have determined for themselves. But it has been very acutely and ably argued by Mr. Kydd for the appellant, that there has been a user of this gate, toll free, by the inhabitants for forty years, and so they had acquired a right of exemption from the toll. No length of user, however, even if it were fully and satisfactorily established, can establish a right in any person or class of persons to exemption from tolls unless it be created or sanctioned by Act of Parliament. A duty is imposed by their Act of Parliament upon the trustees to levy the toll on all who pass through the toll gate, and they have no right or power, by negligence or carelessness, or it might be by favour, to exempt any person or class of persons from payment of it, or to grant to any person or any class of persons leave to pass through the gate gratuitously, and therefore their having permitted certain persons to pass through the toll gate without paying toll, even if it were altogether unexplainable, would create no right of exemption known to the law; and it is therefore really an immaterial fact in the case. Under these circumstances, therefore, upon all grounds, and upon all the questions which arise in the case, I am of opinion that the respondents are entitled to the judgment of the court.

HAWKINS, J.—I am of the same opinion. By their Act, which was passed in the year 1815, and under which they claim the right to take these tolls, the trustees were at liberty to take the tolls at the toll houses and toll bars duly erected, and they were authorised by another section of the Act to transfer the toll bars then erected to other parts of the road. The toll bar in question, it is admitted, stood in 1815 within the town of Sutton; it is admitted also, and so found in the case, that in the year 1838 the toll bar, which up to that time had stood within the town of Sutton, was transferred to a spot some distance from it, and re-erected at a place without the town of Sutton. Now the appellant is an inhabitant of the town of Sutton, and he claims an exemption from this toll by virtue of a proviso to be found at the end of the 32nd section of the Act. So far as it is necessary to state them here, the words of that proviso are these, "Provided also that no toll shall be demanded or taken by virtue of this Act of or from any inhabitant of the town of Sutton, at any toll gate or toll bar to be erected in the town of Sutton, or for any horses, cattle, or carriages belonging to such inhabitants passing through the same." I have said it is found by the magistrates, and it is not disputed, that at the time this toll bar was removed in 1838 it was removed to a spot, which was then, at all events, without the

town of Sutton. The case sets forth the fact, which is beyond all dispute, that since 1838, and chiefly within the last few years, there has been a great deal of building in the neighbourhood between the spot where the old toll bar stood and the place where it was erected in 1838. If the effect of those building operations had been such as to bring the toll bar within the town of Sutton, though it was not so in 1838, I should have been of opinion that the appellant, being an inhabitant of the town of Sutton, was entitled to exemption from the toll, on the ground that at the time the exemption was claimed the toll gate was within the town, although it was not within the town at the time of its removal. In my opinion a town grows with the buildings, and wherever it can be said that the buildings have advanced to such an extent that that which was formerly without the town is now within it, the exemption will apply to that part of the town so newly added. Then comes the question, yes or no? has this toll bar, which avowedly was without the town of Sutton in its new position in 1838, been since brought within the town so as to give exemption to those who claimed it as inhabitants of that town? Now this question is, in my judgment, purely one of fact for the tribunal before whom it is tried. If it had arisen before a judge and jury it would have been a question for the jury to determine under the direction of the judge who tried the case; if the question arises before magistrates, they have to apply the law which is presented to them, or as it exists, to the facts, and they have to determine whether, as a matter of fact, the place is or is not within the town. That was expressly decided by the Court of Queen's Bench in the case of *Reg. v. Ootile*. Lord Campbell, C.J., in delivering judgment in that case, says: "We are therefore of opinion that the learned judge was bound to leave the question to the jury whether, when the indictment was found, the gate stood across a road which was to be considered as at that time in the town of Taunton." There are one or two cases in which definitions are given of what is considered to be a town. One case is that of *Reg. v. Ootile*, to which reference has already been made, which was tried before the late Recorder of the City of London at the Somersetshire assizes, in which the question was whether the *locus in quo* was within the town of Taunton or not, and the learned judge left that question to the jury as one of fact, telling them that the word "town" in the Act was to be understood in the popular sense of "a collection of houses where people congregate," and that they were to consider whether the spot in question was "surrounded by houses so reasonably near to each other that the inhabitants might fairly be said to dwell together." In my judgment that was a very concise way of stating what constitutes a town. In the case of *Elliot v. The South Devon Railway Company*, Alderson, B. gave what in substance was his definition of a town as follows: "What the walls of towns were in ancient times, that is, a boundary, continuous buildings are now. By continuous buildings I do not mean buildings which touch each other, but buildings so reasonably near that the inhabitants may be considered as dwelling together. Within the ambit surrounded by such houses is town, and when the railway passes through that

ambit it passes through town." That is the definition given by Alderson, B. Lord Campbell, C.J., in his judgment in the case of *Reg. v. Cottle*, approved very much of Mr. Russell Gurney's definition, and at p. 420 of 16 Q. B. said: "We think there is no misdirection in this case. The learned judge, with much felicity, comprised in a few words all that was material in the language of the Barons of the Exchequer as to the definition of a town in *Elliott v. The South Devon Railway Company*;" and he added that, "the jury could not be misled" by that definition. I think I need not say more on that subject, except that I entirely concur in the view expressed by Mr. Russell Gurney, and think that his was the true definition. I do not think it is necessary, in order to make a man an inhabitant of a town, that the house in which he resides should be surrounded by other houses; it is quite sufficient if he lives in such proximity to other houses as that his house, with the other houses in its proximity, may be said to form, in point of fact, one congregation of houses. That must be of necessity a question of fact, and it cannot be, as far as I can see, a question of law. In this case the magistrates have found that this turnpike gate, notwithstanding its proximity to a great many houses at the time this toll was demanded, was not within the town, and with that finding, as a matter of fact, I do not think we are at liberty to interfere. The exemption being claimed, and only being claimed, by the appellant as an "inhabitant of the town" by reason of the turnpike gate being also "within the town," the moment it is found and established that the turnpike gate is without the town, the statutory exemption fails, and the appellant is liable to pay the toll, unless he can rest his exemption upon some other ground. Now, I looked with some anxiety to see whether Mr. Kydd would point out any ground upon which he could rest the exemption, because it undoubtedly seems at first sight a little hard that a man who has not for forty years paid any toll should suddenly be called upon to pay it; but I find that the Act of Parliament, in unmistakeable language, imposes the toll upon him unless he can make out not only that he is an inhabitant of the town, but also that the turnpike gate is situate within the town. The claim of exemption fails him altogether. Then Mr. Kydd says that there has been long neglect on the part of those who had the right to take the toll, in collecting it and enforcing payment of it against the inhabitants. I am at a loss to see that that affords any reason why, when the toll is demanded, it should not be paid. There is no Act of Parliament which extends the exemption, or rather, which, to my mind, in the least degree assists the appellant in his contention that he is exempt from the toll. I find no other circumstances which, by the greatest ingenuity of construction, can justify the appellant in refusing to pay the toll. It may be a hardship upon him, but there is the Act of Parliament which imposes the toll, and unless the exemption is conferred upon him by another Act of Parliament, I think he must pay it; that is to say, he cannot resist the collection of it by those who are placed in authority to collect it. As regards the other points which are set out in the case, I do not really think there is anything that calls for observation. "The town of Sutton" I agree is not co-extensive with the

word "Sutton;" and then as to the question of whether, by custom or usage, the inhabitants are entitled to exemption, I have already said I cannot see the slightest ground for the claim. I think, therefore, that upon all grounds the decision of the magistrates was right, and that this appeal ought to be dismissed.

*Judgment for the respondents; appeal dismissed with costs.*

Solicitors for the appellant, *Kays and Jones.*

Solicitor for the respondents, *J. M. Head.*

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

Feb. 20, 21, and 24.

(Before Sir ROBERT PHILLIMORE and TRINITY MASTERS.)

THE ROBERT DIXON. (a)

*Towage — Salvage — Negligence — Damage — Tug and tow.*

*Where in the performance of towage services the tow gets into a position of danger, to extricate her from which would entitle a stranger to salvage reward, the tug is not entitled to any reward if the situation in which the tow was placed was the result of negligence in the tug, and the tow is entitled to be reimbursed by the tug's owners for loss occasioned to the tow in being extricated from the position of danger.*

*Where the tug is familiar with the navigation and the tow a foreigner, it is the duty of the tug to tow in a safe direction, without waiting for directions from the vessel in tow.*

THIS was an action for salvage, by the owners, master, and crew of the steam tug *Commodore*, of 120 tons burthen and of about 700 horse-power (actual), against the *Robert Dixon*, an American sailing ship of 1368 tons registered, and of the value of about 11,000*l.* The owners of the *Robert Dixon*, by counter-claim, claimed against the *Commodore* for the value of her anchors and cables.

The circumstances of the case as proved by the evidence were, that the *Robert Dixon*, when bound in to Liverpool, had been towed by the *Commodore*, and that it was agreed that the *Commodore* should tow her out again when she left Liverpool.

On the 18th March 1878 the *Robert Dixon* was ready for sea, and some conversation took place between the captain and the master of the *Commodore* as to the advisability of going to sea on that day on account of the weather; but it was finally arranged that she should go, the master of the *Commodore* supplying the hawser to tow with, and undertaking to tow the vessel to the Skerries. The vessels crossed the bar about 5.30 p.m., when the Liverpool pilot left; he gave a course before leaving of W.N.W.; there was on board, besides the captain and regular officers and crew of the ship, an unlicensed Channel pilot to assist in the navigation of the vessel. The *Commodore* towed the *Robert Dixon*, it was alleged, too close to the shore for safety, the *Robert Dixon* being in hallast, and sagging to leeward, and it was proved that she passed well inside of a pilot boat (No. 6) off Point Lynas, whilst other vessels in tow passed outside. Some time before midnight, the exact

(a) Reported by J. P. ASPINALL and F. W. RAINES, Esq. Barristers-at-Law.

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time being in dispute, the wind having then increased to a gale, the tug began to tow further off shore, but the wind being on shore with a heavy sea, at 1 a.m. the hawser parted and the *Robert Dixon* began rapidly to drift towards the shore; the tug was unable to get hold of her again, and it was alleged suffered damage by coming into collision with the *Robert Dixon* during the attempts. The *Robert Dixon* let go her anchor, but, as she still dragged, she let go her second anchor also and paid out a whole cable on each. There was some dispute as to whether she still dragged or not, but at daylight she was within half a mile of the shore at Bull Bay, in Anglesea. During the forenoon the weather moderated, and the *Robert Dixon*, after having refused the services of another tug, the *Rescue*, was taken in tow again by the *Commodore* and proceeded to sea; she had been unable to weigh her anchors, and had therefore slipped both cables. In the statement of defence the defendants denied that any salvage service had been rendered, and paid into court 49*l.* in respect of the towage, that amount having been agreed upon before the services were commenced, and by counter-claim alleged that the loss of the anchors and cables was occasioned by the misconduct and negligence of the plaintiffs in supplying an insufficient hawser and towing an improper course, and claimed the value of them from the plaintiffs.

*Butt, Q.C., and Potter* for the plaintiffs.—The defendants knew what the hawser was before they went to sea; besides it was sufficient for the purpose under ordinary circumstances. The course towed was a proper one—it was, in fact, the course which the Liverpool pilot, on leaving, directed to be steered; when the state of the weather rendered it imprudent to continue on that course, the tug towed her further out to sea. The violence of the weather could not be foreseen. There has been no negligence on the part of the tug; but, from unavoidable circumstances, the towage service became a salvage service, and we are entitled to salvage remuneration for it.

*Milward, Q.C., G. Bruce, and F. W. Baikes*, for defendants.—It was imprudent to tow a light ship on such a course with the wind on shore. The plaintiffs knew, or ought to have known, that under such circumstances the vessel would sag to leeward, and not make good the course steered. The course steered was actually one which, if continued, would not clear the land. The plaintiffs undertook the business of towing with full knowledge of the difficulties, and undertook, in any event, to tow clear of the Skerries. Had they taken proper precautions the hawser would not have carried away; the hawser itself was not fit for the work, and the plaintiffs, knowing what that work was, had undertaken to supply a proper hawser. They ultimately completed the service, and we therefore pay into court the contracted price for the service, but we were put into peril by the misconduct or negligence of the tug, and to get out of it had to slip two anchors and cables. That is the direct result of the plaintiffs' negligence, and therefore we are entitled to receive their value:

*The Minnehaha*, Lush. 335; 4 L. T. Rep. N. S. 810.

*Potter* in reply.

Sir R. PHILLIMORE, after consulting the Trinity Masters, said:—There are certain propositions

which are agreed upon, or cannot be denied, relative to this case, which it may be convenient to state before I proceed to pronounce upon the merits of the case itself. This vessel, the *Robert Dixon*, a ship of 1368 tons register, was off Bull Bay, within a quarter of a mile of the shore. There is no doubt, first, that she was in a position of considerable danger, the wind blowing directly upon the shore; and, secondly, that she could only be rescued from that danger by the help of steam power; nor can it be doubted, as matter of law, that had the vessel that came up to her, and whose services were refused, or any other vessel except the *Commodore*, towed her out of her position, that vessel would have been entitled to salvage; and it is not because the *Commodore* did not perform what would have been in its general character salvage service that the objection is taken. It is with reference to the engagement under which she was at the time when this, which otherwise would have been a salvage service, was rendered. The *Commodore* was engaged as a tug to tow this large sailing vessel clear of the Skerries, and she tacitly contracted, of course, to find adequate knowledge and skill for the performance of this service. The vessel, however, came into the position of danger which I have mentioned, and the tug now makes a claim in this court in the character of a salvor, because she says that danger was the consequence of supervening circumstances over which she had no control. There are then two points: first, the parting of the hawser; and, secondly, the coming on of a gale. With regard to the breaking of the hawser, looking to all the circumstances of the case, namely, that it was patent to the captain of the sailing vessel that the hawser was chafed to the extent of three or four fathoms from the end, and that that was the only part of the hawser that was damaged; that his attention having been drawn to it, he refused to allow his own hawser to be used; and that the river pilot saw it, and was of opinion that it was not inadequate; and that it had been used from five p.m. to one a.m.; I do not think, and the Elder Brethren agree with me, that the tug is to blame for having attempted to tow the vessel with an improper hawser. But the more serious question remains, namely, whether the tug, if she was pursuing a proper course, would have been compelled to place the sailing ship in a position of danger. It is important to remember that the weather had been bad for some time; and that at the time when the towing was begun it was seen to be very doubtful. Now, the course that the tug ought to have pursued was a north-west course; the course she says she pursued, in the statement of claim, is this: "The wind was from the northward, a strong breeze, the sea moderate, and the vessel was being towed three-quarter speed, or five to six knots an hour, on a W. by N.  $\frac{1}{2}$  N. course. It appears from the evidence of the master of the tug himself that he received orders from the pilot to steer a W.N.W. course. The contention is, that whereas he did steer half a point more to the west, according to the statement, and that, according to the evidence, he steered a course which brought him inside the pilot boat No. 6, and that he steered this course when to have gone outside the pilot boat would have been a course of, comparatively speaking, perfect safety, and a course that two



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other vessels of the same kind, and under the same circumstances as the tug, at the same time pursued. Now the master of the tug denies that he received any orders at all, but he says that at eleven o'clock he put the vessel N.W. by W. of his own accord. Unfortunately, it was then too late to regain the ground he had lost, and this necessitated the vessel being placed in a position of considerable danger. Now, it is a matter very much for the Elder Brethren of the Trinity House to advise the court on a point of this description, as to whether there was a want of common prudence and skill in going to leeward, the consequence of which was that the ship was taken within a mile and a quarter of the shore; whether it was consistent with common prudence to have taken that course in that state of the weather; and they are clearly of opinion that it was not, that it was an imprudent course to pursue, and the consequence is that the sailing vessel was placed in a position of jeopardy resulting from the imprudence of this navigation. That being their opinion, it is impossible to come to any other conclusion than that the *Commodore* did not act as a salvor, but, on the contrary, is to blame. We are clearly of opinion that, though the master of the tug acted imprudently, he acted in good faith, and we have no reason to believe, nor is it suggested, that he endeavoured to induce the crew to leave the vessel, or that he placed her in a position of danger or in any way intentionally misconducted himself. But he did not give that skill and prudence which he tacitly contracted to give when he engaged to tow the vessel. It may be as well to refer to the very careful language used by the Privy Council in the case of *The Minnehaha* (4 L. T. Rep. N. S. 810; Lush. 335), which is: "Whether the circumstances in each particular case are sufficient to turn towage into salvage must often be a subject of great doubt, as it is in the present case; but there is one point upon which their Lordships can entertain no doubt, and upon which they are surprised that any doubt should have been thrown at the bar. If the danger from which the ship has been rescued is attributable to the fault of the tug; if the tug, whether by wilful misconduct or by negligence, or by the want of that reasonable skill or equipments which are implied in the towage contract, has occasioned or materially contributed to the danger, we can have no hesitation in stating our opinion that she can have no claim to salvage. She never can be permitted to profit by her own wrong or default. When it is remembered how much in all cases—how entirely in many cases—the ship in tow is at the mercy of the tug; how easily, with the knowledge which the crews of such boats usually have of the waters on which they ply, they may place a ship in their charge in great real or apparent peril; how difficult of detection such a crime must be, and how strong the temptation to commit it, their Lordships are of opinion that such cases require to be watched with the closest attention, and not without some jealousy." I am of opinion, after receiving the advice of the Elder Brethren, that this case is brought within the scope of these observations of their Lordships of the Privy Council in the case of *The Minnehaha*, and that the tug did "materially contribute to the danger" and the position in which this vessel was placed. It remains only to consider the other part—the

counter-claim—in this case, namely, certain damage to the vessel by reason of being obliged to slip both her anchors. She claims to be reimbursed for the loss occasioned to her, as she says, by the tug; and, inasmuch as I am of opinion that the loss of the anchors and chains was a consequence of the imprudent navigation of the tug, I must refer the matter to the registrar and merchants to ascertain their value, and the amount of the loss which was so caused.

Solicitor for the plaintiff, owner of the *Commodore*, Ayrton.

Solicitors for the defendants, owners of the *Robert Dixon*, Neale and Philpot.

March 7, 8, 14, and 18.

(Before Sir R. PHILLIMORE.)

THE HANKOW. (a)

*Collision—Damage—Compulsory pilotage—Exemptions—Exceptions from—Port or place to which ship belongs—Particular provisions—Costs—* 6 Geo. 4, c. 125, preamble, s. 59—17 & 18 Vict. c. 104, ss. 353, 370, 376, 379, 388.

*The provisions of the Pilotage Act 1825 (6 Geo. 4, c. 125), as to compulsory pilotage and exemptions therefrom, are preserved by the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 353. A vessel within the limits of her own port at a place where, previous to the passing of the Pilotage Act 1825, there were provisions in force for the appointment of pilots, is not exempt from compulsory pilotage.*

*The provisions of the Trinity House Charter, granted by James II., and of the Acts of Parliament relating to the pilotage of the rivers Thames and Medway, and the approaches thereto, are "particular provisions" relating to the port of London, within the meaning of sect. 59 of the Pilotage Act, so far as that port is contained in the pilotage district. (b)*

*A ship belonging to the port of London, and bound to London from Australia with passengers, is obliged to employ a pilot by compulsion of law, under the provisions of sect. 59 of the Pilotage Act 1825 (6 Geo. 4, c. 125), when within the limits of the port of London, by reason of there being at that time "particular provisions" for the*

(a) Reported by J. F. ASPIHALL and F. W. RAYNES, Esqs., Barristers-at-Law.

(b) There may be some doubt as to whether the charter of James II. has really any bearing on the question. The *Hankow* was an inward-bound vessel from Australia, and would therefore in all probability have come by Dover. In that case she would, under the original pilotage law (3 Geo. 1, c. 13, s. 1; 7 Geo. 1, stat. 1, c. 21, s. 14; 5 Geo. 2, c. 20, s. 12; 43 Geo. 3, c. 52), have had to employ a Cinque Port pilot, and none other. The reciprocal right of piloting vessels inward by the South Channel was only conferred on the Trinity House of Deptford pilots by 46 Geo. 3, c. 104, s. 2, and was confirmed by 52 Geo. 3, c. 39, s. 2. Therefore the charter of James II., though giving power to the Trinity House of Deptford to appoint pilots for the Thames, could not have affected the case of a ship inward bound having passed by Dover. The Cinque Ports pilots do not appear to have obtained their right of piloting inwards by charter, as the preambles of the Acts referring to it speak of them as having existed "time out of mind," and having enjoyed the exclusive right. The Act however of 52 Geo. 3, c. 39, would appear to be a sufficient "particular provision," provided there was no special exemption in it and the previous Acts for a vessel in its own port.

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*appointment of pilots for the rivers Thames and Medway below bridge.*

The Stettin (*Br. & Lush*. 199; 6 L. T. Rep. N. S. 613; 1 Mar. L. O. 229) not followed.

The Killarney (*Lush*. 427; 6 L. T. Rep. N. S. 908; 1 Mar. L. O. 238) approved.

*When defendants rely solely on the defence of compulsory pilotage and are successful, they may not get costs if the court is of opinion that under the circumstances the plaintiffs were justified in bringing the action.*

THIS was an action for damage by collision brought by the owners of the *Nelson* steam tug against the *Hankow*. The collision happened in the river Thames, above Gravesend, about three p.m. The *Nelson* was engaged in towing a ship called the *Bellana* up to London, and was lashed alongside of her. The *Hankow* (a screw steamer of 2322 tons register) was bound to London from Sydney in New South Wales with a cargo of wool and seventy or eighty passengers. At the time of the collision she had a duly licensed pilot on board and in charge of her.

The action was originally brought in the City of London Court against the owners of the *Hankow* and also against the pilot, and was transferred by the judge of that court on the ground that he could not entertain a suit of that nature against a pilot. At the trial in the Admiralty Division the defendants did not dispute that their ship was to blame but alleged that the pilot was employed by compulsion of law, and that all his orders were obeyed, and that therefore the owners of the *Hankow* were not liable for the damage. At the hearing it appeared that the statement of defence only alleged that the *Hankow* (par. 2) "was in charge of a duly licensed pilot," and (par. 7) that "before and at the time of the collision the *Hankow* was being navigated by the defendant Robert John Oates, a duly licensed pilot, and if and so far as the collision was caused by any negligence of any one on board the *Hankow* it was caused by the negligence of the said pilot."

*March 7.*—*Milward*, Q.C. and Dr. W. G. F. *Phillimore*, for the defendants.—The plea of compulsory pilotage being the only question to be decided, the defendants have the right to begin.

*Clarkson*.—There is no plea that the pilotage is compulsory; the pleadings only assert that you had a pilot on board, and that he was in charge; they do not say that his employment was compulsory.

*Milward*, Q.C. asked leave to amend the pleadings so as to raise the issue distinctly.

Sir R. PHILLIMORE.—I shall allow the amendment.

The pleadings were therefore amended by interpolating in paragraph 7 of the defence a statement that the employment of the said pilot was compulsory.

*Milward*, Q.C.—I have to show, first, that I had a pilot on board; secondly, that I was compelled to employ him; and, thirdly, that his orders were obeyed.

Sir R. PHILLIMORE.—There are two questions to be decided: one of law, whether the pilotage was compulsory; one of fact, whether the pilot's orders were obeyed.

The pilot himself was thereupon called. He stated that he went on board at Gravesend, took charge of the ship, that she was from Australia with passengers, that he was a properly licensed pilot, and that all his orders were obeyed.

*Clarkson* claimed the right to cross-examine the pilot as to what his orders were. Thereupon other witnesses were called for the plaintiff to show that all the material orders were obeyed. After hearing the evidence and counsel,

*March 8.*—Sir R. PHILLIMORE.—On the question of fact, I am of opinion that the pilot gave the order to slow the engines; and on the question of nautical science, the Elder Brethren advise me, that whether given or not, or obeyed or not, it could not have contributed to the collision.

*Milward*, Q.C. then called an official from the Trinity House, who produced a box containing, as he alleged, the original charter granted to the Trinity House by James II.

The argument as to whether the pilotage was compulsory was then postponed, and was argued on March 14th and 18th. The argument turned upon the following enactments:

6 Geo. 4, c. 125 (An Act for the Amendment of the Law respecting Pilots and Pilotage; and also for the better Preservation of Floating Lights, Buoys, and Beacons).

#### Preamble:

Whereas, ships and vessels have frequently been wrecked, and many lives and much property have been lost from the ignorance and misconduct of persons taking charge of such ships and vessels as pilots; and whereas the master, wardens, and assistants of the guild, fraternity, and brotherhood of the Most Glorious and Undivided Trinity, and of St. Clement, in the parish of Deptford Stroud, in the county of Kent, commonly called the "Corporation of Trinity House of Deptford Stroud," have as well by usage for more than three centuries, as by grants from the Crown, been empowered to appoint pilots, loadmen, or guides, to conduct ships and vessels into and out of and upon the river Thames, through the North Channel, to or by Orfordness, and round the Long Sand Head, or through the Queen's Channel, the South Channel, or other channels, into the Downs, and from or by Orfordness, and up the North Channel, and up the rivers Thames and Medway, and the several creeks and channels belonging to or running into the same, and to make such orders and constitutions as should be needful for the wholesome government of seafaring men, and maintenance and increase of navigation, and of all seafaring men within the said river of Thames; in pursuance of which powers the said corporation have from time to time appointed a sufficient number of pilots for the purposes before mentioned, and made orders for the better regulation and government of the same: And whereas there has been, time out of mind, and now is, a society or fellowship of pilots of the Trinity House of Dover, Deal, and the Isle of Thanet, who have had the pilotage and loadmanage of all ships for the said places up the rivers Thames and Medway, which said society or fellowship have been confirmed by various Acts of Parliament for regulating the pilots of the society or fellowship of pilots of Dover, Deal, and the Isle of Thanet, commonly called Cinque Ports pilots; and whereas, by certain Acts of Parliament, and more particularly by an Act passed in the fifty-second year of the reign of his late Majesty King George III., intitled "An Act for the more effectual regulation of pilots, and of the pilotage of ships and vessels on the coast of England," certain additional powers and authorities were vested as well in the said corporation of Trinity House of Deptford Stroud and the said society or fellowship of pilots of Dover, Deal, and the Isle of Thanet, commonly called Cinque Port pilots, as also in the corporation of the Trinity House of the ports of Hull and Newcastle respectively; and whereas a certain other Act of Parliament was passed in the fifty-fifth year of the reign of his late Majesty King George III., intitled, "An Act to relieve certain foreign vessels resorting to the Port of London in respect of pilotage, and to regulate the mode of payment of pilotage on foreign vessels in the said port;" and whereas the provision of the several Acts have been found inadequate and insufficient, and it is therefore expedient that the same should be repealed (except as

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hereinafter provided), and that the several provisions therein contained respecting pilots and pilotage should be improved and amended and consolidated in one law: May it therefore please your Majesty that it may be enacted, and be it enacted, &c. . . . that the said Act passed, &c., and also the said Act passed, &c. . . . and all and every the clauses, provisions, powers, penalties, forfeitures, matters, and things relating as well to pilots appointed by the said corporation of Deptford Stroud as to pilots of the fellowships of Dover, Deal, and the Isle of Thanet, and to the pilotage by and regulation of all such pilots as aforesaid, and also as to the conduct of all persons in matters of pilotage within the jurisdiction of the said corporation of Trinity House of Deptford Stroud, and the liberty of the Cinque Ports, which are contained in any Act or Acts of Parliament heretofore made, shall be and the same are hereby repealed: Provided always, that nothing in this Act contained shall extend or be construed to extend to repeal so much of the said Acts passed in the fifty-second and fifty-fifth years of the reign of his late Majesty, or either of them, as relates to any rates of pilotage due or to become due, or to any penalty or forfeiture incurred or to be incurred, or any other act, matter, or thing done or to be done before the commencement of the operation of the provisions of this Act, in relation to any such matter and things as last aforesaid.

#### Sect. 59:

*Masters of certain ships may pilot same so long as not assisted by unlicensed persons.*

Provided always, and be it further enacted, that for and notwithstanding anything in the Act contained, the master of any collier, or of any ship or vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards for the ports between Boulogne inclusive and the Baltic (all such ships and vessels being British register, and coming up either by the North Channel, but not otherwise), or if any Irish trader, using the navigation of the rivers Thames and Medway, or of any ship or vessel employed in the regular coasting trade of the kingdom, or of any ship or vessel wholly laden with stone for Guernsey, Jersey, Alderney, Sark, or Man, and being the production thereof, or of any ship or vessel not exceeding the burthen of sixty tons, and having a British register, except as hereinafter provided, or of any other ship or vessel whatever whilst the same is within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots, shall and may lawfully, and without being subject to any of the penalties by this Act imposed, conduct or pilot his own ship or vessel, when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot or other person or persons then the ordinary crew of the said ship or vessel.

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104).

#### *Compulsory Pilotage (General).*

*Compulsory pilotage, in what mode to be enforced.*

353. Subject to any alteration to be made by any pilotage authority in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this Act comes into operation; and all exemptions from compulsory pilotage then existing within such districts shall also continue in force; and every master of any unexempted ship navigating within any such district who, after a qualified pilot has offered to take charge of such ship or has made a signal for that purpose, either himself pilots such ship without possessing a pilotage certificate enabling him so to do, or employs or continues to employ an unqualified person to pilot her, and every master of any exempted ship navigating within any such district who after a qualified pilot has offered to take charge of such ship or has made a signal for that purpose employs or continues to employ an unqualified pilot to pilot her, shall for every such offence incur a penalty of double the amount of pilotage demandable for the conduct of such ship.

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*Trinity House to license pilots to act within certain limits.*

370. The Trinity House shall continue, after due examination by themselves or their sub-commissioners, to appoint and license under their common seal pilots for the purpose of conducting ships within the limits following or any portion of such limits; (that is to say,)

- (1.) "The London District," comprising the waters of the Thames and Medway as high as London Bridge and Rochester Bridge respectively, and also the seas and channels leading thereto or therefrom as far as Orfordness to the north and Dungeness to the south; so nevertheless that no pilot shall be hereafter licensed to conduct ships both above and below Gravesend.

#### *Compulsory Pilotage (Trinity House).*

*Penalty on masters of ships employing unlicensed pilots, or acting as pilot.*

376. Subject to any alteration to be made by the Trinity House, and to the exemptions hereinafter contained, the pilotage districts of the Trinity House within which the employment of pilots is compulsory are the London district, and the Trinity House outport districts, as hereinafter defined; and the master of every ship navigating within any part of such district or districts, who, after a qualified pilot has offered to take charge of such ship, or has made a signal for that purpose, either himself pilots such ship without possessing a certificate enabling him so to do, or employs or continues to employ an unqualified person to pilot her, shall for every such offence, in addition to the penalty hereinbefore specified, if the Trinity House certify in writing under their common seal that the prosecutor is to be at liberty to proceed for the recovery of such additional penalty, incur an additional penalty not exceeding five pounds for every fifty tons burden of such ship.

#### *Exemptions from compulsory pilotage.*

379. The following ships, when not carrying passengers, shall be exempted from compulsory pilotage in the London district, and in the Trinity House outport districts; (that is to say,)

- (1.) Ships employed in the coasting trade of the United Kingdom;
- (2.) Ships of not more than sixty tons burden;
- (3.) Ships trading to Boulogne or to any place in Europe north of Boulogne;
- (4.) Ships from Guernsey, Jersey, Alderney, Sark, or Man, which are wholly laden with stone being the produce of those islands;
- (5.) Ships navigating within the limits of the port to which they belong;
- (6.) Ships passing through the limits of any pilotage district on their voyages between two places both situate out of such limits, and not being bound to any place within such limits nor anchoring therein.

#### *Saving of Owner's and Master's Rights.*

*Limitation of liability of owner where pilotage is compulsory.*

388. No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law.

*Milward, Q.C. (with him Dr. W. G. F. Phillimore) and Verney.*—The pilotage of this vessel at the place in the London district (Merchant Shipping Act 1854, 17 & 18 Vict. c. 104, s. 370) is compulsory (Merchant Shipping Act 1854, 17 & 18 Vict. c. 104, s. 376); she had passengers on board, and therefore cannot claim exemption under sect. 379 of that Act, though she is navigating within the limits of her own port, being above Gravesend, and therefore above Yantlett Creek also:

*General Steam Navigation Company v. British and Colonial Steam Navigation Company*, L. Rep. 3 Ex. 230; L. Rep. 4 Ex. 238; 19 L. T. Rep. N. S. 357; 20 L. T. Rep. N. S. 581.

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She is not exempt under sect. 358 of the same Act, for that section preserves only the exceptions existing at the time it was passed; that is, those existing under 6 Geo. 4, c. 125. Sect. 59 of that Act only excepts ships "whilst within the limits of the port or place to which she belongs" when that port or place is not "a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots." Therefore, if London is a port or place for which previous to that Act particular provision had been made for the appointment of pilots, whether their employment was compulsory or not, this vessel cannot be exempt under that section. I have proved the existence of a charter for the appointment of pilots in that place, and it is recited in the preamble of the Act (*ubi sup.*), together with previous statutes having reference to it. The decision in *The Stettin* (Br. & Lush. 199; 6 L. T. Rep. N. S. 613; 1 Mar. L. C. 229) was given because this charter and the Act relating to it were not brought to the notice of the learned judge. He is reported in the report of the case in the LAW TIMES Reports to have said: "I am aware of no such Act of Parliament, and no such Act has been mentioned, so I must conclude there is none." I have shown that there was such an Act (59 Geo. 3, c. 39) recited in the preamble to the very Act (6 Geo. 4, c. 125), in which that provision is made, and which was therefore in operation at the time the latter statute was made. When any such particular provision as is required by the statute was brought to the notice of the learned judge, he decided that it was a bar to the exception:

*The Killarney*, Lush. 427; 6 L. T. Rep. N. S. 908; 1 Mar. L. C. 238.

That case is precisely similar to this, with the exception that the port or place is there Goole, and here London. The other leading cases on the subject of pilotage are not in point, as the exemptions claimed in *The Earl of Auckland* (1 Lush. 164; 3 L. T. Rep. N. S. 786; 1 Mar. L. C. 27, 177); *Reg. v. Stainton* (8 E. & B. 445), and *The Moselle* (32 L. T. Rep. N. S. 572), were on the ground that the carriage of passengers (sect. 379 Merchant Shipping Act 1854) did not necessitate the employment of a pilot by a vessel exempted under sect. 59 of 6 Geo. 4, c. 125, by reason of being engaged in a particular trade.

*E. C. Clarkson.*—The decision in *The Stettin* (*ubi sup.*) was based on sect. 59 of 6 Geo. 4, c. 125, and therefore the statute was before the learned judge; that being so, it was not necessary to give evidence of the charter, as it is recited in the Act. The real ground of the decision in *The Stettin* (*ubi sup.*) was, that though special provisions are made for the appointment of pilots by the Trinity House by the charter, and the employment of such pilots is rendered compulsory by the Act with certain exemptions, the charter and Act only relate to certain districts of which the London district is one, and not to the port of London; therefore this ship is exempt from compulsory pilotage because she is within the port (London) to which she belongs, such not being a port for which any particular provision is made. It is true that there were special provisions at the place where she happened to be, but this place was for pilotage purposes the river Thames, and the ship cannot be said to belong to the river Thames.

*The Killarney* (*ubi sup.*) is decided on the express grounds that the port in which she was, and to which she belonged, was a port for which particular provisions were made. *The Stettin* (*ubi sup.*) was followed by the Lord Chief Baron in the *General Steam Navigation Company v. British and Colonial Steam Navigation Company* (L. Rep. 3 Ex. 330; 19 L. T. Rep. N. S. 357), and there the charter of James II. and the Acts making pilotage compulsory were specially referred to. There was a general provision for pilotage in the river Thames and waters adjacent thereto, but no "particular provision" has been made for the "port" of London to which this vessel belongs; she therefore is exempt from the necessity of carrying a pilot, as being "within the limits of the port or place to which she belongs" (sect. 59, 6 Geo. 4, c. 125).

Sir R. PHILLIMORE.—This is a case in which the court, if it had the option, would not choose to decide where the statutes are so very conflicting upon the question; but I have no option of my own. It appears to me that by sect. 376 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), it is enacted that "subject to any alteration to be made by the Trinity House, and to the exemptions hereinafter contained, the pilotage districts of the Trinity House, within which the employment of pilots is compulsory, are the London district" . . . . Then sect. 370 of the same Act defines the London district as follows: [His Lordship here read sect. 370 (1) *ubi sup.*] Now it is admitted that the collision took place in the river Thames above Gravesend. If, therefore, that statute (the Merchant Shipping Act 1854) stood alone, the law would be tolerably clear that, as that vessel had passengers on board, and could not therefore take advantage of the exemptions given by sect. 379, a pilot would be compulsorily employed on board her when within these waters. But the question really turns on the construction of the Pilotage Act 1825 (6 Geo. 4, c. 125). It has been shown to me that there is a charter of the Trinity House, which was in existence prior to the passing of that Act, making provision for the appointment of pilots at the place where the collision happened. The question is whether that is a "particular provision" to satisfy the requirements of sect. 59 of the statute, qualifying the exemption given to vessels when within the limits of their own port, as this vessel was. I am of opinion that it is. The point was before my learned predecessor twice, once in the case of *The Killarney* (Lush. 427; 6 L. T. Rep. N. S. 908; 1 Mar. L. C. 238), and once in the case of *The Stettin* (Br. & Lush. 199; 6 L. T. Rep. N. S. 613; 1 Mar. L. C. 229); and what surprises me is, that when the whole of the subject-matter was discussed, no reference to the former case was made in the latter. In *The Killarney* (*ubi sup.*) Dr. Lushington says, speaking of the exemption from compulsory pilotage: "One of these exemptions (the only one at all applicable to this case) is that a master may pilot his own ship whilst the same is within the limits of the port or place to which she belongs. Here *The Killarney* was in Goole, the port to which she belonged, and accordingly this case would appear to be within the exemption, and the pilotage would be voluntary only. But there is an exception to this exemption, for the section goes on to say 'the same,' that is 'the port or place, not being a

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port or place in relation to which particular provision has heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots.' The whole case, therefore, comes to this: Had any particular provision been made in relation to Goole before the year 1826 by any Act of Parliament or by any charter for the appointment of pilots? If there had been, the exemption just mentioned did not attach, and the pilotage was compulsory." Then he went on to say that there was an Act of Parliament which brought Goole within the operation of the exception in the statute. So in the case of *The Stettin* (*ubi sup.*) he is reported as saying, in the report of the case in the *Mar. Law Cases* and *LAW TIMES*: "I am well aware that to put one construction upon the 59th section of the Pilot Act, and another upon the 379th section of the Merchant Shipping Act, tends to create some confusion; but I cannot help myself, for the Legislature has used different expressions, as I think conveying different meanings. Then follow the words, 'the same not being a port or place in relation to which particular provision has heretofore been made by Act of Parliament. . . .' Now, I am aware of no such Act of Parliament, and no such Act has been mentioned, so I must conclude by this there is none. The result is that I must hold that the steamer was exempt from compulsory pilotage." But there is no reference to the charter in this case, and it is more than probable that it never was brought to the judge's attention on that occasion, and it does not appear to have been present to his mind. I feel some difficulty in discovering why the decision in *The Killarney* (*ubi sup.*) is not referred to in the case of *The Stettin* (*ubi sup.*). There is one more case referred to which I ought not to pass by, that is the case of *The General Steam Navigation Company v. The British and Colonial Steam Navigation Company*. I am unable to extract any assistance from that case, and I find myself rather perplexed in reading the judgments, which are conflicting on almost all points, therefore I must put that case on one side. Upon the whole, I am of opinion that it is proved in this case that the pilotage was compulsory, the *locus in quo* being a "place" which is excepted from the more general exemption given by the statute. The case is one in which it is very difficult to find one's way with satisfaction; but I shall hold that in this case there was a pilot by compulsion of law.

*Milward, Q.C.* asked for costs.—We only relied on the pilotage being compulsory, having admitted that the collision was caused by the negligence of the pilot in charge of our ship. We therefore have succeeded on the only issue before the court, and are entitled to our costs:

*The Royal Charter, L. Rep. 2 Ad. & E. 362.*

*Sir R. PHILLIMORE*.—The question has been one of such complexity, and the opinion which I have formed being contrary to that expressed by my learned predecessor in *The Stettin* (*ubi sup.*), I think the plaintiffs were justified in coming here, and I shall make no order as to costs.

Solicitors for plaintiffs, owners of the *Nelson, Lowless and Co.*

Solicitors for defendants, owners of the *Hankow, Cooper and Co.*

## House of Lords.

March 20, 21, 24, and 25, and April 7.

(Before the LORD CHANCELLOR (Cairns), Lords HATHERLEY, PENZANCE, O'HAGAN, SELBORNE, BLACKBURN, and GORDON.)

MUIR AND OTHERS v. THE CITY OF GLASGOW BANK AND LIQUIDATORS. (a)

ON APPEAL FROM THE FIRST DIVISION OF THE COURT OF SESSION IN SCOTLAND.

*Unlimited company—Trustees—Personal liability—Construction of contract.*

*It is competent for a trustee to contract by apt words in such a manner as to bind only his trust estate; but whether in any particular case the contract of a trustee is one which binds himself personally, or is to be satisfied only out of the trust estate, is a question of construction to be decided with reference to the circumstances of the case.*

*In this respect there is no difference in principle between English and Scotch law.*

*In a case in which certain persons, trustees for S. and B., had become shareholders in a joint-stock company in which the liability of the shareholders was, by the deed of partnership, unlimited, and their names and addresses were entered in the stock ledger of the company, followed by the words, "as trust disponees of S. and B.:"*

*Held (affirming the judgment of the court below), that the trustees had thereby rendered themselves personally liable for the debts of the company; and that the above words served only to distinguish the particular fund.*

*Lumsden v. Buchanan* (4 Macq. 950) approved and followed.

*Gordon v. Campbell* (1 Bell, 428) distinguished.

THIS was an appeal from a judgment of the First Division of the Court of Session in Scotland, consisting of the Lord President (Inglis), Lords Deas, Mure, and Shand.

The facts of the case were these:—The City of Glasgow Bank was established in 1839 as a joint-stock company, and in 1862 it was incorporated under the Companies Act of that year (25 & 26 Vict. c. 89).

In 1843, Mr. Murdoch, a gentleman possessed of considerable property, residing in Edinburgh, executed with his wife, who pre-deceased him, a trust disposition and settlement, which took effect on his death on the 2nd June 1873. He was at the time of his death possessed of 5000*l.* worth of shares, afterwards converted into stock, in the City of Glasgow Bank, acquired after the death of his wife, and a doubt having arisen whether his settlement effectively conveyed estate acquired after the death of Mrs. Murdoch, Mrs. Syme, and Mrs. Boyd, his two daughters, made up a title as *executrices-dative* in the character of next of kin to the whole estate, as the only competent way of administering to the part thereof, including the bank stock in question, which had been acquired by Mr. Murdoch after the death of his spouse; and having *ex pte* the usual confirmation in that character, they proceeded to execute a supplementary deed of trust, with the view (*inter alia*) of bringing the bank stock under the trusts of their

(a) Reported by O. E. MALDEN, Esq., Barrister-at-Law.

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father's will. This deed of trust, dated the 20th Sept. 1873, conveyed the property, including the bank stock in question, to the appellants, Muir, Thomson, John Boyd, and James Lawrence Boyd, on certain trusts. The appellants, upon the execution of the deed, communicated with the secretary of the City of Glasgow Bank in order to have the stock, which had been increased to the amount of 6000*l.*, entered in their names as trustees, it being provided by the company's contract that the deed of transfer should be prepared by such person and in such form as the ordinary directors might appoint. A deed of transfer was accordingly prepared under the direction of the company's law secretary, and was executed by Mrs. Syme and Mrs. Boyd and the appellants in their capacity of trustees. Under it the stock was conveyed to the appellants expressly as "trust disponees under the trust," and the appellants accepted the same "as trust disponees foresaid," subject to the articles and regulations of the company. By the authority of the bank the appellants were entered in their books in the character of trust disponees of the grantors, and a certificate was issued by the bank that the trust disponees of Mrs. Syme and Mrs. Boyd had been entered in the books of the bank as the holders of the stock. The names of the appellants were written on the back of the certificate, but they did not appear in any of the published lists of the shareholders of the bank, nor in the returns made to the Commissioners of Stamps and Taxes (now the Board of Inland Revenue) and to the Registrar of Joint-Stock Companies, in which returns the stock was entered under the name of "Syme," and was described as being held by the trust disponees of Mrs. Syme and Mrs. Boyd.

The bank stopped on the 2nd Oct. 1878, and a resolution to wind-up voluntarily was passed on the 22nd. On investigation of its affairs the bank was found to be hopelessly insolvent.

The liquidators made up a list of contributories of the bank on the 7th Nov., and on the 13th of that month they made a first call of 500*l.* on each 100*l.* of stock.

On the list of contributories were placed the names of all the trustees who were entered in the books of the bank as the holders of stock in trust, whether under testamentary instruments or otherwise. These trustees were entered on the first part of the list as contributories in their own right, the liquidators alleging that they were personally liable to the full extent of their means. The trustees were all entered in the list of contributories, with the description of the particular trust appended to each, the word "as" occurring in the books of the bank and qualifying their title to the shares being dropped out.

The appellants having received an intimation that their individual names had been placed upon the list of contributories as holders of stock in their own right, petitioned the court for rectification of the list, with the object of having their liability, if any, defined as an obligation to make the trust estate forthcoming in due course of administration.

Answers were given in by the liquidators, and a minute of admissions was afterwards adjusted between the petitioners and the respondents.

The case was heard before the First Division of the Court of Session, and judgment was given

against the appellants on the 20th Dec. 1878, the court being of opinion that the case was governed by the decision of the House of Lords in *Lumsden v. Buchanan* (4 Macq. 950). From this judgment the present appeal was brought.

*Napier Higgins, Q.C., McLaren* (of the Scotch Bar), and *Grosvenor Woods* appeared for the appellants, and contended that as trustees they were only liable to the extent of the trust estate. We have three propositions to submit: First, that the appellants never agreed to become members of the company personally and individually, but only as trustees; secondly, that the contract was of a qualified character, governed by the peculiar law of Scotland as to trustees; thirdly, that if the contention of the respondents is correct the whole contract was *ultra vires*, and consequently void *ab initio*. The court below decided this case on the authority of *Lumsden v. Buchanan* (4 Macq. 950), but we hope to distinguish that case from the present. The various Acts relating to joint-stock companies passed since 1856 (statute 19 & 20 Vict. c. 47, s. 19; statute 20 & 21 Vict. c. 48, s. 15; statute 25 & 26 Vict. c. 89, s. 35) show that a distinction exists between Scotch and English law on the subject of the liability of trustees, a declaration of the trust being allowed to be put on the register in Scotland. The case of *Gordon v. Campbell* (1 Bell, 428) should govern this case rather than *Lumsden v. Buchanan*. In the latter case, which arose out of the liquidation of the Western Bank of Scotland, the trustees had not disclosed the trust, and took as allottees of shares directly from the bank; in the present case they accepted "as trust disponees" shares which formed part of an existing trust estate; and even in that case Lord Kingsdown felt great difficulty in concurring in the judgment of the House, which reversed the decision of the great majority of the judges of the Court of Session. Poor law guardians, trustees for turnpike trusts, churchwardens, or other persons of a *quasi* corporate character would not incur a personal liability; and the case of *Gordon v. Campbell* (*ubi sup.*) shows that in Scotland trustees might contract in such a manner as to show that they were acting only in a fiduciary character. They were in a different position to all other shareholders; under the deed of co-partnership of the company they could not become directors, nor vote. By virtue of the Acts (24 & 25 Vict. c. 84, s. 1, and 30 & 31 Vict. c. 97, s. 10) they had a right of resignation, and would have had their names struck off the register at any time on withdrawing from the trust, without any transfer to another transferee. By the very terms of the transfer to them they only accepted the position if taken as representing the trust estate, and the bank has no power to accept them as shareholders on any other footing but that. The mere receipt of dividends makes no difference. See also

*Bullen v. Sharp*, L. Rep. 1 C. P. 86; 14 L. T. Rep. N. S. 72;

*Stace and Worth's case*, L. Rep. 4 Chan. 682; 21 L. T. Rep. N. S. 182;

*Re Western of Canada Oil Company*, 1 Ch. Div. 115; 33 L. T. Rep. N. S. 645.

*Kay, Q.C. Benjamin, Q.C. Davey, Q.C., and Kinnear* (of the Scotch Bar) appeared for the respondents, and argued that the main question was whether in fact the appellants became shareholders in the bank, because, by the deed of co-

partnership, there was only one class of shareholders, namely, shareholders with unlimited liability. The appellants admitted that they became transferees of unlimited shares, but they asked the House to declare that they had entered into a special contract, and that there were in fact two classes of shares in the company with different liabilities. *Gordon v. Campbell* is distinguishable; it was a case of a "heritable bond," a thing peculiar to Scotch law. [Lord SELBORNE.—Rather a peculiar custom of Scotch conveyancing, to contract with a limited liability.] See also the cases of

*Higgins v. Livingstone*, 4 Dow. 341;  
*Thomson v. M'Lachlan's Trustees*, 7 Shaw, 787;  
*Eaton v. M'Gregor's Executors*, 15 Shaw, 1012;  
*Jeffrey v. Brown*, 2 Shaw's Appeals, 349;  
*Thomas v. Walker's Trustees*, 11 Shaw, 162;  
*De Nisbet's Trustees*, 1 Morison, 15268;  
*Fairlie v. Neilson*, 1 Shaw 222.

The words "as trust disponees" were inserted in the transfer in accordance with the usual practice, and did not bind the bank in any way, or create any such special contract as is contended for; under the deed of copartnership the bank had no authority to do so, nor any intention, even if they had the power. The case must be governed by *Lumsden v. Buchanan*. See also

*Lumsden v. Paddie*, 5 Court of Session Cases, 3rd series, 84.

*Higgins*, Q.C. in reply.—We ask to be put on the list of contributories in the same manner in which we were placed on the list of shareholders, namely as trustees. We do not contend that there are two classes of shares, but two classes of shareholders. The bank had power under the deed to enter into the special contract. The parties are bound by the deed of transfer, and that must be looked at to ascertain the conditions on which the contract was made, and in it the appellants appear as "trustees." The Act 20 & 21 Vict. c. 49 expressly recognises the right of trustees in Scotland to contract in their representative character only, and the consequence of affirming the decision of the court below would be very serious for all parties concerned. The judges of the court below decided the case solely on the authority of *Lumsden v. Buchanan*, which is clearly distinguishable.

At the conclusion of the arguments, their Lordships took time to consider their judgment.

April 7.—Their Lordships gave judgment as follows:

THE LORD CHANCELLOR (Cairns).—My Lords, the City of Glasgow Bank is a joint-stock partnership, which has carried on business since the year 1839. In 1862 it was registered as an "unlimited company," under the Companies Act of that year (25 & 26 Vict. c. 89). The partnership contract (to the terms of which I shall have afterwards to refer) was registered as the articles of the company under the Act. In this bank the late John Murdoch held, at the time of his death, 6000*l.* of stock. He died in 1873. He had made a deed of trust disposition and settlement dated in 1843, but a question having arisen whether the bank stock would pass under it, his daughters, Mrs. Syme and Mrs. Boyd, made out a title to his estate as *executrices-dative*, and executed a supplementary deed of trust dated the 20th Sept. 1873, by which they assigned and made over to the appellants the whole estate of their father, includ-

ing the stock in question, to be held upon the trusts contained in the settlement of their father. On the 27th Jan. 1874 a transfer of the stock was executed by Mrs. Syme and Mrs. Boyd to the appellants, in order that their legal title to the stock might be completed. By this transfer Mrs. Syme, who was a widow, and Mrs. Boyd, with the consent of the appellant, John Boyd, her husband, assigned and made over to the appellants, described as "the trust disponees in the deed of conveyance in trust, dated the 20th Sept. 1873, and their successors and assigns whomsoever," the 6000*l.* capital stock—the appellants "as trust disponees aforesaid, by acceptance thereof, being, in terms of the contract of copartnership of the bank, subject to all the articles and regulations of the company, in the same manner as if they had subscribed the said contract;" and the appellants, "as trust disponees aforesaid," thereby accepted the said transfer on those terms and conditions. In the stock ledger of the bank the appellants were entered by their names and addresses, their names and addresses being followed by these words, "as trust disponees of Mrs. Mary Murdoch or Syme, widow of the late Francis Darby Syme, 14, Great King-street, Edinburgh, and Mrs. Sophia Maria Darby Murdoch or Boyd, wife of the said John Boyd." A stock certificate was also issued by the bank to the appellants in these words: "Glasgow Feb. 4, 1874.—These certify that the trust disponees of Mrs. Mary Murdoch or Syme, widow of the late Francis Darby Syme, and residing at 14, Great King-street, Edinburgh, and Mrs. Sophia Maria Darby Murdoch or Boyd, wife of John Boyd, residing at 27, Melville-street, Edinburgh, have been entered in the books of this company as the holders of six thousand pounds consolidated stock." And on the back the certificate was indorsed thus: "William Muir, Esq., of Inistrynich, Argyleshire, merchant in Leith; William Thomson, Esq., of West Binney, Linlithgowshire; John Boyd, Esq., residing at No. 27, Melville-street, Edinburgh, and James Laurence Boyd, Esq., Solicitor Supreme Courts, Scotland, and residing at No. 1, Regent-terrace, Edinburgh, as trust disponees within mentioned." In the returns made to the Board of Inland Revenue and to the Registrar of Joint Stock Companies, the stock is described as held by the trust disponees of Mrs. Syme and Mrs. Boyd. The liquidation of the bank commenced on the 22nd Oct. 1878, and the liquidators have entered the appellants in the first part of their list as contributories in respect of the stock in question. The effect of this is to make the appellants personally answerable for calls. Whether they should thus be made answerable is the question to be determined in this appeal. The respondents, the liquidators, contend that the appellants are personally liable, and this has been the unanimous decision of the Court of Session. The appellants, on the other hand, contend that they are not personally liable, but that the bank entered into a special contract with them, to use the terms of their petition, "to admit them as holders of stock in their representative capacity as trust disponees," and by the terms of their obligation the appellants undertook only to subscribe to the undertaking, and to be liable in the obligation incumbent on holders of stock to the extent of the trust funds under their administration.



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Whether in any particular case the contract of an executor or trustee is one which binds himself personally, or is to be satisfied only out of the estate of which he is the representative, is, as it seems to me, a question of construction, to be decided with reference to all the circumstances of the case, the nature of the contract, the subject-matter on which it is to operate, and the capacity and duty of the parties to make the contract in the one form or in the other. I know of no reason why an executor, either under English or Scotch law, entering into a contract for payment of money, with a person who is free to make the contract in any form he pleases, should not stipulate by apt words that he will make the payment not personally but out of the assets of the testator. If, for example, A. B., the executor of X., contracted to make a payment as executor of X., and as executor only, to C. D., it would be difficult to suppose that any obligation except an obligation to pay out of assets was intended. C. D., in the case supposed, would have authority to accept a contract so limited, and the words used could have no meaning and could be referred to no object other than that of limiting responsibility. I do not know that there is in this respect any difference in principle between English and Scotch law, although there may be a difference in the application of the principle. It may be (I will not say more) that from the English system of judgments in actions at common law, and from the difficulty of obtaining a judgment *de bonis testatoris* founded upon an engagement made by the executor, the English courts have leaned against a construction which would not result in a judgment *de bonis propriis*; whereas in Scotland, where law and equity were jointly administered, such a difficulty did not arise. But the first question, whether in Scotland or in England, must be, what is the contract which the parties have entered into? and that must be accompanied by another question—What is the contract which the parties were competent to enter into? For if words have been used of any ambiguity, or the object of which may be open to any doubt, that construction must, according to the well-known rules of law, be given which will make the contract a legitimate and valid one, and not the construction by which the contract will be destroyed. Now, it is to be observed that the directors of the bank were a body with limited and clearly-defined powers, and acting in the execution of a delegated and limited authority. The appellants must be taken, as must all persons who deal with the directors of a company, and especially those who deal with the directors for admission into the company, to have known the nature and extent of the authority of the directors, and the character of contract which they were empowered to enter into. With regard to the directors also it is to be borne in mind that if they exceeded the powers committed to them by the deed of partnership, if they placed the stock and capital of the bank in the power of persons brought upon the register upon terms less favourable to the other shareholders than the deed authorised, the directors would incur a liability to their constituents for so doing, and it is not to be supposed that they intended to incur this liability. With these observations I will now ask your Lordships to bear in mind the general scope and provisions of the deed of partnership. There is

no limit of liability whatever for the shareholders of the company. The deed takes notice that the shareholders might be individual, or companies and bodies corporate, but the scheme of the deed is that the shares shall be held by individuals, or by companies, that is to say, partnerships consisting of individuals, or by corporations, without any limit of liability in the individual so far as he has property, or in the corporation so far as it has property; and I need hardly observe that there was no power by law to affix any limit of liability upon the shares except by a resort to statutable arrangements, which, in this case, were not resorted to. By the fourth section of the deed, the parties bound themselves to contribute and pay when required the sums of money corresponding to the number of shares of the stock subscribed. By the fifth section, the partners were to have the right to the profits and to be liable for the losses, and bound to relieve each other of all the debts and engagements of the company in the proportion of their respective interests or shares in the capital stock. By the 6th section any person holding a share, whether as an assumed subscriber or as a purchaser, heir, or other representative of a subscriber, "shall be entitled to all the rights, and subject to all the liabilities of an original partner of the company." The 13th and 14th sections contain careful provisions for the purpose of preventing any person interested in a share other than the partner in whose name the share stands on the register from attending or voting, or interfering with the concerns of the company. The 33rd and 34th sections relate to the transfers. The shares are to be transferable by the partners, and shall transmit and descend as personal property to their executors or representatives by testament. Every partner who shall dispose of his share of the company's stock agreeably to the regulations therein written, or who shall cease to have an interest in the concern through forfeiture or otherwise, in the terms of the deed, shall be entitled to relief of the whole debts owing by the company; and the party or parties acquiring the shares so disposed of, or otherwise coming in right of the party or parties so ceasing to have interest, shall take and assume the place and liability of his author, ancestor, or other cedent. A gratuitous assignment by a deed, *inter vivos*, of any shares, is to be effectual if sanctioned by the directors. If they withhold sanction, the share is to be sold by the directors and the price accounted for to the assignee. Shares may be disposed of onerously, but the name of the purchaser and the price must first be intimated to the directors, who are to have the option of purchasing for the bank. By the 37th section it is provided that where the shares of any partner are transferred, conveyed, or sold in terms of the article, the deed of transference shall be prepared at the head office; and the 38th section provides that this deed of transference, and also every assignment of shares in security or *mortis causa*, and confirmations thereof by right of succession, shall be recorded in a book to be kept for that purpose; and the production of such writings to the manager or directors for registration shall *ipso facto* infer the acceptance of the capital stock therein specified, and the liabilities of the parties having a right to the same as partners of the company; but no purchaser, or other assignee of, or successor to shares

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so acquired, shall be recognised as a partner until his title is recorded in the books. The 40th section provides that the person, or persons, companies, or corporations whose names shall at any time stand in the stock ledger containing the list of the partners of the company, whether as original or as assumed partners, shall be deemed and taken to be the proprietors of the several shares standing in the ledger in their respective names, and shall be liable to the payment of every call for instalments of capital stock to be made thereon, and to all such actions, obligations, forfeitures, and penalties, and entitled to the whole profits, and liable for the losses to which the original proprietors of shares in the company are subject, liable, and entitled by the deed; and the names entered in the ledger, and the amount of shares, shall be the sole evidence receivable at any meeting of the partners as to the right of voting at the meeting. I have now referred to the principal clauses of the deed, and it is upon the terms indicated in these clauses, and upon those terms alone, that the directors had any authority to admit an assignee of shares as a partner into the bank. The scheme of the deed is clear—the bank is to consist of partners, and these partners are to be either individuals or corporations. There is no limit of liability. If the partner is an individual, he is absolutely liable to the extent of his means as an individual for the proportion of the debt of the bank attributable to his share. If the partner is a corporation, the corporation is liable to the extent of all the property which it may possess. It is necessary to contrast with this the contract which the appellants allege was entered into between them and the bank by reason of the use in the transfer to them and in the stock ledger of the words “as trust disponees of Mrs. Syme and Mrs. Boyd.” The appellants undertook, as they say, to be liable in the obligations incumbent on holders of stock to the extent only of the trust funds under their administration. In the view of the appellants there were, as to these shares, to be no partners of the bank individually liable. The liability as to these shares was not to be the liability of the trustees, but the liability of certain funds under the administration of the trustees. As to what these funds might be nothing is said. The trust might consist of nothing more than the shares themselves, and thus the shares be their own security, or the trust funds might be such as that in a due course of administration they might all be parted with before any liability came to be enforced against them. The bank would be obliged to consider and scan every deed of trust in order to determine whether the trust funds could, under the trusts declared, be properly used in the purchase of bank stock, or in the payment of bank liabilities. But, putting these considerations aside, and assuming that the trust funds were a definite, declared, and always available sum of money, what would this be but the creation of shares with limited liability? And if this limit of liability could be created for some shares in the bank, why not for all the shares in the bank? If the argument of the appellants is right, what would there be to prevent every share in the bank being held by trustees who would be furnished as a trust-fund with the precise amount to be paid upon the share, and would have no further

liability? But this is just what the law would not permit to be done with regard to a joint-stock company of this kind, except by means of the constitution of a company with liability limited according to the statute, and such a company the City of Glasgow Bank never was. I have no hesitation in saying that in my opinion the directors had no power under their deed, and the appellants must be taken to have known that they had no power, to enter into or accept a contract of this description, and the contract, if attempted to be made, would have been *ultra vires* and void. But for this very reason it appears to me to be necessary that your Lordships should consider whether the words upon which the appellants rely require a construction which would invalidate the contract in which they occur. Now these words are—“as trust disponees of Mrs. Syme and Mrs. Boyd.” I don’t wish to say that in a case in which such a contract would be within the competency of the contracting parties, and where these words could not be referred to any other object or purpose, they might not, on the construction of the whole instrument, be held to negative the idea of personal responsibility, but I have endeavoured to show your Lordships that such a contract would not be within the competence of the parties in the present case, and there is no difficulty whatever in assigning to the words a meaning and a purpose clear, intelligible, and within the limits of the contracting power of the directors. One object of these words, and one purpose served by them, is noticed in the judgments of the Lord President and Lord Shand. The Lord President says that the practice of using them and of entering them upon the register arose “not for the purpose of altering the liability of the holders of such stock as compared with the other holders of stock in the same company, but only for the purpose of marking the stock as the property of the particular trust named in the transference and in the register.” The Lord President further observes that it was the Scotch practice of marking trust stock in this way which prevented the Legislature extending to Scotland the enactment that no joint-stock company should take notice of any trusts on its register of shares; and I may add there is no doubt that a permission to notice trusts on a register of shares is *primæ facie* a permission introduced for the benefit of the beneficiaries and not of the trustees. Lord Shand observed that the law of Scotland as to the proof of trust is very stringent “in requiring that in all cases the averment that property is held in trust shall be proved only by a writing subscribed by the alleged trustee, or by his oath on reference; and no more effectual way of avoiding the dangers of this limited mode of proof can exist than by having the title of the trust property qualified by a declaration on its face that the property is held for behoof of others.” A second purpose served by the words is that they make it clear that the shares are held upon a joint account, with a right of survivorship, and that they do not belong to the persons named on the register as tenants in common. It is possible—I will not say more—that there may be a third purpose served by the words, founded on the law of Scotland, which gives peculiar facility to a trustee for retiring from the trust, and which might justify, in the case of a retiring trustee, a simpler mode of

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removing his name from the register than in the case of another joint owner. I have not up to this point referred to any authorities bearing upon the question, and even in the absence of authority I should have been of opinion, for the reasons I have stated, that the appellants were personally liable in respect of these shares. I should have been of opinion that it was incompetent for the directors of the bank to have made with them any contract but a contract of personal liability, and that the words relied upon by the appellants as limiting liability were introduced for and served a different purpose. But, my Lords, almost the whole of the observations which I have made will be found, as it seems to me, to be supported by two authoritative decisions of your Lordships' House, which will be the only cases to which I shall feel it necessary to refer your Lordships. The first of these is a case of *Gordon v. Campbell* (1 Bell, 428). In that case certain trustees borrowed, for the purposes of their trust, from Col. Gordon of Cluny 7000*l.*, and granted a heritable bond over the trust property to secure the loan. They also bound themselves, as "trustees aforesaid," to make payment of the loan, and in the clause of warrandice of the land they bound themselves, "*quid* trustees only," to warrant at all hands and against all mortals. Now this was exactly such a case as in the earlier part of my observations I supposed might arise. It was perfectly competent to Col. Gordon and these trustees to make any contract they pleased. Col. Gordon might have insisted that they should be personally liable to him, or he might have agreed that they should only be liable as trustees, *i.e.*, to the extent of their trust funds. They professed in one part of the instrument to contract as trustees, and in another as trustees only, and it was obvious that they meant in both places to contract in the same way. Further, if these words, "as trustees only," were not introduced to limit liability, there was no other purpose in the deed which they could possibly serve. They were absolutely unmeaning if they did not mean that the trustees were not contracting as individuals. Under these circumstances the Court of Session, and afterwards this House, held that there was no personal liability created against the trustees beyond their possession of the trust funds. The other case was that upon which so much of the discussion before your Lordships in the present appeal took place—the case of *Lumsden v. Buchanan* (4 Macq. 950). The principal respondents in that case had signed 'a deed of accession for shares in the Western Bank. In the testing clause their names and designations were followed by the words, "trustees for Mrs. Ellen Brown, the majority surviving being a quorum;" and in the register of shareholders their names and addresses were entered, with the addition of the words "trustees for Mrs. Ellen Brown." This House held that the trustees were personally liable. The observations of the Lord Chancellor (Westbury) and of Lord Cranworth have been so frequently referred to during the argument of the present appeal that I will not here repeat them. They appear to me to apply conclusively to the present case, and the decision of their Lordships in *Lumsden v. Buchanan* appears to me to derive, if it were possible, additional strength from the circumstance that Lord Kingsdown stated that it was with some hesitation and regret he felt obliged

to concur in the judgment, and from the further circumstance that this House had before it a most full and learned examination of the subject from all the Scotch judges, of whom at that time four had declared themselves in favour of the appellants in *Lumsden v. Buchanan*, and eight in favour of the respondents. I ought to observe that in *Lumsden v. Buchanan* the words in the deed and in the register were "trustees for Mrs. Ellen Brown," not "as trustees." In a case, however, in the same bank which occurred immediately afterwards, *Lumsden v. Peddie* (5 Ct. of Sess. Cas. 3rd series, 34), Peddie was *curator bonis* to Mrs. Broomfield, and he accepted stock in these words: "I, the said D. S. Peddie, as *curator bonis* aforesaid, do hereby agree to take and accept the said capital stock, and as such bind and oblige myself, &c." The Lord Ordinary in that case, and afterwards the Court of Session, held that the case was governed by *Lumsden v. Buchanan*, and that the introduction of the word "as" made no difference. From this decision there was no appeal. The Lord Justice Clerk, in giving judgment in that case, observed: "It is now well settled that in this or any like company no one can become a partner with a limited liability, or with any other liabilities than such as are borne in common by all the partners." This decision must be taken along with that of *Lumsden v. Buchanan*, and shows what was then understood in Scotland to be established as the law in such cases. On the whole I am of opinion that the decision of the Court of Session now under appeal is correct, and I must move your Lordships to dismiss the appeal. It is difficult to use words which will adequately express the sympathy I feel for all those who have been overwhelmed in the disaster of the Glasgow Bank, and that sympathy is peculiarly due to those who, without any possibility of benefit to themselves, and probably without any trust estate behind sufficient to indemnify them, have become subject to losses or ruin by entering for the advantage of others into a partnership, attended with risks of which they probably were forgetful, or which they did not fully realise. The duty of your Lordships is, however, to declare the law, and of the law applicable to this case your Lordships can, I think, entertain no doubt. I move that the appeal be dismissed, and if no other arrangement has been made between the parties, it must, I conceive, be dismissed in the usual way, with costs.

LORD HATHERLEY.—My Lords, it would be impossible to come to any other conclusion in the present case than that which has been already announced as the conclusion arrived at by my noble and learned friend on the woolsack. Most anxiously does one scrutinise every case, especially every case presenting an appearance in any degree whatever of novelty, in order to see that the edge of justice is administered duly and not with undesirable sharpness. But this case really did appear to be one in which the appellants must have been painfully conscious from the first opening that they had to struggle against that which had been settled and determined by the highest court of the Legislature, and which in reality, therefore, was not open to revision by any court whatsoever. In vain did I listen during the argument for that which I was most anxious to see—whether or not there had been any failure of justice in the case of *Lumsden v. Buchanan*,

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but there was no distinction which could be made in any way available, pointed out between the cases. The last distinction which was referred to by the Lord Chancellor—namely, that of the introduction of parties “as trustees”—seems to have existed in the subsequent case of *Lumsden v. Peattie*, and in that case the distinction was not found to be available, or not so available as for it to be thought possible that an appeal could be founded upon such a distinction as that. The distinction raised before us was, that in the one case new shares were applied for, and that in the other case shares were accepted by way of transfer, being dealt with in the open market. I apprehend that there can be no distinction founded upon any such thin discrepancy as that. The real point of the whole case is, as it appears to me, summed up in one or two clauses of the contract of copartnership. The fourth clause of that deed is as follows: “The parties do hereby bind themselves respectively to contribute and pay when required the sums of money corresponding to the number of shares of the said stock subscribed by them, as the same are specified in the testing clause of these presents, and are likewise in *majorum evidentiam* adjoined to their signatures, and which several sums of money are held to be herein repeated.” The 5th clause is this: “The said partners shall have right to the profits and be liable for the losses, and bound to relieve each other of all the debts and engagements of the company in the proportion of their respective interests or shares in the said capital stock, declaring that the whole capital stock and profits of the company, as well as the said parties and the aforesaid individually, shall be bound and obliged to free and relieve the governor and deputy-governor of the company, elected or to be elected as after-mentioned, in the event of either of them not becoming parties thereto, of all liability for the debts and engagements of the company.” And by the sixth clause, “Any person holding a share of the said capital stock, whether as an assumed subscriber or as a purchaser, heir, or other representative of such subscriber, shall be entitled to all the rights and subject to all the liabilities of an original partner of the said company.” What are these great companies in fact? They are very large and extensive partnerships. Every partnership, as we all know, as a matter of almost elementary jurisprudence, involves equality of liability, and equality of participation in the profit and loss, or if not equality of participation, at all events participation upon some rule analogous to equality, upon which the whole basis of the transaction stands. It does not depend upon who are the holders of the shares. The shares themselves are the things which regulate on the one hand the responsibility of the person who is the owner of those shares, and on the other hand, the advantage and profit which the person who is the owner of the shares is to acquire. Whosoever at any given time, be it for profit or be it for loss, finds his name attached to the ownership of a given number of shares, that person has to deal with those shares as provided by the articles of the partnership deed—namely, to contribute to the loss, and to share in the profit in proportion to the number of shares that he holds. That at once distinguishes the case from the case of *Gordon v. Campbell*, because in that case it was held that by the terms of the bond any person who stipulated or acted as trustee could

say that he stipulated or acted as trustee only, which is the just reading of that deed. But when a person says that, you must find whether the persons with whom he is dealing have power so to deal with him, and in the case of *Gordon v. Campbell*, all the parties were *sui juris*, and had power to deal as they thought fit. But here, when you are dealing with a company, either in applying for new shares, or in buying shares in the share market, and bringing them to be registered, which makes you a shareholder in the company, upon what terms do you become a shareholder? You must become a shareholder upon the original terms and upon no other terms. The directors have a good many powers of an extensive description—powers when shares are offered for sale to purchase on behalf of the company, and a variety of other powers not altogether usual in companies of this kind. But these powers which they have are the only powers they are entitled to exercise, and there is no power in the deed to allow them to treat a certain set of shares in the company as being held by a different tenure from all the other shares to be held, and liable only as certain particular estates will hold out; so that, as has been observed already, you might—to take an extreme case—imagine almost every lot of shares to be held upon different tenures as between the different proprietors of those shares: whereas the true principle from beginning to end of the deed, and the principle which, as I apprehend, was determined in the case of *Lumsden v. Buchanan*, was this—that those who are partners under a deed of this description take their profits and bear their losses according exactly to the number of shares which they hold. As regards the introduction of the names of the trustees as trustees on the share list, we perhaps in England are a little surprised at it, because we have now long been accustomed to the practice which first began with the Bank of England, which has always refused to recognise trusts at all, and the same practice has been adopted by railway companies and the like, in which, wisely or unwisely, trusts are not recognised upon the face of the share list. We are surprised to find any recognition of this trust, but the use of it one can easily see. With all its advantages the rule of the Bank of England is productive sometimes of great inconvenience. I have myself known cases of considerable inconvenience where a man has become, say, the surviving trustee of three trustees. Perhaps he has in the bank 5000*l.* or 6000*l.* of his own, and 10,000*l.* as a trustee, and some day when he goes to the bank he would be surprised to find that he has 15,000*l.* of stock, because the bank will not recognise trusteeship at all, and he finds himself registered as the owner not only of his own stock but of the stock that he holds upon trust. That is not always the most convenient arrangement, and sometimes it leads to worse accidents than that, because if the last survivor of three or four trustees happened to be a person of dishonest character, he is the sole proprietor, and has the sole command of the stock, and the bank is entirely free from all responsibility in dealing with it. That appears to have been thought, as the learned judges say, not a desirable position to place matters in; and therefore, in Scotland, for the sake of the *cestui que trust*, notice is taken

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upon the face of the bank books of the existence of the trust, and also a second advantage accrues to him—namely, that when changes take place in the trust, then there is a note in the bank books, which tells you that that has occurred without the necessity of having a new deed entered for the purpose of saying that such a change has been made, and parties are thereby liberated from some expense, and from a good deal of inconvenience. Many reasons may be assigned for it, but whatever reasons may be assigned it is impossible to hold that the other shareholders, who have either entered into the original contract of partnership or have become shareholders since in a bank like this which we have now before us, can repudiate responsibility for anything professed to be done on their behalf by the directors contrary to the general stipulations of the deed. The directors can only do that which their power and authority entitle them to do, and in vain one has asked to have any passage pointed out in this deed which authorises the directors, in dealing with different lots of shares, to manipulate them in such a way that one lot of shares may go into one trust, and another lot into another trust, and a third lot into no trust at all, and that those shares may, in the event of disaster to the company, be held upon a different footing from the other shares, so that, so far from partaking according to the number of their shares in the profit and loss, it would be found that there was, as regards a very large proportion of the individual shares of the company, a regulation contrary to the express stipulations of the deed. Perhaps I have occupied already too much time in the few words that I have said, because I am only saying what I believe to have been the principle in the case of *Lumsden v. Buchanan*; and beyond the case of *Lumsden v. Buchanan* I have not the inclination, nor I do see in any way how your Lordships have the power to go.

LORD PENZANCE.—My Lords, no question involved in this appeal—though one of the deepest interest to the parties concerned—depends for its solution upon any very numerous or intricate considerations. It is not to be denied that the appellants on the face of the transfer deed into which they entered with the banking company, whereby they became shareholders in it, announced in express terms that they did so as trust dispoonees for other people. The question is, whether the statement of this fact has in any degree exonerated them from the obligations which attached to the character and position of shareholders, which it was the object of that deed to confer upon them. Speaking generally, there might no doubt arise an inference (if not rebutted by other circumstances) that a person who derived no benefit himself, and who acted only for the benefit of others, in contracts or engagements of any kind into which he might enter, would not intend thereby to expose himself to personal liability if it could be avoided. A general consideration of this character has, I think, largely pervaded the reasoning upon which the exemption of the appellants from personal liability has been based and enforced in argument. But meanwhile it will not be doubted that a person who, in his capacity of trustee or executor, might choose to carry on a trade for the benefit of those beneficially interested in the estate, in the course of which trade debts to third persons arose, could not avoid

liability for those debts by merely showing that they arose out of matters in which he acted in the capacity of trustee or executor only, even though he should be able to show in addition that the creditors of the concern knew all along the capacity in which he acted. The case of an agent who acts for others is of course entirely different. His contracts are the contracts of his principal, and the liabilities, from which as a general rule he is personally exempt, fall upon his principal, who acted through him. But to exonerate a trustee something more is necessary beyond the knowledge of those who deal with him that he is acting in that capacity, and it would not be sufficient in all cases to state that fact on the face of any contracts he may make. To exonerate him it would be necessary to show that upon a proper interpretation of any contract he had made, viewed as a whole—in its language, its incidents, and its subject matters—the intention of the parties to that contract was apparent, that his personal liability should be excluded, and that, although he was a contracting party to the obligation, the creditors should look to the trust-estate alone. These propositions are, I conceive, conformable to the law of Scotland equally with that of this country. It is not enough, then, in the present case to show that the appellants on the face of the transfer deed accepted the stock in question “as trustees,” but they must go on to show that the proper construction of that instrument showed the intention of the parties to be that, being trustees, they should not be personally liable. It becomes, then, material to inquire what was the nature of the partnership whose stock they agreed to accept, and in whose business they agreed to become partners, and how far the nature of that stock and the constitution of that partnership are consistent with the exemption which they now claim. The constitution of this banking company was framed and declared by the partnership deed to which reference has been made. It provides for one class, and for one class only, of shares and shareholders, and declares in express terms that the partners shall have a right to the profits, and be liable for the losses, and bound to relieve each other of all debts and engagements of the company in the proportion of their respective interests or shares in the capital stock thereof. This deed the appellants have not actually signed, but they have executed the deed of transfer, in which they have expressly declared their acceptance of the stock in question, upon the footing that they would be subject to all the articles and regulations of the said company in the same manner as if they had subscribed the contract of co-partnership. Having thus become shareholders in a partnership, the members of which have by their deed of partnership agreed to stand upon an equal footing one with the other, entitled equally to the profits, and bound equally to the losses, the question arises, whether by stating in that deed of transfer that they so became shareholders as trustees for other persons, the appellants have altered or limited the obligations that otherwise would attach to them? In my opinion they have not. There are many contracts in respect of which, if a man were to state in contracting that he only did so as trustee, it is quite conceivable that his contract might be construed as not being intended to bind him personally. The case of *Gordon v. Campbell* offers an example of such a

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construction. Other cases may be easily imagined in which, on the one hand, the intention to restrict the liability of the person contracting may be clearly inferred from the character in which he declared that he contracted, taken in connection with the other circumstances of the case, and in which, on the other hand, nothing is to be found inconsistent with the restriction in the subject-matter of the contract. But in this case the subject-matter of the contract was the stock of an association whose shares were by the very terms of its constitution to be held only by persons who were all to be personally and equally liable to its obligations; and it cannot be held that the liabilities in respect of this stock were intended to be restricted by the words "as trustees," without ignoring the very nature, and inseparable incidents, of the thing which formed the subject-matter of the contract. In a word it comes to this—such a thing as a share in this association with a limited liability in the holder of it did not exist. No such share or stock had ever been created. No provision is made for it in the partnership deed, and every provision to be there found which speaks of the liability of those who hold the shares is diametrically, and in the most express language, opposed to it. If, then, the appellants did not become bound to the liabilities attaching to ordinary shares and ordinary shareholders, they did not become bound at all, and the contract of transfer would be void. But before your Lordships can arrive at such a conclusion you must, I think, be at least satisfied that the words "as trustees" in this particular deed so clearly imported an intention not to undertake the obligations of shareholders (though the entire contract might thereby be rendered contradictory and absurd) that they could have been introduced for no other purpose. For if a reasonable interpretation can be assigned to these words, which would permit the deed to stand as a consistent one, competent to effect that transfer of stock which it was the obvious intention of the parties to bring about, your Lordships would be bound to accept that interpretation. Such a reasonable interpretation was suggested in the case of *Lumsden v. Buchanan*, and is referred to by the Lord President in his judgment in the present case. His Lordship says: "Hence arose the practice referred to in *Lumsden v. Buchanan*, of taking notice of trusts in the transference and registration of such stocks, not for the purpose of altering the liability of the holders of such stock as compared with the other holders of stock in the same company, but only for the purpose of marking the stock as the property of the particular trust named in the transference and in the register." The whole question, then, is, as it seems to me, one of construction; and as to the proper interpretation to be put upon this transfer deed and the acts of the appellants under it, and for the solution of that question your Lordships have before you these two alternatives—on the one hand, a construction which gives a reasonable and efficient meaning to the words "as trustees," and is not inconsistent with that transference and acceptance of stock which was the sole object of the instrument; and on the other hand, a construction which defeats the intended transfer of stock altogether, and reduces the deed of transfer of stock to a nullity. According to all known principles of construction, your Lordships are, I apprehend, bound to accept

the construction which gives effect to the instrument. A great deal was said in the course of the argument as to the difference between the law of Scotland and that of England in regard to trustees. But the principles upon which written instruments are to be construed, and particularly the principle to which I have just alluded—that any construction which invalidates the instrument altogether ought to be rejected if a reasonable construction can be found which gives effect to it—are surely common to the law of both countries, and in whatever light the law of Scotland may regard trustees, if it does not go the length of regarding them as corporate bodies (which it has been admitted it does not)—they must, I think, remain liable upon contracts and engagements, into which they have personally entered, and in which no exemption from that liability is to be found expressed, or properly implied. I have offered these remarks to the House upon the footing of the matter being *res integra*, but in truth the present case is, in my opinion, governed in principle by the case of *Lumsden v. Buchanan*. The principle involved in that decision was, as I think, rightly appreciated, and declared by the learned judges in the Court of Session. The Lord President said the rule of liability then established might be stated in a single sentence as follows: "Persons becoming partners of a joint-stock company such as the Western Bank, and being registered as such, cannot escape from the full liabilities of partners, either in a question with creditors of the company or in the way of relief to their copartners, by reason of the fact that they hold their stock in trust for others, and are described as trustees in the register of partners and the other books and papers of the company." And Lord Deas said that the grounds of decision in *Lumsden v. Buchanan* resolved themselves into this—that where the trustees join in a contract of partnership for trading purposes, such as a contract for carrying on business of banking, the mere designation of them as being trustees will not exempt them from the same personal liability as is undertaken by the other partners or limit their liability to the value of the trust estate. It is matter for deep concern, not unmingled with surprise, that the legal effects attaching to these contracts of trustees having been thus asserted and exposed in a notable case as long ago as the year 1865, people should have been found still willing to enter into them. But in all probability the profound conviction with respect to the great banks in Scotland that such a thing as loss or liability was not to be practically apprehended at all, may have led to a widespread indifference as to the legal consequences of this improbable event, should it ever come to pass. Be this, however, as it may, your Lordships, while bound to give effect to the lawful rights of the creditors, will not the less commiserate losses and sufferings which, in their amount and intensity, rise to the level of a national calamity.

Lord O'HAGAN.—My Lords, I agree with the Lord Chancellor that it is impossible to approach the decision of this case without feelings of the deepest pain. That persons undertaking the onerous duties of trustees from kindness to others, and without the smallest view to their personal advantage, should be involved in ruinous responsibilities, which in many cases may not have been within their contemplation when they



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accepted the trusts, must be regarded as a calamity appealing to our sympathy and compelling our regret; but we are bound simply to regard the legal rights and obligations of the parties before us, and I am constrained to the opinion that the unanimous judgment of the Court of Session must be affirmed. The question of this appeal appears to be concluded by authority, and I do not feel that it is necessary to discuss the grounds on which the decision in *Lumsden v. Buchanan* was pronounced, as it would have been if the matter were *res integra*. These reasons have been shown by my noble and learned friends who preceded me to have been very cogent. But I am content to rest on the decision of this House in a case which, I think, undistinguishable in any material particular from that before us. I shall only refer to the arguments by which it was justified, as applicable to both of them, and establishing identity between them. The question is one of contract and construction, and the contract of the trustees in *Lumsden v. Buchanan* was in substance, and, as I shall indicate immediately, almost in terms the same as that with which we deal in the present case. Then, as now, it was urged that the directors of a company formed on the principle of unlimited liability, had no authority to admit a shareholder on terms inconsistent with the principles or the competency of the directors of the Western Bank, which was held to be bounded by the provisions of their deed of copartnership. They had admittedly no statutable powers under the Limited Liability Acts; they had received no authority from individual shareholders to alter or modify the conditions of membership of the company; there was no pretence for saying that the words of the deed and the undertakings of the allottees or transferees had relation to anything but liability of that kind; and, therefore, it was expressly stated as the main foundation of the judgment that, the directors being incompetent to qualify the responsibilities of the shareholders on the ground of trusteeship, or to create limited liability unauthorised by statute, they should not be assumed to have committed an act quite *ultra vires*, at least if the terms of the contract with the trustees were in any reasonable way capable of reconciliation with the proper discharge of their duty, and the true effect of the copartnership deed. The custom of noticing trusts on the register of companies in Scotland was assumed in the Court of Session and in the judgment of this House to have arisen for the purpose of facilitating the proof of the character of the property, and not as qualifying the liabilities of the shareholders, inasmuch as the Scotch law requires evidence of trusteeship either by the oath of the trustee or by a writing under his hand, which cannot always be obtained, and this was taken as a sufficient account of the reason of the thing. The maxim *ut res magis valeat quam pereat* now applies. It is plain that this ground of decision is as applicable here as it was in *Lumsden v. Buchanan*. There it was determined that the terms of the deed in that case had no contemplation of more than one class of shareholders, and no regard to a distinction between fiduciary liability and personal liability. The reasons for hesitating to admit such a distinction with a view to commercial policy and results have already been pointed out by the Lord Chancellor, but in my view it is enough to say

that that case and this case are identical in the want of a pretence for making the distinction, for in *Lumsden v. Buchanan* one class of shareholders only was admissible, with equal privileges and equal liabilities. It is impossible to find authority for admitting another in the contract and copartnership of the City of Glasgow Bank. Next, the conditions of partnership in *Lumsden v. Buchanan* were in no way more stringent or more absolute for the purpose of creating the largest liability than in the present case. The appellants accepted a transfer of the stock of Mrs. Syme and Mrs. Boyd "with the whole interests, profits, and dividends that may arise and become due thereon, the said appellants, by acceptance thereof, being in terms of the contract of copartnership of said bank, subject to all the articles and regulations, and declaring that they accepted of the said transfer on the terms and conditions above mentioned." The acceptance was made by them "as trust disponees," but it bound them to all the articles and regulations of the company. I shall not again go over the articles and regulations to which my noble and learned friends have sufficiently referred in detail, but I will advert to the stock certificate procured by the appellants, referring to the entry of their names on the stock register, and describing them as "holders" of the stock, and then point to the 6th section of the contract of copartnership, which is in these terms: "Any person holding a share of the said capital stock, whether as an assumed subscriber or as a purchaser, heir, or other representative of such subscriber, shall be entitled to all the rights, and subject to all the liabilities of an original partner of the said company." I shall only further refer to the 40th section, which declares that; "The person or persons, companies or corporations, whose names shall at any time stand in the said stock-ledger containing the list of partners of the company, whether as original or assumed partners, shall be deemed and taken to be the proprietors of the several shares standing in the said ledger in their respective names, and shall be liable to the payment of every call or calls for instalments of capital stock to be made thereon, and to all actions, suits, obligations, forfeitures, and penalties, and shall be entitled to the whole profits and liable for all the losses to which the original proprietors of shares in the company are subject, liable, and entitled to by these presents, and the names entered in the same stock-ledger and the amount of shares annexed thereto shall be the sole evidence receivable at any meeting of the partners as to the right of voting at said meeting." Now, looking to the contract of the appellants as the transferees of these shares, and the articles and regulations by which they bind themselves to abide, nothing could be conceived more full and conclusive, more absolute and unconditional, than the grant on the one side and the assumption of liability on the other. It is not pretended that in this respect the contract of copartnership of the Western Bank differed materially from that which we have been considering. Indeed, it is hard to imagine any collection of words more decisive for the purpose of negating any distinction between classes of shareholders, or any difference in their respective liabilities, and therefore, in the important matter of the specific terms of the contracts, *Lumsden v. Buchanan* is wholly undistinguishable. Both the



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contracts were manifestly framed with a view to the maintenance of the recognised rule which establishes mutuality of responsibility *inter socios*, and divides the profits and the losses among all the members of a partnership according to their respective interests. In neither is there the least indication of a design to depart from that rule by creating an exceptional class with peculiar immunities. The words of Lord Kingsdown, whose hesitation to agree with the majority of the law lords makes his ultimate concurrence more striking, significant, and important on this point, were: "When persons have signed deeds of this description it would be very dangerous to permit them to relieve themselves from the obligations of covenants into which they have expressly entered on any speculation founded on mere probabilities that they really did not intend what the deed in terms expresses. Now, unless the covenants by which the parties subscribing the deed bind themselves, their respective heirs and successors, in the third clause of the first deed, and the second deed of accession, can be read so as by some interpretation to exclude those who sign as trustee, it is not disputed that the covenant infers personal liability, and there seems to be in this insuperable difficulty." I shall have to observe shortly on the argument as to the omission of the word "executors" in the City of Glasgow Bank partnership contract, and I note in passing that the words "heirs and successors," on which Lord Kingsdown relies as asserting the insuperable difficulty in the way of limiting the liability of trustees, are equally inserted in the contract, in the same connection, and with the same purpose, as in the contract of the Western Bank. The general grounds, therefore, of the decision in *Lumsden v. Buchanan*, seem to me completely applicable in this case as to the character of the contract, the incompetency of the trustees to limit liability in defiance of its terms and in disregard of the relations created by the legal impossibility of accepting fiduciary shareholders as a separate class, and the clear and unequivocal words of the covenants stipulating for no exemption as they forego no right. If this be so as to the general grounds of decision, is there anything in the particular differences which have been suggested between the deeds that relieve us from the necessity of following the authority of *Lumsden v. Buchanan*? It has been argued there is such a difference in the fact that in this case the appellants are described as trustees in the body of the deed, and so registered, whilst in *Lumsden v. Buchanan* the fiduciary character appears only in the testing clause. But that clause is clearly embodied by reference in the deed, and so dealt with as being so embodied in the judgment of the noble and learned Lords. In this matter, therefore, for the purpose of decision, the difference is immaterial. Then it was said that the introduction of the word "as" in the transfer of the City of Glasgow Bank before "trust disponees," which is not found in the testing clause in *Lumsden v. Buchanan*, demonstrates that the appellants qualified their liability, and entitled themselves to say that they are only answerable to the extent of the trust estate. There seems some plausibility in the argument representing "trustees" as a mere word of description, while the inserting of the words "as trust disponees" is indicative of the character in which alone the transfer was

accepted, and the case of *Gordon v. Campbell* undoubtedly shows that in certain cases a trustee may, by apt words, limit his liability. The words in that case were held by this House to be sufficient for the purpose, but then the parties were free to enter into such a contract. Their intention to do so was put beyond all question by the phrase "quid trustee," and proper effect was given to it. That case, therefore, scarcely applies where the directors of a bank are incompetent to make a contract of the kind, when the nature of the dealing does not admit of it, and when, as in *Lumsden v. Buchanan*, a fair interpretation in another sense may be put on the words, reconciling them, as I have said, with the duty of the directors and the rights of the shareholders. But the decisive answer seems to be that the whole reasoning of the noble and learned Lords proceeded on the assumption that, had the trustees dealt with the Western Bank only in that character, the *ratio decidendi* and the decision itself would have been exactly the same had the word "as" also been employed in the testing clause. This difference alone appears to me to be insufficient to diminish the coercive force of the authority. It was further argued that another distinction arose because the appellants were not original allottees of the stock, and did not personally enter into an undertaking which might have bound them in that character. But I fail to appreciate the value of the point. The original allottees took shares without limit of liability, and the other shareholders and creditors of the bank therefore acquired certain rights to be exercised in certain contingencies, and are these rights to be destroyed merely because the appellants are transferees, having accepted the transfer expressly "subject to all the articles and regulations of the company in the same manner as if they had subscribed the original contract?" And had they made a transfer it seems impossible to hold that those holding under them could have been dealt with on a different principle. The directors were incompetent to deal with them on any other. There seems to be, therefore, no material difference between the cases, for the purpose of the argument, in the diverse modes by which the shares were acquired. Then it was strongly urged that the use of the words "heirs, executors, and successors" in the deed of the Western Bank implied the liability of the trustees; and unquestionably Lord Kingsdown placed reliance on these words, although, as I have already said, he omitted from them in his citation the word "executors," and thus reduced them to the expression "their heirs and successors," which occur and have equal force in the last clause of the contract of copartnership of the City of Glasgow Bank, which declares "that parties hereto and their heirs and successors shall be bound and obliged to observe and perform their respective parts of the present contract;" so that in the view of Lord Kingsdown the words of the deed before us would equally have imputed personal responsibility with those which he thought important in the deed of the Western Bank. Besides, the absence of the word "executors" could have no differential effect which is not removed by the presence of the word "heirs," in the interpretation given to it by the Scotch law, as connected equally with the devolution of personal and real estate. On this point also the argument has failed to satisfy me that any real distinction exists between

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the cases. I have adverted to the particular instances in which it has been sought to set up differences between *Lumsden v. Buchanan* and the case of the appellants, and certainly with no indisposition to recognise such differences if they can be shown to exist; and after very grave and careful consideration I find myself unable to discover a real distinction between them, and I think with the Scotch judges that the decision of the former case is absolutely binding in the latter. We were pressed to regard the law and practice of Scotland as distinct from that of England, especially in reference to the position of trustees, as clothed with something of a corporate character by the former, which is admittedly unknown to the latter; and undoubtedly, if a Scotch trust constituted a trustee or a number of trustees a corporation, that would have relieved the individuals composing it from liability in their separate persons, and imposed it on the body. But I fail to discover authority for such a position, whilst there seems to be high authority the other way. Arguments were also founded on the registration and incorporation of the City of Glasgow Bank under the Act of 1862, as distinguishing its position from that of the Western Bank. These arguments appear to have been elaborately urged in the courts below, but were not relied on much before your Lordships, and I think it enough to refer to the very able refutation which was applied to them in the judgments of the Lord President and Lord Shand in the Court of Session. The Joint-Stock Acts of 1856 and 1862 operated certain changes, but there have been none with reference to the entry of notice of trusts upon the register of companies, or as to the character of the obligations undertaken by a shareholder, which were ascertained from the deed of copartnership. I have adverted, I think, to all the material points which have been raised in the course of the able and elaborate arguments of the counsel for the appellants, and, on the whole, whilst I participate fully in the painful sympathy which has been expressed by my noble and learned friend on the woolsack, I am obliged to agree with his conclusion that the judgment of the Court of Session should be affirmed, and the appeal dismissed.

LORD SELBORNE.—My Lords, by the 5th, 6th, 33rd, 38th, 40th, and last clauses of the copartnership deed of the City of Glasgow Bank, it is in effect provided that every person who is at any time admitted as a partner shall be absolutely and without limit liable for all the debts and engagements of the company, and that all the partners shall be equally liable, *inter se*, in proportion to their respective shares. It is consistent with this that a plurality of persons may be (as is contemplated by the 13th and 14th clauses) co-proprietors of the same shares. The aliquot part of the common burden cast by the partnership contract upon those shares is exactly the same whether they are held by one or more than one person. If by more than one, every one of the co-proprietors is bound to the company for the whole proportionate liability attaching to those shares neither more nor less, and they among themselves are *prima facie* bound to contribute equally to that liability. In this there is nothing extraordinary, nothing unjust. Whether they undertake the obligations of partners for their own benefit or for the benefit of others is a question for themselves

and not for the company. By the 40th clause it is provided that those who stand registered as shareholders in the stock ledger of the company are for all purposes of liability on the one hand, and of participation in profits on the other, to be regarded as "the proprietors" of the shares. The effect of this provision, when considered in connection with the absence in this deed and in the relative statute law of anything to prevent the company from taking notice of trusts, is that although any partner who holds his shares in a fiduciary capacity will, of course, be bound to apply and account for any share of profits to which he may be entitled according to his trust, the company is entitled and is bound to look to him, and to him only, as having for all partnership purposes the sole title to the shares both as to profit and as to liability, and he must be taken to have known and understood this when he accepted them. Corporations (including, of course, incorporated companies, and therefore all companies formed with limited liability under the Act of 1862) might, under clause 40, be members of this copartnership, and being illegal persons, they would be subjected in respect of any shares which they might hold to precisely the same equal and unlimited liability with individual shareholders, every one of them being liable to the full extent of his whole means and estate. In the one case the whole property of the individual, in the other the whole property of the corporation, would be answerable to the creditors and (in contribution) to the copartners of the bank. If by the law of Scotland every trustee, or body of trustees acting in that character, were a corporation, and the trust estate corporate property, the appellants in this case would be right. There would, on that hypothesis, be no need to show that there was any special or exceptional contract between the appellants and the copartnership. The corporation would be liable, and not the individual corporators. But no authority has been produced showing this to be the law of Scotland, and it appears to me (postponing for the present all consideration of the effect of the decision of *Lumsden v. Buchanan*) to be at variance with the case of *Martin v. Wright* (8 Ct. Sess. Cas. 2nd series, 485). There Lord Mackenzie said: "A trust with a power of assumption does not establish a corporation. I do not think that a private trust is to be considered as of the nature of a corporation;" and Lord Fullerton said: "The case is different from a corporation, which is held to be one person. A trust for purposes does not create a separate constructive person like a corporation. The title of each trustee stands on the right made up in his own person." These observations related indeed to the mode of making up titles to heritable property held in trust when new trustees had been assumed, but the principle could not be limited to that case. If authority had been wanting, reason would lead to the same result. Corporations, properly so called, are public bodies, created for definite purposes by royal charters or by public law, and this is equally true of quasi-corporations, or bodies having some, but not all, of the incidents of corporations. But if the constitution of any private trust could in law have a similar effect, every individual would be able for purposes and upon conditions of his own choice, without any restraint or regulation by public law, to invest himself or others with a corporate cha-

acter, and so to limit and subdivide by mere operation of law what would otherwise be the effect of his and their engagements. In *Lumsden v. Buchanan* the respondents were five persons, individually named and described in the testing clause of the deed, with this designation super-added to their personal names and descriptions, "Trustees for Mrs. Ellen Brown, the majority surviving being a quorum." That designation, though occurring in the testing clause, was incorporated by words of the reference into the inductive and operative parts of the deed. That could mean nothing less than that the title and interest of these five persons to and in the shares for which they subscribed was fiduciary and not beneficial, and that in this sense, at all events, they subscribed "as trustees." If by the general law of Scotland they were a corporation or *quasi*-corporation (it was admitted at the bar that trustees cannot sue or be sued under any collective designation without using their own individual and personal names), I can imagine no ground on which it could possibly be held that they did not subscribe that deed in their corporate character. But the decision of this House was that they were all individually and personally liable. To my mind the present case depends upon this single point. But I think it right, also, to consider another and less technical way by which it has been sought to reach practically the same conclusion. The inequality which would be produced by allowing trustees to be accepted or assumed as partners upon the footing that the whole trust property, and that only, should be liable, is said to be apparent only, and not real, because the copartnership and its creditors can never in any case get more from any partner than the whole of his property available for the payment of his debts, which property must in all cases have some limit less or more, according to circumstances of which the other partners may know nothing, and must take their chance, and in some cases may really be worth nothing at all, and it is contended that if they get the liability of the whole property subject to a particular trust, they get what is as good as, and may perhaps be better than, the liability of individuals. On these grounds it has been contended that it was open to the directors of the City of Glasgow Bank to accept the appellants as partners on those special terms, and that they, in fact, did so. The principle of this argument, when applied to such a copartnership as the City of Glasgow Bank, seems to me altogether fallacious, however common a practice it may be in Scotland for simple money obligations and other ordinary contracts to be made between trustees and other persons competent to contract in any manner which they think fit, upon the footing that the trust estate only is to be held liable. A contract of the kind supposed would really be for limited liability, though of an anomalous nature, the limit being undefined as to amount, variable in different cases, and subject in many conceivable cases to various doubts and questions. By the Joint-Stock Companies Act of 1862 provision is made for limiting liability in either of two ways, one of which is called liability limited by guarantee. This consists in an engagement by each shareholder to contribute towards the payment of the debts and engagements of the company in case of its being wound-up a sum of money not exceeding

a certain specified amount. The City of Glasgow Bank was not a company limited by guarantee or otherwise. If an individual shareholder had proposed to the directors to take an allotment of shares upon the condition that he should in no case be liable beyond a certain specified amount (in other words, that he should be a shareholder limited by guarantee), it is clear that the directors would have had no power under this deed to agree to such a condition, whether accompanied or not by a pledge in security of any particular fund or property. *A fortiori* such a condition could not be annexed to a transfer of shares originally issued and held by the transferor upon the ordinary terms of unlimited liability. The effect of the appellants' contention practically is that, on the occasion of the transfer to them of the shares registered in their names, something equivalent to this was done, though without specifying the amount of the trust funds constituting the assumed limit of their liability. It is stated that in the present case there were trust funds beyond the shares, themselves of large amount. But the principle of the argument when taken in connection with the terms of this copartnership deed goes much further. If sound, it would enable a trustee shareholder, when no other property was in trust, to become a partner without any personal liability at all, and also without any liability of any property or fund beyond the shares themselves. There is nothing in this deed to prevent any purchaser of shares in the market from causing them to be transferred into the name of a trustee declared to be such on the face of the transfer, who, according to this view, would be under no personal liability, and therefore would have no occasion for or right to any indemnity against the beneficiaries, or against the author of the trust; and the purchaser himself, having never become a partner, would also be free from all liability. Nor would such a transaction (at all events if it took place when the bank was a going concern, and in good credit) be impeachable for fraud. The copartnership deed does not anywhere contemplate that shares once issued can undergo any alteration in their character or incidents by reason of any subsequent transfer. No authority is given to the directors to impose or accept any special terms upon the accession of any transferee to the contract. They have power under clause 34, in the case of a gratuitous transfer, to require shares to be sold in the market, and in the case of a transfer for value, to purchase them at the price proposed to be given if they think fit to do so. Unless they exercise this power they cannot intercept the right of transfer or object to receive any transferee on the ground that he is a mere trustee, or for any other reasons arising out of his relations to the transferor or any other person—relations into which, so far as I can see, he is not bound to recognise their right even to inquire. All that they can do is to regulate under clause 37 the form of the transfer. The effect of the transfer when made is treated by the deed as the same in all cases. Under clause 6 the transferee (when registered) becomes "entitled to all the rights and subject to all the liabilities of an original partner of the company," and under clause 38 he is to "take the precise place of his author." What, then, under these circumstances, is the effect of the introduction of the word "as" before "trust disponents" in the

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transfer deed, by which the appellants in this case expressly agreed to become, "in terms of the contract of copartnership of the said bank, subject to all the articles and regulations of the said company in the same manner as if they had subscribed the said contract?" This word "as" (twice used) constitutes the sole difference which can possibly be represented as substantial between the present case and *Lumsden v. Buchanan*, the omission of the word "executors" in the obligation undertaken at the end of the partnership deed by "the parties thereto and their heirs and successors" being certainly immaterial. It is urged that the necessary import of a contract in Scotland "as trustees" is to exclude unlimited personal liability, and that if that could not be done the transfer and consequent registration did not impose upon these trustees a liability to which they had never consented, but must wholly fall to the ground. Whether, if the premises were right, this conclusion would follow, it is unnecessary to inquire, because I think that the premise is not correct. The authorities cited at the bar—*Gordon v. Campbell* and *Thomson v. McLachlan's Trustees*—show that there is no fixed rule in Scotland as to the effect of such words, but that it must always depend upon the context, and upon the nature and circumstances of the contract in which they occur. If they are open to either of two constructions—the one consistent with the context and with the substance of the contract, the other repugnant to and destructive of it—the former ought certainly to prevail. Applying that test, it appears to me that in this deed of transfer the words "as trust disponees" not only may mean but do mean the same thing which was meant by the designation of trustees (though without the word "as") in *Lumsden v. Buchanan*, and therefore that the Court of Session was right in holding the position of the present appellants to be undistinguishable from that of the respondents in *Lumsden v. Buchanan*, and to be governed by your Lordships' decision in that case. It is hardly necessary for me to add that I concur to the fullest extent in the expression given by my noble and learned friend on the woolsack to the sympathy which all your Lordships must feel for sufferers in this most painful case.

LORD BLACKBURN.—My Lords, I also am of opinion that the judgment of the Court of Session in this case was right, and should be affirmed. In an ordinary case I should have contented myself with an expression of a general agreement with the various reasons given by the noble and learned Lords who have already spoken, but the amount at stake, and the hardship on the appellants is so great, that I think it right to give my own reasons. The facts on which the question arises are few, and may be briefly stated. The contract of copartnership of the City of Glasgow Bank was originally framed in 1839. The 6th article provides that any person becoming the holder of a share shall have all the rights and be subjected to all the liabilities of an original partner. The shares have since been converted into stock, and this article now applies to holders of stock. By the last article "The parties hereto and their heirs and successors shall be bound and obliged to observe and perform their respective parts of the present contract." It seems to me quite clear, and, I think, was not disputed, that those who took

shares or stock, and acceded without qualification to this contract, became personally liable to fulfil the terms of it as much as the original subscribers. But the appellants contend that they did not accede without qualification, and it is necessary to inquire how they acceded. By a deed of transfer, dated 27th Jan. 1874, the then holders of 6000*l.* stock transferred and made over to Wm. Muir and three others named the "trust disponees," in a deed described "their successors and assignees," 6000*l.* stock in the City of Glasgow Bank, "the said William Muir and others named as trust disponees aforesaid, by acceptance hereof, being in terms of the contract of copartnership of the said bank, subject to all the articles and regulations of the said company, in the same manner as if they had subscribed the said contract, and we, the said William Muir, &c., as trust disponees aforesaid, do hereby accept of the said transfer on the terms and conditions above mentioned." And this is subscribed by the four persons in their own names, and there was an entry made in the stock ledger of the company, "William Muir" and the three others "as trust disponees." I do not think that there is any other fact affecting the question before the House. It appears, therefore, that these four gentlemen are in the same position as if they had with their own names subscribed the contract of copartnership, but stated on the face of the instrument that they were trust disponees, and that the stock was conveyed to them as trust disponees, their successors and assigns, and that they, as such "trust disponees," accepted the stock, and as if the bank, knowing all this, entered their names as trust disponees; and the question raised I take to be whether these statements do so qualify the contract into which they entered as to make them not bind themselves, their heirs and successors, personally as would have been the case if they had subscribed the contract without any qualification. Before the decision of this House in *Lumsden v. Buchanan* in 1865 this question was one on which much difference of opinion prevailed, but nine years before the parties executed this transfer, the decision of this House, so far as it extended, settled the law. I have carefully considered the judgments in that case, and I think this much at least must be considered as decided and settled—viz., that trustees (not created by a statute) are not by the law of Scotland a body corporate, or, as it has been loosely said, a *quasi*-corporation. I have myself no doubt that if individuals enter into a contract because they are trustees and for the benefit of the trust, it would be prudent in them to stipulate that, should they bind themselves to see that the trust funds are properly applied to fulfil that contract, their contract shall extend no further, and that they will not be personally liable to make good the deficiency; and if they express such a limitation with sufficient clearness, and the other contracting party (being *ex vi juris*) accepts such a limited engagement, he cannot call on the trustees to do other than to fulfil that limited engagement. There was an opinion entertained by many Scotch lawyers—and to some extent countenanced by the decision in this House in *Gordon v. Campbell*—that by the law of Scotland the mere statement on the face of the contract that the contractors were trustees and entered into the contract because they were trustees was, as a matter of law, enough

to express that the engagement was of this limited kind. I do not, speaking for myself, doubt that it is an important element to be taken into consideration in construing a contract, but I think the decision of *Lumsden v. Buchanan* determines that it is not by itself enough to give any contract this limited effect, and certainly that it is not enough to do so when the contract is a contract of copartnership, the nature of which would make such a limited engagement, to say the least, very inconvenient. If the matter were *res integra* I think I should have come to the same conclusion, for the statement that the parties are trustees is not thereby made an idle or inoperative statement. It marks, as has been pointed out, that the property in the shares is trust property, which is, it is true, for the convenience of the trust only, but it also informs the bank that the property belongs to trustees, and will consequently, in case of death, vest by survivorship, and it is for the benefit of both parties that this should be known from the beginning. But, even if it were an inoperative statement, I do not think it a sound rule of construction that some effect must be found for every word, even if that can only be done by giving it a force beyond what it can reasonably bear. But I do not rest my judgment on this. I act on the ground that the decision in *Lumsden v. Buchanan* is binding as far as it goes, and I see what I think good reasons for acting on it strictly in this and the other cases arising out of the stoppage of this bank. I think that the main object of the parties in the present case was that the shares should vest in the four gentlemen, and it is at the best very doubtful whether, if the contract was understood as the appellants contend, that object would not be frustrated. Now, as a general rule of construction, ambiguous expressions in a contract should not be construed in a sense that would frustrate the main object of the contract. They should be construed *ut magis valeat*, and if the trustees meant to limit their liability, it was for them to see that the words were sufficient to make that clear. For both reasons it seems to me to rest on anyone who after 1865 became or continued a shareholder to show that there is some substantial difference between the terms of his accession to the contract and the terms of that which in 1865 had been determined not to restrict the liability of the trustees. Now, as far as I can see, there is scarcely any difference in form, and none at all in substance, between the two. The contract of copartnership of the Western Bank began by saying that the parties bound themselves, "their heirs, executors, and successors;" that of the City of Glasgow Bank by declaring that they bind themselves, "their heirs and successors." Does the omission of the word "executors" make any difference? I cannot think that it does, and it is perhaps worth noticing that Lord Kingsdown quotes the words of the contract in the Western Bank case (inaccurately it is true) as being that they bound themselves, "their heirs and successors," showing that he did not think the word "executors" was material. The parties in *Lumsden v. Buchanan* acceded to the contract by subscribing a contract. That deed of accession narrated that the directors had created new shares and allocated them to a large number of persons designated in the testing clause. The designations were differently worded, I presume, according to the words in which the applications for

shares were expressed. The designation of the appellants in *Lumsden v. Buchanan* was "trustees for Mrs. Ellen Brown, the majority surviving being a quorum;" that in the present case is "as trust disponents." Can that make any difference? I think not. I therefore agree in the motion of the Lord Chancellor, that this appeal should be dismissed with costs.

Lord GORDON.—My Lords, after the very full expression which has been given of the grounds on which your Lordships have proceeded, it would be quite out of the question for me to detain the House by saying more than that I concur in the judgment of your Lordships.

*Judgment of the court below affirmed, and appeal dismissed with costs.*

Solicitor for the appellants, *W. Robertson*, agent for *Boyd, Macdonald, and Co.*, Leith.

Solicitors for the respondents, *Martin and Leslie*, agents for *Davidson and Syme*, Edinburgh.

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT LINCOLN'S INN.

Feb. 19 and March 5.

(Before JESSEL, M.R. and BRAMWELL and BRETT, L.JJ.)

Re HORBURY BRIDGE COAL, IRON, AND WAGGON COMPANY. (a)

*Company—Meeting of shareholders—Mode of taking votes when no poll demanded—Companies Act 1862, ss. 51, 179—Table A. clauses 42, 43, 44.*

*By the articles of a company, each shareholder had a vote for each share. At a meeting at which the winding-up was resolved upon, five shareholders were present. One shareholder proposed M. as liquidator; another proposed K. Three shareholders voted for M. and two, who held a greater number of shares, for K. A poll was not demanded.*

*Held (reversing the decision of Bacon, V.O.), that, a poll not having been demanded, the voting was by show of hands, and not according to the number of shares, and that K., for whom two persons only had voted, while three voted against him, was not duly elected, and that M. was.*

*The common law of all meetings is that votes are taken by a show of hands, and that common law must prevail unless the articles of association of a company contain any provision to the contrary.*

THIS was an appeal from an order made by Bacon, V.C., refusing, with costs, a motion on behalf of John Masterman, Christopher Alexander, and John Oliver Norris, to the following effect: That David Wood and Smith Kippax (who were respectively a director and secretary of the said company at the commencement of the winding-up) might be restrained by the order and injunction of the court from acting as liquidators or liquidator of the said company, and from selling, or dealing, or intermeddling with any of the assets and property of the same; and that the said respondents might

(a) Reported by E. S. ROCHE, Esq., Barrister-at-Law.

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be ordered to deliver up to the applicant, John Masterman, as liquidator, all the books and documents of the company in the possession or power of the respondents, or either of them, and all moneys and other property of the company in their hands. The second branch of the notice was that the conduct of the said respondents might be examined into by the court, and that they might be ordered to contribute such sums of money to the assets of the company as the court might think fit, by way of compensation, in respect of any loss which the company might have sustained in consequence of their respectively acting as liquidators; and the third branch was that if the court should be of opinion that the applicant, John Masterman, had not been duly appointed liquidator, a liquidator or liquidators of the company might be appointed, and such meeting or meetings of the company directed to be held as the court should think expedient.

The company was framed in 1873, to carry on some works at Horbury Bridge, in Yorkshire. The articles of association contained the following provisions:

At any general meeting, unless a poll is demanded by at least two members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

If a poll is demanded by two or more members, it shall be taken in such manner as the chairman directs. In case of an equality of votes at any general meeting, the chairman shall be entitled to a second or casting vote.

Every member shall have one vote for every share.

These articles were in substance the same as those of table A. of the Companies Act 1862, the only material difference being that, instead of a provision that the number of votes to which the shareholder was entitled should be fixed according to a graduated scale, varying with the number of shares held by him, it was provided that each shareholder should have one vote for every share held by him.

At the meeting at which the winding-up was resolved upon, only five shareholders were present. One shareholder proposed Masterman as liquidator, and another proposed Kippax. Three shareholders voted for Masterman, and two, who held a greater number of shares, voted for Kippax. A poll was not demanded. In the court below Bacon, V.C. held that Kippax was duly elected, and refused to restrain a sale of property of the company by Kippax, while acting as liquidator under the voluntary winding-up. The sale was impeached on other grounds beside the question whether Kippax had any authority to make it, but the Court of Appeal did not enter upon them.

The shareholders who opposed the election of Kippax appealed.

*Hemming, Q.C.* and *Grosvenor Woods*, for the appellants, contended that the appointment of Kippax as liquidator was invalid, the universal rule with regard to voting being that at meetings held under the Companies Act 1862, the vote was first to be taken by a show of hands. The provision in the articles of association that the chairman should be entitled to a second or casting vote showed that each shareholder present was to have but one vote. With regard to voting by poll,

sects. 51 and 179 of the Act supported the view that votes were to be taken by a show of hands, if a poll was not demanded, and so did clauses 42, 43, and 44 of table A.

*Sir H. Jackson, Q.C.* and *Hatfield Green*, for the respondent, contended that the question had nothing whatever to do with the rule that votes should be taken by show of hands in the absence of any other regulation, an entirely different state of things being contemplated by these articles of association. The provision in the articles that a shareholder should have one vote for every share held by him, clearly applied to the case of a meeting like the present. The chairman was responsible for the voting, and he had exercised a sound discretion. With regard to a poll not having been demanded, they submitted there was done here by one process what might have been done by two with the same result, because the chairman might have taken a poll at once.

*JESSEL, M.R.*—If a poll had been demanded, could the chairman order a poll at once? Surely it would have to be taken in the usual way.

*BRETT, L.J.*—Do you mean that on demand being made for a poll, the chairman could take it without giving notice to the other shareholders who were not present at the meeting?

*Sir H. Jackson, Q.C.*—The vote here was practically a poll.

*JESSEL, M.R.*—The only point upon which it is necessary for the present purpose to pronounce an opinion is whether the liquidator *Mr. Kippax* was properly elected. Now the facts are for this purpose beyond controversy. There were five persons present corporally. One of the five held what was called a proxy, but it has been admitted for the purpose of the argument by the respondents that that is not to be taken into account. Of the five persons present two only voted for *Mr. Kippax*, three voted against him. I am assuming now that they did vote for *Mr. Kippax*. The two who voted for him held more shares in the company than the three who voted against him, and according to the law of this company there was a vote for every share. No poll was demanded, and consequently no poll was taken. Therefore the next point is whether the chairman was right in deciding that *Mr. Kippax* was duly elected, because the two persons including himself who voted for *Mr. Kippax* held more shares in the company than the three who were against him. I think he was not. We will first of all consider what the common law of the country is—that is, of England; and it is undoubted, and it was admitted by *Sir Henry Jackson*, in his argument for the respondents, that the common law of all meetings is that you take the votes by show of hands. That is our mode of doing it. Of course it may not always be satisfactory; persons attending in large numbers may be small shareholders, and persons attending in small numbers may be large shareholders; and therefore provision is made for taking a poll, and when a poll is taken undoubtedly the votes are to be counted according to the number of shares; in some cases according to the number of shares absolutely, as in this company, viz., a vote for every share, in other companies notably in railway and parliamentary companies there is another scale. The number of votes

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increases, but not so rapidly as the number of shares, and there is a limit. Now that being the common law mode of voting, is there anything in the Act of Parliament or the articles of association which shows that any other mode is to be adopted, for in the absence of provision to the contrary the common law will prevail? So far from finding anything at all in the Act of Parliament, or the articles, to the contrary, what little I do find on the subject confirms the view that the voting is to be taken by show of hands. First of all we have the 51st section of the Act, which says how a special resolution is to be passed. It is by a majority of not less than three-fourths of such members entitled to vote as may be present in person or by proxy at any general meeting, and then the resolution is to be confirmed by a majority of such members as may be present in person or by proxy at such general meeting. Then it goes on, "At any general meeting unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, shall be conclusive evidence of the fact." Then it goes on, "Notice of any meeting shall, for the purpose of this section, be deemed to have been duly given, and the meeting shall be deemed to have been duly held in the manner prescribed by the regulations of the company." In computing the majority under this section, when a poll is demanded, "reference shall be had to the number of votes to which each member is entitled by the regulations of the company." Therefore, in the case of a special meeting, there is a fair inference, I should say an irresistible inference, that what is to be done when a poll is demanded is not to be done when a poll is not demanded. Resolutions to wind-up have to be passed in the way special resolutions have to be, and therefore there is no repetition in the way of voting. But in the 51st section, as pointed out by Brett, L.J., there is a reference to the mode of voting. It states the regulations, and then says, "In computing the majority under this section, when a poll is demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company," of which he is a member. When we come to the regulations, we find the schedule is not compulsory—and when we come to look at the sections, there is little information to be got. First of all, the 41st section only makes two entries sufficient. Then the 43rd section says that "where a poll is demanded by five or more members it shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the company in general meeting. In the case of an equality of votes at any general meeting, the chairman shall be entitled to a second or casting vote." It is not conclusive, but so far as it goes it confirms the other. If that is so, and if there is a well-known common law on the subject, and if the statute is, at the best for the respondents, silent, and at the worst for the respondents, confirmatory of that view, I think that is the view that ought to be adopted, and consequently this gentleman is not well elected. As regards the articles of association they do not vary the matter in the least, with one exception. They are mere copies from the schedule of the Act of Parliament. That exception is merely making every shareholder to

have one vote for every share without a scale. That clearly applies to the case where a poll is taken, and does not apply in my opinion to where a poll is not taken.

BRAMWELL, L.J.—I am of the same opinion.

BRETT, L.J.—I am also of the same opinion.

Solicitors: *Learoyd and Peace; Torr and Co.*

Wednesday, March 26.

(Before JESSEL, M.R., and JAMES and BRAMWELL, L.JJ.)

*Ex parte GUTIERREZ; Re GUTIERREZ. (a)*

*Debtors' summons—Absconding debtor—Foreigner in England for a temporary purpose—Arrest—Absconding Debtors Act 1870, s. 1.*

A Spanish subject, who resided at Havannah, as partner of a firm there, came to England on behalf of his firm, who were insolvent, with a view of making some arrangement with their English creditors. He offered them a composition which some were willing to accept. Among those who did so was a firm at Manchester. Some of the English creditors refused to accede to the proposal, and commenced proceedings, in consequence of which the arrangement could not be carried out, and the partner who had come to England received a telegram requesting him to return home. He wrote to the Manchester firm, telling them he was going. They thereupon issued a debtor's summons against him, and at the same time obtained a warrant under the Act of 1870 for his arrest. He was served with the summons, and arrested under the warrant.

Mr. Registrar Murray, acting as Chief Judge, having refused to order his release, the debtor appealed.

Held, on the evidence, that the debtor had no intention of avoiding payment of the summoning creditor's debt. There had been a gross abuse of the process of the court. The warrant would be set aside, with costs, and an order made for the immediate discharge of the prisoner.

There is no presumption in the case of a foreigner about to leave England after a temporary stay here, as there might be in the case of a domiciled Englishman going abroad, that he is going away with the intention of defeating his creditors.

*Ex parte Crispin* (28 L. T. Rep. N. S. 483; L. Rep. 8 Ch. App. 374) followed.

THIS was an appeal from a decision of Mr. Registrar Murray, acting as Chief Judge in Bankruptcy. The question raised was as to the power of arresting an absconding debtor, which is given by the Absconding Debtors Act of 1870. A debtor's summons was issued against a Spanish subject, who was in England for a temporary purpose under the following circumstances:—Mr. José Gutierrez resided in Havannah, where he carried on the business of a merchant in partnership with another Spaniard, Mr. Francisco Argumosa. At the commencement of 1879, owing to the badness of trade, they found themselves practically insolvent, and it was arranged that Mr. Gutierrez should come to England to explain matters to their English creditors, and endeavour to make some settlement with them. He arrived in England on the 29th Jan., and then communicated with all the English creditors, and ultimately

(a) Reported by E. S. ROCHES, Esq., Barrister-at-Law.



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made them an offer of a composition of 5s. in the pound. Several of the English creditors, among whom were Messrs. Samson and Co., of Manchester, who claimed to be creditors for 678l., accepted the offer, and Mr. Gutierrez then endeavoured to procure the assent of the other English creditors. Some of them, however, did not assent; but, on the contrary, commenced proceedings in Havannah, and placed an embargo on the assets of the firm there. In consequence of this, the money necessary to pay the proposed composition could not be provided, and Mr. Gutierrez received a telegram from his partner requesting him to return home. On the 15th March he wrote to Messrs. Samson and Co. as follows:

In view of the resistance of some of my creditors to accept my proposition, I find myself compelled to set out for Havannah, therefore you will please name some person there with sufficient power to represent you.

On the 18th March Samson and Co. issued a debtor's summons against Mr. Gutierrez for the 678l., and the same day they obtained from the Court of Bankruptcy a warrant under the Absconding Debtors Act 1870 for his arrest. The warrant contained a statement that

By evidence taken upon oath it has been made to appear, to the satisfaction of the court, that there is probable reason to suspect and believe that the said José Gutierrez is about to go abroad with a view of avoiding payment of the debt for which the summons has been granted.

The same day the summons was served on Mr. Gutierrez, and he was arrested under the warrant and lodged in Holloway Prison.

The preamble to the Absconding Debtors Act of 1870, states that

The laws now in force for the arrest of debtors absconding from England are insufficient for the purpose, and sect. 1 provides that the Court of Bankruptcy may

by warrant addressed to any constable or prescribed officer of the court cause a debtor to be arrested if, after a debtor's summons has been granted, and before a petition in bankruptcy can be presented against him, it appear to the court that there is a probable reason for believing that he is about to go abroad with a view *inter alia* of avoiding payment of the debt for which the summons has been granted,

and by sect. 2 no arrest is to be valid, unless the debtor, before or at the time of his arrest shall be served with the debtor's summons.

On the 21st March Gutierrez applied to Mr. Registrar Murray for his release, on the ground that he had no intention of avoiding the payment of the debt.

The Registrar refused the application, being of opinion on the evidence that there was reason to suppose that the debtor was about to go away with the intention of avoiding payment of the debt.

The application was now renewed by way of appeal.

*Alexander*, for the appellant, contended that the Act did not apply to the case of a foreigner coming to this country for a temporary purpose; and even supposing he was wrong in that contention, there was no evidence whatever to satisfy the court that the debtor's intention was to go away with a view of avoiding payment of his debt.

He was stopped by the Court, who called upon

*Winslow*, Q.C. and *E. O. Willis*, who appeared to support the decision of the registrar.—They

contended that the Act applied to a case like the present where the debtor was going away to avoid process by which the creditors might recover their debt. In the case of *Ex parte Pascal, Re Myers* (34 L. T. Rep. N. S. 10; L. Rep. 1 Ch. Div. 509) it was held that a debtor's summons might be taken out by a foreign creditor against a foreign debtor who was at the time in England, in respect of a debt contracted abroad; and therefore the debtor's summons here having been properly issued, the issue of the warrant properly followed upon the facts appearing in evidence.

*Alexander* was not called upon to reply.

JESSEL, M.R.—I must say it appears to me that the process of the Court of Bankruptcy has been abused in this case, by which I mean that it has been knowingly used for an improper purpose, contrary to the plain meaning of the Act and the justice of the case. [After referring to the title and preamble of the Act and mentioning the provisions of sect. 1, and observing that the warrant was to issue on one of the grounds mentioned in the section, his Lordship continued:] The facts are simply these: A Spaniard, who is a partner in a firm at Havannah, who is trading and domiciled in Havannah, who is not trading in this country, and has no assets here, but who owes some debts here, comes to England on behalf of his firm to inform the English creditors that the firm are insolvent and are desirous of offering a composition, and for that reason only he comes to this country temporarily. He offers a composition which these very creditors are willing to accept, but it appears that there is some difficulty in raising even that amount, and he is asked to return home. He writes to these creditors telling them he is about to return home, and thereupon they obtain this warrant. It does not appear to me that there is the slightest evidence that he is going abroad with a view to avoid payment of this debt. He never had an intention of paying the debt in full, being satisfied that the firm would not be able to do so; and it is not suggested that he would avoid the payment of sixpence by going back to Havannah, or that he ever dreamt of such a thing. I am quite satisfied that he was not going away to avoid payment, and I should be very much surprised if these creditors, after the evidence which has been given, would be prepared now to make an affidavit of their belief that there was any such intention. The prisoner must be discharged at once.

JAMES, L.J.—I entirely agree. The order must be set aside, with costs, and the prisoner discharged. I am bound to say I should not have thought it possible, after the way in which the late Lord Justice Mellish, in the case of *Ex parte Orlspin* (28 L. T. Rep. N. S. 483; L. Rep. 8 Ch. App. 374), laid down the distinction between the inference to be drawn from an Englishman leaving England, and a foreigner who had come to England for a temporary purpose returning to his own country, that such an order could have been made.

BRAMWELL, L.J.—I am entirely of the same opinion.

*Alexander* said that he appeared by the instructions of the Consul-General of Spain, who felt it his duty to interfere.

JAMES, L.J.—I am very glad he has taken the

case up. There has been a very gross abuse of the process of the court. I am very sorry that the appellant has had reason to complain of the way in which justice is administered in this country.

BRAMWELL, L.J.—I am not sure that, when the warrant is discharged, there will be any answer to what we used to call an action of trespass for false imprisonment.

Solicitors: *H. Montagu; Pritchard, Englefield, and Co.*

## SITTINGS AT WESTMINSTER.

Friday, Dec. 20, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

GARDNER AND ANOTHER v. IRWIN AND ANOTHER. (a)

*Practice—Discovery—Affidavit of documents—Privilege—How claimed in affidavit—Rules of Court 1875, Order XXXI., r. 13.*

*It is not enough to state, in answer to an application for production of documents, that certain documents are privileged. The affidavit should also state the grounds upon which privilege is claimed.*

*Decision of the Exchequer Division reversed.*

APPEAL from a decision of the Exchequer Division.

The plaintiffs claimed from the defendants the costs of an action brought against plaintiffs in respect of certain timber in the courts of Russia, by one Vorticiano, and who was the agent of the defendants in the present action.

Judgment had been given in favour of the present plaintiffs in the Russian courts.

The statement of claim in the present case alleged that

Such judgment was by the law of Russia valid, final, and conclusive, not only as between the plaintiffs and Vorticiano, but also between the plaintiffs and defendants as *domini litis* of the proceedings, and the defendants were and are liable to pay the costs to the plaintiffs under the judgment.

Plaintiffs having obtained an order for discovery of documents, the defendants made an affidavit of documents, of which the following are the material parts:

We have in our possession or power the documents relating to the matters in question in this action set forth in the first and second parts of the schedule hereto. We object to produce the said documents set forth in the second part of the said schedule hereto. That one reason for objecting to produce the said documents set forth in the second part of the said schedule hereto is that the same are privileged.

In the second part of the schedule the documents were described as follows:

Correspondence between ourselves and our solicitors.  
Correspondence between our solicitors and their agents.  
Cash books, ledgers, and accounts.  
Writ of summons, statement of claim and other pleadings, counsel's opinion, statement of case in Russian courts prepared by attorney for Vorticiano, including copies of depositions and evidence given.

The plaintiffs took out a summons to compel the defendants to make a further and better affidavit. Lush, J., in chambers, dismissed this summons, and the plaintiffs appealed to the Exchequer Division, who affirmed the order of Lush, J.

The plaintiffs appealed.

Order XXXI., r. 13, of the Rules of Court 1875 provides that

The affidavit . . . shall specify which, if any, of the documents . . . he (the party from whom discovery is sought) objects to produce, and it may be in the Form 9 in Appendix B. hereto, with such variations as circumstances may require.

Form 9, Appendix B., paragraph 2:

I object to produce the said documents set forth in the second part of the said first schedule hereto.

Paragraph 3:

That (here state upon what grounds the objection is made, and verify the facts as far as may be).

*Crompton* for the plaintiffs.—The affidavit is insufficient; it does not follow form 9 in Appendix B, made under rule 13 of Order XXXI. The schedule describes documents, as, for instance, the cash book or ledger, which are not necessarily privileged; and, as the facts upon which the claim of privilege is founded are not set out, it is impossible to tell whether privilege is rightly claimed or not. Full particulars of the correspondence, such as dates and addresses of the letters, should also have been given. He cited

*Minst v. Morgan*, 28 L. T. Rep. N. S. 573; L. Rep. 8 Ch. 361; 42 L. J. 627, Ch.

*Fitzadam* for the defendants.—The affidavit is sufficient; the defendants can take out a summons for inspection, and so raise the question of privilege. A *prima facie* ground for privilege is shown in this affidavit. Form 9 of Appendix B of Order XXXI., r. 13, has been substantially followed in this affidavit; it is not necessary to follow it literally; it is only an example.

BRAMWELL, L.J.—This appeal must be allowed. We are not differing from the court below, because the rule and form were not brought to their notice. The affidavit does not satisfy the requirements of that rule and form. Paragraph 3 of form 9 of Appendix B requires that a statement should be made of the grounds of the objection to produce. I do not think that has been sufficiently done here. As, however, the plaintiffs did not call the attention of the divisional court to the rule and order, the costs of this appeal should be costs in the cause.

BRETT, L.J.—The provisions of Order XXXI., r. 13, have not been complied with. The skeleton form in Appendix B. remains a skeleton; it has never been filled up. The facts on which the claim of privilege is grounded should be stated and verified on oath; that has not been done here. I agree that we ought not to construe affidavits with the same strictness as if they were pleadings, but in this case the facts which ought to have been stated have been wholly omitted. I am of opinion that the affidavit is insufficient, and the appeal must be allowed.

COTTON, L.J.—I think that the defendants ought to make a further and better affidavit. The question of privilege might be raised, no doubt, on an order for inspection of the documents. But, as the affidavit does not follow Order XXXI., r. 13, and the form in Appendix B. the plaintiffs are entitled to a further and better affidavit. This affidavit is clearly insufficient. In the body of it the defendants say that the documents are privileged, and in the schedule they set out documents; as, for instance, cash-book and ledgers, to which *prima facie* no privilege attaches. The defendants ought clearly to state, not merely that the

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documents are privileged, which is a conclusion of law, but to state the facts, in order to enable us to see whether the privilege is rightly claimed. In one sense an affidavit like this must be construed strictly, because the other party cannot contradict it, or cross-examine upon it; he is bound by it, and cannot test its truth. It is not sufficient to say that the letters are correspondence between the client and his solicitor, it must be shown that they are professional and confidential communications for the purpose of getting legal advice. But I do not think that the plaintiffs are entitled to have such particulars of the correspondence between the defendants and their solicitors as would enable the plaintiffs indirectly to discover the contents of the letters, and so cause the defendants to furnish evidence against themselves from the correspondence. The law on this subject was, I think, recently and correctly laid down in *Taylor v. Batten* (39 L. T. Rep. N. S. 408; 4 Q. B. Div. 85; 48 L. J. 72, Q. B.). The present affidavit is in my opinion insufficient, and this appeal must be allowed.

*Appeal allowed.*

Solicitors for plaintiffs, *Crowder, Anstie, and Vizard*, for *Yates, Son and Stenought*, Liverpool.

Solicitors for the defendants, *Gregory, Rowcliffe, and Bawls*, for *Charnley and Finch*, Preston.

Wednesday, March 26.

(Before BRETT and COTTON, L.JJ.)

DAVIS v. GODBEHERE. (a)

*Practice*—New trial—Action remitted to County Court—Trial by County Court judge without a jury—Order XXXIX., r. 1—19 & 20 Vict. c. 108, s. 20.

*Rule 1 of Order XXXIX. does not apply to motions for new trials in actions remitted to the County Court under the provisions of 19 & 20 Vict. c. 108, s. 20, so that when such an action has been tried by a County Court judge without a jury application for a new trial must be made, in accordance with the old practice, to the divisional court.*

THIS was an action which had been commenced in the Exchequer Division of the High Court of Justice, and remitted to the County Court of Nottingham for trial under the 19 & 20 Vict. c. 108, s. 26. The trial took place before the judge of the County Court without a jury, and judgment was entered for the plaintiff.

W. Graham now moved for a rule nisi for a new trial on the ground that the finding of the County Court judge was erroneous in point of law. Order XXXIX., r. 1, (b) provides the mode of moving for new trials. The action was commenced in the Exchequer Division, and it has been tried by a judge without a jury. The application, therefore, is properly made to the Court of Appeal. [BRETT, L.J.—But does not that rule apply only to actions tried before a judge of the Superior Court? COTTON,

(a) Reported by W. APPLETON, Esq. Barrister-at-Law.

(b) Order XXXIX., r. 1: Where in an action in the Queen's Bench, Common Pleas, or Exchequer Division, there has been a trial by a jury, any application for a new trial shall be to a divisional court; and where the trial has been by a judge without a jury the application for a new trial shall be to the Court of Appeal.

L.J.—The question is whether a County Court judge is a judge within the meaning of that rule.] Though I am complaining of something a County Court judge has done, yet it is in an action commenced in one of the common law divisions of the High Court within the meaning of the rule. The only case bearing on the point is *London v. Roffey* (L. Rep. 3 Q. B. Div. 6). There an action commenced in the Queen's Bench Division was remitted in the same way to the County Court for trial, and afterwards application made to the Queen's Bench Division for a new trial, and an objection taken that it was out of time. Cockburn, C.J., in giving judgment, expressed an opinion that Order XXXIX. did not apply to actions remitted to a County Court; but I suggest that the rule only draws the distinction between actions tried with and without a jury, and it is only when there has been a trial before a jury that I am entitled to go to the divisional court.

BRETT, L.J.—It is clear to me that we cannot entertain this motion. In my opinion the word judge, in Order XXXIX., r. 1, refers to a judge of the Superior Court, and does not include a judge of the County Court. This being so, this case is not within the rule, and our only jurisdiction would be by way of appeal from the divisional court, for we have no jurisdiction to grant a new trial in cases from the County Courts. As this case is not within the rule there is no rule which is applicable to it, and it must therefore be governed by the old practice. The motion must be made to the divisional court, and if there is a wrong decision, then there is an appeal here.

COTTON, L.J.—I am of the same opinion. The question depends entirely upon the construction of rule 1 of Order XXXIX. It is contended that the rule is exhaustive; that is, that in every case of an action commenced in a common law division, and tried before a judge with a jury, application for a new trial must be made to a divisional court, and in every case where an action has been tried by a judge without a jury the application must be to the Court of Appeal. Now, I am of opinion that on consideration of rule 1 and rule 1a, they are intended to apply to a judge of the Superior Court only, and not to a County Court judge, and that it does not provide for the case of an action commenced in the Superior Court and remitted to the County Court for trial. If this rule does not apply to the present case, then there is no rule which does apply to it, and the application should have been made as under the old practice.

*Motion refused.*

Solicitor for plaintiff, *Toynbee*.

Friday, March 28.

(Before BRETT, COTTON, and THESIGHER, L.JJ.)

WRIGHT v. FREEMAN. (a)

*Practice*—Appeal—Discretion—Interpleader—Sale of horse—Warranty—Order I., r. 2—1 & 2 Will. 4, c. 58—23 & 24 Vict. c. 126, s. 12.

Defendant, an auctioneer, sold a horse, by auction, for Q., and plaintiff bought it. Plaintiff subsequently claimed damages against defendant for breach of warranty, and also for injuries sustained by the vice of the horse whilst in plaintiff's possession. Q. gave defendant notice not to

(a) Reported by W. APPLETON, Esq. Barrister-at-Law.

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return or part with the purchase money paid by the plaintiff, who had sent back the horse to defendant. Defendant took out a summons under Order I., r. 2, to obtain an order that plaintiff and Q. should interplead.

The Common Pleas Division refused to make the order.

The Court of Appeal refused to interfere with the discretion exercised by the Common Pleas Division, and dismissed the appeal.

The facts of the case are set out in the report of the case in the court below, reported at 40 L. T. Rep. N. S. 134, and sufficiently appear in the head-note to this report.

Lord of the auctioneer, the defendant.

Sims and Melsheimer for the purchaser, the plaintiff.

Petherham for the vendor, the original owner of the horse.

BRETT, L.J.—We cannot overrule the decision of three tribunals. The granting of the order is purely discretionary, and I base my decision solely on the ground that it is so.

COTTON, L.J.—I cannot see that the discretion of the judge and of the court below was not properly exercised.

THESIGER, L.J. concurred.

*Appeal dismissed.*

Solicitor for the appellant, F. C. James.

Solicitors for the respondent, Dixon, Ward, Letchworth and Weld.

Solicitors for the claimant, Venn and Woodcock.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Monday, Jan. 13.

(Before JESSEL, M.R.)

LEONINO v. LEONINO. (a)

*Mortgage—Further advances—Further security—Running account—Primary security—Locke King's Act (17 & 18 Vict. c. 113).*

A testator, formerly carrying on business as a merchant, being indebted to his bankers in a sum of 62,000*l.* for which they held various stocks and shares as security, applied to them for a further advance of 15,000*l.*, and executed a memorandum by which he charged his freehold property at Caterham with that sum, and agreed that the security was to cover any moneys due from time to time from him to them. At the same time he deposited with the bankers the title deeds of the Caterham property. The 15,000*l.* was received by him in instalments, and he also received further advances from time to time, for which he deposited further securities. Some of the stocks and shares were sold by the bankers in the testator's lifetime, and the proceeds applied in reduction of the debt, which at his death amounted to 28,625*l.* By his will it appeared that he treated the several advances and deposits as forming one running account. By his will he devised the Caterham property specifically, and devised and bequeathed his residuary real and personal estate in trust for sale, and, after payment of his debts, to divide the proceeds amongst certain persons.

Held, that the transactions formed one loan and one security; and that the 28,625*l.* and interest thereon must be borne by the various securities then held by the bankers rateably according to their respective values at the testator's death.

IPPOLITO LEONINO, a merchant, formerly carrying on business in London, had been in the habit of borrowing money from his bankers, Messrs. Roberts, Lubbock, and Co., from time to time, depositing with them securities for each advance, and on the 29th March 1876 his total indebtedness to them amounted to 62,000*l.*, as security for which they held various stocks and securities. On the 30th March 1876 Leonino, requiring a further advance of 15,000*l.*, deposited with his bankers the title deeds relating to certain freehold property at Caterham, and signed a memorandum as follows:

Gentlemen,—In consideration of your advancing to me, at my request, the sum of 15,000*l.* by way of loan to be repaid by me on the 30th June next, I deposit with you the deeds relating to my property at Caterham, in Surrey, of about ninety-six acres, value 25,000*l.*, as per statement hereon, with full authority for you to dispose of the same when and how you think proper in default of payment of the said loan of 15,000*l.* and interest on the day above stated. And I agree at my own expense to concur in such sale, and to perform any act that may be required to effectuate the same, and to make good any deficiency. It is agreed that this security is to cover any moneys due from time to time from me to you with interest and usual banker's charges.

The said sum of 15,000*l.* was advanced to Leonino by instalments in the months of March and April 1876, and subsequently he received further advances, depositing further securities, and, as some of the debt was paid off, obtained back some of the stocks and shares. In June 1877 Ippolito Leonino died, having made his will dated the 21st Jan. 1875, whereby he devised certain freehold property in Sussex to his wife, the defendant Hannah Leonino, in fee, and he then devised his freehold property at Caterham partly to his son, the plaintiff Edward Leonino, in fee, and partly to another son, the defendant Charles Leonino, in fee, and he gave his residuary real and personal estate to his said two sons Edward (who afterwards disclaimed) and Charles upon trust for sale, and out of the proceeds to pay his funeral and testamentary expenses, debts, and legacies other than specific legacies, and to divide the ultimate residue amongst his children living at his death.

The bankers sold some of the stocks and shares in the lifetime of the testator, and applied the proceeds in reduction of the debt, which at the time of his death amounted to 28,625*l.* It appeared from the testator's memorandum book and ledger that he treated the several advances and deposits as forming one running account.

The question which now arose was how the balance due to the bankers ought to be borne as between the persons entitled to the Caterham property and those interested in the residuary estate.

Chitty, Q.C. and Alexander, for the plaintiff, contended that the whole debt should be borne rateably by the several properties under Locke King's Act (17 & 18 Vict. c. 113). They referred to

*Marquis of Bute v. Cunynghame*, 2 Russ. 275;

*Lipscomb v. Lipscomb*, L. Rep. 7 Eq. 501;

*De Rochefort v. Dawes*, L. Rep. 12 Eq. 540.

Carson, for the defendant Charles Leonino, took the same view.

(a) Reported by G. WELBY KING, Esq., Barrister-at-Law.

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*Davey, Q.C.* and *Owen*, for the defendants *Arth ur Leonino* and *Alfred Leonino*, who were interested in the residuary estate, contended that the *Caterham* property was primarily liable for the 15,000*l.* They referred to

*Sackville v. Smyth*, L. Rep. 17 Eq. 153;

*Newmarch v. Storr*, 39 L. T. Rep. N. S. 146, 9 Ch. Div. 12.

*W. C. Druce*, for the defendant *Hannah Leonino*, in the same interest.

**JESSEL, M.R.**—I must say I have myself not the slightest doubt on this case, and I should hardly have considered it of sufficient importance to give a formal judgment on it, had it not been for the authorities to which I have been referred. First of all is, what is the case? A merchant in London borrows money of his bankers, and he gives them security—security in the first instance on various stocks and shares, which, according to our law, were personal estate. Then wanting 15,000*l.* more, he gives his bankers a memorandum, by which he says: "I give you some deeds relating to my property at *Caterham*, that is to be the security for the 15,000*l.*; in default of payment you may sell; it is agreed this security is to cover the money due from me to you with interest and the usual banker's charges." Now, at that time he owed his bankers on the other securities 62,000*l.*, and therefore we must read this memorandum with the knowledge of that fact. Consequently, the *Caterham* deeds became a security, not merely for the 15,000*l.* proposed to be advanced, but for the 62,000*l.* already due together with interest, and also all future moneys. What did he do? He took the 15,000*l.*, not in one sum, but by instalments, and he afterwards deposited other deeds relating to other estates, both freehold and leasehold, and other certificates for stocks and shares with his bankers. From time to time, as part of the total debt is paid off, he receives back some of the stocks and shares, and from time to time he takes further advances, which again are partially paid off, and so he continues his account, varying the amount from time to time, but without giving his bankers any document beyond the memorandum I have mentioned. The bankers treated the transaction throughout, as they were entitled to treat it, as one loan and one security, and as I read the testator's books, he treated it in the same way. He clearly treats the loan as being a loan, for he says "loan stands at so much," treating it as one consolidated loan, and then at one time he gives a "recapitulation" of the securities. It is clearly one loan and one security. In my opinion that is the true nature of the transaction; and consequently, looking at what had actually taken place, I hold that the property should bear the debt rateably, there being no contrary intention which the statute requires to be shown that the property should bear the burden otherwise than rateably. With reference to the authorities they stand in this way: The leading authority on the subject is a case of *Marquis of Bute v. Cunynghame* (*sup.*). Now what Lord Eldon there says is this: "If Lord Bute had wished that both estates should be equally liable, I do not mean to say that he might not have made them so liable, or that as between him and the mortgagee Lord Bute would not have been as to both in the situation of a common mortgagor. But may not a man make a mortgage of two estates in such a way

that though the incumbrance may go against both or either, yet if the owner of the equity of redemption shall have created in the meantime two different titles to those estates so that they shall go to different persons, the estate, which was the primary security, shall remain the primary security as between the persons claiming under that mortgagor?" No doubt he may. A man may put an express declaration into the mortgage deed, and I have known it done, for I have done it myself. It is generally a declaration between the legal and personal representative as to how the debt shall be primarily borne; sometimes it is a declaration as between two estates as to how the debt shall be primarily borne. This, then, is a statement in express terms that one estate shall be the primary security as between the persons entitled to the equity of redemption in that estate, and the persons entitled to the equity of redemption in the other estate. But Lord Eldon goes on to consider whether you can effect the same result by inference or implication. Of course you can. If you can do it by express terms you can do it by implication, or by terms which amount to the same thing as express terms; and Lord Eldon winds up by saying: "Taking the whole of this transaction together, and without venturing to lay down any general principle, it is my opinion that in this case there is no right to that contribution towards satisfaction of the mortgage which is prayed by the bill;" that is all he decided. When we come to the subsequent cases I agree the question is far more difficult. The first is *Lipscomb v. Lipscomb* (*sup.*) which is very shortly reported. There real estate was mortgaged to secure 1500*l.*, and then by a subsequent deed this was done in consideration of the original debt, which was still due, and a further advance of 950*l.*; *Lipscomb*, who was the mortgagor, conveyed to Christmas, the mortgagee, the original property and other real estate, subject to a proviso for redemption on payment of 2450*l.* and interest, and then by the same deed he gave a further security on some personal estate, including a policy of assurance. What Malins, V.O. said was this: "Mr. Locke King's Act does not affect the liability of the properties;" and then he says: "The effect of the deed of 1861"—that was the second deed—"was to retain the original mortgage security for the 1500*l.*, to make that estate subject also to the further charge, and to add to that security (as regards that portion of the debt) the other estate and the policy of assurance." Then he says: "I am of opinion that the estate originally mortgaged remains the primary security for the 1500*l.*, and that the 950*l.* must be apportioned upon the land and the policy of assurance rateably." What does that decision come to? It comes to this, that on the question of construction of the second deed, the Vice-Chancellor came to the conclusion that there was a sufficient expression of intention on the part of the mortgagor that the estate should be primarily charged with the 1500*l.* as between the persons claiming under the mortgagor. That is the conclusion the Vice-Chancellor must have come to, according to Lord Eldon's decision, which he did not intend to overrule, and could not have overruled. Therefore the decision comes to a mere question of construction. Not forgetting that Wickens,

V.C. agreed with Malins, V.C. as to the construction in that particular instance, I must say I should have felt great difficulty in arriving at the same conclusion on the mere question of construction. But the question was one of construction and nothing else. According to the rule to which I have so often referred, as laid down by the House of Lords, where the question is merely one of construction of documents, the mere fact that judges have come to a conclusion as to the meaning of particular documents before them does not compel another judge to arrive at the same conclusion upon other documents differing more or less substantially from those documents. Therefore, strictly speaking, I am not bound by the decision as a question of construction. I do not require to be bound by the decision as a question of law, because, if the Vice-Chancellor is right that there is the indication of intention sufficiently expressed that it is to be a primary security as between those claiming under the mortgagor, then the previous decision of Lord Eldon had already settled the law. The other case is *De Rochefort v. Dawes* (sup.). There Wickens, V.C., after expressing an opinion that *Lipscomb v. Lipscomb* was well decided—upon which, as I said before, notwithstanding the concurrence of those two judges, I still have doubts—says it is not distinguishable from the one before him. There again it is a question of construction, and the question was whether on a particular letter there was a sufficient expression of intention that certain property, the title-deeds of which were referred to in that letter, should be the secondary security only as between the several persons claiming under the mortgagor. The Vice-Chancellor thought there was. There again, speaking with the greatest possible respect, I have great doubts whether on the question of construction I should have come to the same conclusion. But it is a mere question of construction, and whether I should or should not have come to the same conclusion, it cannot be pretended that both those cases are not very substantially different, as regards the facts, from the case before me, not only as regards the fact of the deposits and the mode in which the deposits were made, but as regards the documents accompanying or showing the meaning of the deposits. Therefore, were I clearly of opinion that I should have come to the same conclusion on the construction of the documents in both those cases, it would not prevent me at all from coming to the conclusion I have arrived at in the present instance, that there is no distinction as regards priority of charge between the several persons who claim under the testator, and that the rule apportioning contribution applies to the case of the estates of which he died possessed. I therefore hold that the £28,625<sup>1</sup> and the interest thereon from the testator's death must be borne by the various securities then held by the bankers, rateably according to their respective values at the testator's death.

Solicitors: *Emanuel and Simmonds; Bischoff, Bompas, and Co.*

Monday, Feb. 24.

(Before JESSEL, M.R.)

BRAMWELL v. LACY. (a)

*Lease—Covenant not to carry on any business—Hospital—Injunction.*

*A covenant in a lease of a house not to carry on any trade, business, or dealing whatsoever, or anything in the nature thereof, held to be broken by the use of the house as a hospital for out-patients suffering from diseases of the throat and chest.*

THE lease of a house in St. John's-gardens, Kensington-park, contained a covenant on the part of the lessee, that he, his executors, administrators, or assigns, "shall not exercise or carry on, or suffer to be exercised or carried on, upon any part of the said premises, any trade, business, or dealing whatsoever, or anything in the nature thereof, without the consent in writing of the lessor, his executors, administrators, or assigns, or be party to or suffer any act or thing which may be or may grow to the annoyance, damage, injury, prejudice, or inconvenience of the neighbouring premises." The defendants, the assignees of the lease, were the committee of management of the Hospital for Diseases of the Throat and Chest in Golden-square, Regent-street, who had established a branch of the hospital at this house for out-patients, which was opened in May 1878. A considerable number of persons had been treated there, the greater portion gratuitously, and the rest making payments according to their means; but the hospital was in fact supported by voluntary contributions. The plaintiffs were the owners of the reversion of the house, and also of the adjoining houses, subject to the leases affecting the same respectively, and they not having consented to the use of this house as a branch hospital, brought this action to restrain the defendants from so using it, or otherwise committing a breach of the covenant.

*Davey, Q.C. and Hadley* for the plaintiffs.

*Chitty, Q.C., E. Cooper Willis, and G. Foster Cooke*, for the defendants, contended that the hospital was not a business within the meaning of the covenant. They referred to

*Jones v. Thorne*, 3 Dow. & Ry. 152;  
*Harrison v. Good*, L. Rep. 11 Eq. 338.

JESSEL, M.R.—The words of this covenant are peculiar, but I have no doubt as to the meaning of them. The defendants have converted this house, which is in a residential neighbourhood, into a hospital. It appears to be frequented by numerous patients, who are treated and supplied with drugs by the medical officer in attendance, and it also appears that a large number of them pay for this treatment. The payment, however, is a very moderate one, and there is no pretence for saying, nor is it alleged, that the hospital is carried on for any pecuniary profit, but the hospital authorities very properly require those patients to pay who can afford to do so. The neighbours, however, complain of the hospital, and say it is a nuisance, and also a source of danger to the health of the neighbourhood. Now it is well known that there are some throat diseases of an infectious character, and moreover, it is possible that a patient suffering from an infectious or contagious malady might go to the hospital, thinking that he had only an ordinary

(a) Reported by G. WYLER KING, Esq., Barrister-at-Law.

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throat disease. Now has there been any breach of the covenant? First, then, is this a "business," or "in the nature of a business?" I have no doubt it is. It is in reality an apothecary's business. The question whether or not it is carried on for a profit is not, in my opinion, material. Even if it is not strictly a business, it is, at all events, in the nature of a business; but I am distinctly of opinion that this is a business within the meaning of the covenant. Next, is it within the second part of the covenant, the terms of which are very comprehensive? On this point I think the plaintiff's evidence is conclusive. It appears to me that it is quite sufficient to show that persons in the neighbourhood have already suffered annoyance, inconvenience, and injury, and that the possible danger from infection is one they have full right to complain of. I am of opinion, therefore, that there has been a breach of the covenant, and that the plaintiffs are entitled to an injunction. The defendants must pay the costs of the action.

Solicitors: *Bockett and Son; B. Chandler.*

### COMMON PLEAS DIVISION.

*Saturday, Dec. 21, 1878.*

(Before LOPES, J.)

IREDALE v. KENDALL. (a)

*Distress—Conversion of goods—Rescue—Auctioneer.*

*The plaintiffs, brewers, were the lessors of a public-house to D., under an agreement which gave them all the rights and remedies of landlords for rent against the effects of the tenant for the recovery of any book-debts for liquors sold by them to him. There being moneys due in respect of such debts, the plaintiffs sent in their bailiff with a written authority to distrain for the amount, who showed his authority to the defendant, an auctioneer then on the premises, took an inventory and made a valuation. The tenant D. and the defendant thereupon proceeded to sell the goods in disregard of such distress—the defendant putting up and knocking down the goods by auction, the tenant handing them to the purchasers.*

*Held, that though the plaintiffs had not such possession as to enable them to sue for conversion, they could maintain an action for a rescue against the defendant, for knowingly assisting in transferring the dominion and property in the goods seized to the respective purchasers.*

#### FURTHER CONSIDERATION.

Action tried before Lopes, J., at Carlisle, without a jury.

The facts and evidence are fully set out in the judgment of the learned judge.

Gully, Q.C. (Bradley with him), for the defendant, contended that the plaintiffs had no property nor possession in the goods sold, and were therefore not entitled to sue. He cited

*Hollings v. Fowler*, 33 L. T. Rep. N. S. 73; L. Rep. 7 H. of L. 757.

Henry, for the plaintiffs.

LOPES, J. delivered the following judgment.—This action was brought by the plaintiffs against the defendant to recover damages for the defendant's assisting in forcibly and illegally removing certain goods after the plaintiffs' bailiff had seized them,

and in wrongfully depriving the plaintiffs thereof. The case was tried before me at Carlisle without a jury, and I have to decide the law and facts. The plaintiffs are brewers; the defendant is an auctioneer. On the 7th Sept. the plaintiffs let to one Dawson Hodgson, by an agreement in writing, a public-house known as the Hope and Anchor. The agreement contained a clause giving to the plaintiffs all the rights and remedies of landlords as in cases of rent in arrear against the effects of the tenant for the recovery of any book-debts for liquors, &c., sold by them to him. It was proved that before the 26th March 1878, one Spencer had recovered judgment against Dawson Hodgson for 22l. 10s. 6d., and that there was due to the plaintiffs 19l. for rent. An execution was put in, and sufficient was sold to pay Spencer's debt and the plaintiff's rent. The defendant Kendall was the auctioneer employed. On the 2nd April, after the sale the bailiffs went out, leaving a considerable amount of goods on the premises. At the time Dawson Hodgson was indebted to the plaintiffs for liquors under the agreement to the amount of 42l. 17s. 8d., and the plaintiffs, being anxious to realise the amount of their debt, and to avail themselves of the powers conferred upon them by the said agreement, authorised their bailiff to distrain. Accordingly, on the 3rd April, the bailiff went to the premises, where he saw defendant Kendall. The bailiff told him he had a distress from the plaintiffs for 42l. 17s. 9d. Defendant asked to see his authority and the bailiff handed it to him; the defendant Kendall took the authority in his hand, called his clerk, both of them read it, and the clerk said, in defendant's presence, "Come away, it is all humbug." At the moment Dawson Hodgson came to the door, and asked what was the matter. The defendant told him that a bailiff had come with an authority from Messrs. Iredale to distrain, to which Dawson Hodgson replied he had nothing to do with Iredale, and wanted nothing to do with them. After this conversation plaintiffs' bailiff proceeded to take an inventory, and to make a valuation. He completed the inventory and valuation, and remained upon the premises until the sale. After the inventory and valuation was made by the plaintiffs' bailiff, the defendant Kendall proceeded to sell the goods. It was admitted that what defendant did was this: he put the goods up for sale, and knocked them down, and then Dawson Hodgson handed them to the respective purchasers. It was contended for the plaintiffs that in these circumstances plaintiffs were entitled to maintain an action against the defendant. It was contended for the defendant that there was no such property nor possession in the plaintiffs as would entitle them to maintain trover or trespass, and that no actionable wrong was done by defendant (defendant not having touched the goods, and being in the position of a person who did no more than draw up a contract). No evidence was given by the defendant, and it was agreed that the damages, if plaintiffs were entitled to recover, should be 20l. The first question which arises is, what is the meaning of the clause in the agreement, and what powers does it confer on the plaintiffs? I think it places the plaintiffs, in respect of the debt, in the same relation to their tenant as if they were landlords distraining for rent in arrear. It is also important to determine

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.



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the effect of what was done by the plaintiffs' bailiff. I think it amounted to a seizure, and that the bailiff did his best to impound, and was only prevented so doing by defendant and Dawson Hodgson. It appears from the authorities which were cited that, notwithstanding a distress, the property in the goods distrained remains vested in the tenant or owner until they are sold under the distress, and the landlord has no property in the goods distrained, nor even the possession of them. The plaintiffs, therefore, could not maintain trover nor trespass. Could they not, however, in the circumstances of this case, maintain an action for a rescue against anyone who interfered with the goods? I think they could. The goods had been seized, and the plaintiffs' bailiff did all he could towards impounding them, and proceeding with the distress, but was prevented from so proceeding, and the goods were sold. I think the plaintiffs have a good cause of action against anyone who prevented them proceeding, and who sold or assisted in the sale of the goods. They would have had, therefore, a good cause of action against Dawson Hodgson. Had they, however, a good cause of action against defendant Kendall? This would depend on whether he was a joint tortfeasor with Dawson Hodgson. He had notice of the authority given by the plaintiffs to their bailiff to distrain; he disregarded it, and with full notice of the plaintiffs' position he put the goods up for sale and knocked them down. Dawson Hodgson then handed them to the respective purchasers. I think defendant enabled Dawson Hodgson to dispose of the goods, and assisted him in so doing. I think he knowingly and intentionally assisted in transferring the dominion and property in the goods to the respective purchasers. *Hollings v. Fowler (ubi sup.)* was relied upon by the defendant, but I do not think it assists his contention, having regard to the proved and admitted facts of the case.

*Judgment for the plaintiffs.*

Solicitor for the plaintiffs, Wood, for Milburn.

Solicitors for the defendants, Flus and Lead-bitter, for De Eggesfield Collin, Maryport.

Monday, March 31.

(Before GROVE and LINDLEY, JJ.)

PULLEN v. SNEELS. (a)

*Practice—Pleading—Striking out embarrassing plea—Statute of Frauds—Ord. XIX., rr. 16, 18, 23; XXVII., 1.*

*To a claim for goods sold and delivered, and for work and labour, the defendant pleaded that there was no balance due to the plaintiff, and also the following paragraph: "The defendant will further avail himself, if necessary, as an answer to this action, of the provisions of the Statute of Frauds."*

*Held, that this paragraph was calculated to embarrass the plaintiff, and order made to strike it out accordingly.*

*APPEAL from a decision of Lindley, J. at chambers, confirming a master's refusal to strike out as embarrassing a certain paragraph of a statement of defence.*

The statement of claim claimed for certain goods "supplied" to the defendant by the plaintiff, and for work, labour, and materials.

The statement of defence, after denying that there was any balance remaining due in respect of the matters mentioned in the claim, proceeded as follows:

4. The defendant will further avail himself, if necessary, as an answer to the action, of the provisions of the Statute of Frauds.

The plaintiff applied at chambers to strike out this paragraph as embarrassing. Lindley, J. having affirmed the master's refusal to make the order asked for, the plaintiff appealed.

*M'Call* for the plaintiff.—This is an embarrassing form of pleading. The cases in which general issues are still allowed are specified in Order XIX.; and in *Thorpe v. Houldsworth* (L. Rep. 3 Ch. Div. 639) the Master of the Rolls said that the provisions of that order would be construed strictly. This is not a specific allegation which the plaintiff can meet by a traverse, by a confession and avoidance, or a demurrer. By Order XIX., r. 23, the sufficiency of a contract under the Statute of Frauds must be expressly raised on the pleadings: (*Byrd v. Nunn*, L. Rep. 7 Oh. Div. 287.) In *Phillips v. Phillips* (39 L. T. Rep. N. S. 556; L. Rep. 4 Q. B. Div. 133) Brett, L.J. lays down as an ideal test of the kind of pleading desired by Order XIX., r. 4, the form of a special case. The decision in *Stokes v. Grant* (40 L. T. Rep. N. S. 36; L. Rep. 4 C. P. Div. 27) shows that vague intimations of an intention to raise a legal point are not desirable. In *Clarke v. Callow* (46 L. J. 27, Q. B.) the Statute of Frauds was not relied on in the pleadings at all, and the decision there does not at all show that it is sufficient to refer to the Statute of Frauds without indicating the defence that will be raised under it. We cannot even tell under which section of that statute the defendant intends to shelter himself. The point has recently been before the Exchequer Division in an unreported case.

*Yelverton*, for the defendant, relied on *Clarke v. Callow*, and contended that the effect of the pleading was to require the plaintiff to prove a contract good under the Statute of Frauds. He also cited

*Hough v. Chamberlain*, W. N. 1878, p. 123;

*Tolmason v. Bonhote*, 34 L. T. Rep. N. S. 745; L. Rep. 2 Ch. Div. 199.

GROVE, J.—I am of opinion that our judgment should be for the appellant, though my first impression was the other way. I think, having regard to the difficulties which still exist under the new style of pleading, that it is not sufficient merely to state that the defendant will avail himself of the Statute of Frauds. It does not raise a sufficiently definite issue for the opposite party to reply on, and it may be embarrassing, though it is impossible, of course, to say here whether the plaintiff is actually embarrassed by it or not. All that the court can fairly say is that it is calculated to embarrass, and may put the opposite party to a great deal of needless expense, the whole of which, even if successful, he may not recover from his opponent. It is argued that other Acts of Parliament might be used as this has been, and that some Acts, as for example, the Mercantile Law Amendment Act, if pleaded in this manner, would embarrass the party very much. I do not, however, think that argument quite sound, because the rest of the pleadings may be such that this general form of pleading a particular statute may

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

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show quite unmistakably what the real defence is. But in this case there are at least two sections (sects. 4 and 17) of the Statute of Frauds on which the defendant may intend to rely. Now it may be that the plaintiff, not knowing whether the defendant is going to rely upon sect. 17, and if so, upon what part of it, or if he is going to rely upon sect. 4, may be put to considerable expense. There may be a memorandum in writing, but it may be an ambiguous one; there may be a question whether the delivery of the goods was sufficient, or whether there had been part payment, and so on. I think, therefore, this defence would throw upon the plaintiff the trouble of procuring a good deal of evidence, much of which might be unnecessary. I think that is not the intention of the Judicature Acts, nor within the words of the rules which govern pleading generally. There are not, in this case, sufficient facts apparent on the statement of claim to narrow the issue to such a degree that a reference to the Statute of Frauds, if pleaded generally, will show at once what is the real question under the Statute of Frauds which it is intended to raise. I am further led to think this form of pleading insufficient by considering the provision in Order XIX., r. 16, which preserves to certain persons the right of pleading not guilty by statute; because that is a privilege given by certain statutes to particular defendants, generally in some official position, to give them a wider defence than other people have; and if this plea were allowed, it would be almost equivalent to allowing everybody a plea of not guilty by statute. The case which has been chiefly relied on by the defendant is *Clarke v. Callow*; but it does not appear to me that that case assists him much. I think the balance of that case is on the whole rather against him. In that case the facts of the defence were set up, but not the Statute of Frauds; and the court said that a party intending to rely on the Statute of Frauds must set it up; but they do not say at all in what form he must set it up. The effect of the judgment is that the real nature of the defence must be pointedly shown by one party to the other, and that rather favours the plaintiff's contention in this case. No doubt a good deal of confusion has been introduced by the new system, and necessarily so; and perhaps part of that confusion has been due to the fact that the framers of the Act appear to a certain extent to have gone upon the hypothesis that parties would assist each other; whereas they very often think that it is their interest to impede each other as much as possible. I think the real object should be to make pleadings more precise, and that each party should show the other the facts on which he relies in such a way that clear and neat issues may be taken upon them. This pleading does not do that, but throws, in my opinion, unnecessary trouble upon the opposite party. I may add that we have spoken to the Lord Chief Baron and Mr. Justice Hawkins as to the case mentioned by Mr. McColl, and that they confirm his account of it, and agree with us in thinking that this form of pleading is insufficient. As the appeal is from a master and a judge, we think, under the circumstances, the costs should be costs in the cause.

LINDLEY, J.—I am of the same opinion. I have been persuaded by Mr. McColl that I took an erroneous view of this at chambers. I thought

at chambers that this was merely an action for goods sold and delivered, and if I still thought so, I might probably even now think that the plea was sufficient. But I see now that there is also a claim for work and labour in the statement of claim, which alters the case. I think the plaintiff's counsel is justified in saying here that he cannot tell whether the defendant means to rely upon sect. 4 or sect. 17. It is quite possible on these pleadings that the defendant may contend that part of the contract relates to an interest in land. What ought to appear somewhere on the pleadings are those facts which, according to the defendant, make the Statute of Frauds applicable. He must make those facts appear, and then go on to show that he intends to rely on the Statute of Frauds. I think the course taken by the defendant is calculated to embarrass the plaintiff, and that the paragraph complained of must be struck out.

*Appeal allowed. Costs in the cause.*

Solicitor for the plaintiff, T. J. Holmes.

Solicitor for the defendant, Parkes.

Friday, April 25.

(Before Lord COLERIDGE, C.J. and DENMAN, J.)

WEST v. HOUGHTON. (a)

*Landlord and tenant—Lease of sporting rights—Covenant to keep down rabbits—Trust for tenant, when constituted—Nominal damages.*

*By a lease of sporting rights over land in the occupation of a third party as tenant to the lessor, the sporting lessee covenanted that he would during the term keep down and destroy the rabbits on the estate, so that no appreciable damage should be done to the crops. The rabbits were not kept down, and appreciable damage was thereby done to the crops; but it was admitted that the sporting lessor was never under any liability to compensate his tenant, the occupier, for damage done to his crops by rabbits, and that he had in fact paid him no money in respect of such damage.*

*Held, that the lessor was entitled to nominal damages only in respect of the breach of covenant.*

CASE stated on appeal from the County Court of Denbighshire holden at Denbigh.

CASE.

1. The appellant was plaintiff, and the respondent defendant, in an action tried in the County Court of Denbighshire, held at Denbigh, on the 7th May 1878.

2. In such action the appellant claimed 50l. damages for breach of the covenant in the 4th paragraph hereinafter set forth.

3. The said covenant is contained in a lease of sporting rights, dated the 30th March 1876, and made between the appellant of the one part, and the respondent of the other part. A copy of the said lease of sporting rights is set out *in extenso* in the Appendix. (Reference was then made to other documents and letters contained in a second appendix, which became immaterial in the course of the argument.)

4. The covenant, for the alleged breach of which this action was brought, is as follows: "And shall and will, during the said term, keep down and destroy the rabbits on the said estate, so that no appreciable damage may be done to the crops on the said estate."

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

5. It is admitted, for the purpose of this case, that John Roberts, who was at the time of this action the occupier of the farm (portion of the said estate in respect of which the damage is alleged to have been caused), was also tenant thereof at the time of the making of the said lease of the said sporting rights to the defendant, and that the defendant, at the time of the making of the said lease, had no reason to suppose that any portion of the said estate was occupied by the plaintiff personally, or otherwise than by his tenants.

6. It is admitted, for the purpose of this case, that the appellant never was under any liability to compensate the said occupier of the said farm for any damage done to his crops by rabbits, and that he has in fact paid him no sum whatever in respect of such damage.

7. At the trial it was contended for the appellant that he was entitled to recover such damages as would be sufficient to compensate the said occupier for the injury caused to the crops on the said estate by the respondent's breaches of covenant on account of and for the benefit of such occupier, and as trustee for such occupier, on the ground that the covenant in question was inserted in the agreement for the benefit of the occupier, and not for the personal benefit of the appellant, and in support of his right to sue as such trustee the case of *Robertson v. Wait* (8 Ex. 299; 22 L. J. 209, Ex.) was cited.

8. It was contended on the part of the respondent that the covenant did not bear the alleged construction, and that even if a breach of covenant were proved the appellant was not entitled to recover more than nominal damages for breach of the covenant set out in paragraph 4, as he had personally sustained no damage, and was under no liability to the said occupier, and that he was not entitled to recover in the action on account of or as trustee for the said occupier.

9. The judge at the County Court, while the appellant's case was proceeding, intimated that in his opinion the point raised should be decided by the Superior Court, and after argument upon the facts herein stated, and the admission of the respondent in the next paragraph contained, gave judgment for nominal damages, and gave the appellant leave to raise the point of law hereinbefore mentioned by way of this appeal to the High Court of Justice.

10. For the purposes of this case (but not otherwise) it is admitted that appreciable damage has been done to the crops of the said occupier by rabbits on the said estate (a) during the subsistence of the said lease.

The question for the opinion of the court is—Whether the appellant is, under the circumstances hereinbefore set forth, entitled under the lease of the 30th March 1876, and the covenant therein contained, to recover any or (if any) more than nominal damages for the injury caused to the crops of the said occupier by the respondent not having kept down and destroyed the rabbits on the said estate, so that no appreciable damage was done to the crops of the said estate.

If the court should be of opinion that the appellant is entitled to recover more than nominal damages the action is to proceed.

(a) The words in italics were added during the argument at the suggestion of the court.

If the court should be of opinion that the appellant is not entitled to recover any or (if any) only nominal damages, then judgment is to be entered accordingly, or to stand, as the case may require.

The sporting lease contained the following covenant by the lessee:

The said John Johnson Houghton doth hereby . . . covenant . . . that he shall and will during the said term keep down and destroy the rabbits on the said estate, so that no appreciable damage may be done to the crops on the said estate.

There was also a provision for a determination of the term in case of wilful breach of covenant. The remainder of the lease, and the other documents referred to in paragraph 3, became immaterial in the course of the argument.

*McIntyre*, Q.C., for the appellant, contended that the landlord, though he had suffered no pecuniary damage in fact, was yet entitled to recover substantial damages to the full extent of the injury done to the crops, which he would hold as trustee for the tenant. He cited

*Robertson v. Wait*, 22 L. J. 209, Ex.

*W. B. Kennedy* for the respondent.—The judgment of the County Court judge was right. The plaintiff is not in any sense a trustee for the tenant, and is therefore entitled to nominal damages merely. The argument that if this is so the covenant by the lessee to keep down the rabbits is reduced to a nullity, is answered by the fact that there is a provision in the sporting lease by which the demise can be determined by the lessor in case of wilful breach of covenant.

*McIntyre*, Q.C., in reply.

LORD COLERIDGE, C.J.—In this case I am of opinion that our judgment must be for the respondent. The proper measure of damages is the damage done to the covenantee, and as I understand that, in this case, the covenantee has sustained no real damage in fact, the damages given to him should be nominal. No doubt the object of Mr. West in inserting this covenant in the lease of sporting rights was to protect his tenants, and there are means known to the law by which that object might have been indisputably attained; but the parties here have chosen to use language which has not that effect. To give it the effect for which Mr. McIntyre contends, we should have to do violence to the ordinary rules of construction. There is a lease of certain sporting rights, and one of the covenants in that lease is the following: "that (the lessee) shall and will during the said term keep down and destroy the rabbits on the said estate so that no appreciable damage shall be done to the crops on the said estate." We are to take it as a fact that that has not been done, that the rabbits have not been kept down, and that appreciable damage has resulted to the crops. We are also to take it that, as between landlord and tenant, there is no liability on the part of the former to compensate his tenants for an excessive use of the right of sporting, and that no money compensation has in fact been paid by the landlord to his tenants. It is then said that, notwithstanding that this is the state of things, the true measure of damages is the damage that accrued to the tenant under the original lease of the land—a man who is no party to the sporting lease, and who has not under either lease any right to compensation for the damage

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In the Goods of TEODORO HERNANDEZ (deceased).

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done by the rabbits. It is said that, on the true construction of the words of the sporting lease, he has such a right, and that the landlord has a right to recover compensation for damages sustained by the tenant as trustee for the tenant, which compensation he would recover and hold for his *cestui que trust*. In the course of the argument I asked, if Mr. West did recover from the sporting lessee, how the tenant could legally get that money out of Mr. West's pocket, assuming, for the sake of argument, that he did not choose to pay it over. An action for money had and received, or a proceeding in the Chancery Division, would only lie on the ground that there were words constituting the landlord a trustee for his tenant in respect for the damage in question. But one mode of testing that position is this: If that were so, the *cestui que trust* could compel his trustee to bring an action for his benefit, and under the terms of this lease how could it be contended that the tenant could compel his landlord, if unwilling to do so, to bring such an action as this on this covenant? The case appears to me to be perfectly clear. The matter is one solely between covenantor and covenantee, and no other person has any right in it at all. It was pointed out to us by Mr. Kennedy that this view does not by any means reduce the covenant to a nullity, because there is a provision keeping a power in the hands of the lessor to turn the sporting lessee out upon breach of any of the covenants; and it is further quite plain that if the lessee persisted in this breach of covenant, the lessor could, by injunction, restrain him; so that there is abundant provision made for the rights of the tenant of the land. I entirely agree with the decision in *Robertson v. Wait* (*ubi sup.*) which has been cited. There a person was named in a charter-party as the person to collect the freight, and it was held that the plaintiffs, who had agreed that Ewing and Co. should procure the homeward freight at a certain commission, the commission to be divided between Ewing and Co. and the plaintiffs in a certain proportion, had in consequence a right to bring an action for the loss of the commission on that freight, partly on behalf of Ewing and Co., and partly on behalf of themselves. I entirely concur in that case, but it seems to me not to be in point; because, in the present case, there is no one mentioned as the object of the covenant except the covenantee; and also because in *Robertson v. Wait* the person standing in the position of the covenantee in the present instance had himself a direct interest in bringing the action.

DENMAN, J.—I am of the same opinion. The documents contained in the appendix to the case are, in my opinion, irrelevant; the question turning simply on the lease of the sporting rights made by the plaintiff. I think the County Court judge was right in giving judgment for nominal damages only. It is said on behalf of the appellant that he is entitled to more, because of the appreciable damage done to the land, and that he is entitled to sue as trustee for the tenant of the land who owns the crops. I am not of that opinion, because there is no evidence here that any trust was ever created between him and the occupier of the land. I think *Robertson v. Wait* was a different case in all its circumstances, and does not apply here. Judgment for nominal damages was

therefore the only proper judgment, and ought to stand. *Judgment affirmed with costs.*

Solicitors for the appellant, *Dean and Taylor*, for *Longueville, Jones*, and *William, Oswestry*.

Solicitors for the respondent, *Harvey, Alsop*, and *Stevens*, *Liverpool*.

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### PROBATE BUSINESS.

Tuesday, March 18.

(Before the Right Hon. the PRESIDENT.)

In the Goods of TEODORO HERNANDEZ (deceased). (a)

*Foreign sureties—Administration to person out of the jurisdiction of the court.*

*Where a person entitled to take out letters of administration, being resident out of this country, gave a power of attorney to another person also resident out of the jurisdiction of the court, and the latter was unable to obtain the necessary sureties in this country, the Court granted him letters of administration, and accepted sureties resident in Paris, on being satisfied that the bond would be enforced against them by the French tribunals.*

THIS was an application for a grant of administration, with the will annexed, of the goods of Teodoro Yzanga-y-Hernandez to Alezo Yzanga, nephew of the deceased.

The deceased died at Paris on the 27th March 1873, in which city he had resided for some time previous to his decease. It appeared that the deceased had spent the greater portion of his life in the city of Trinidad, in the island of Cuba, where he had duly made and executed his last will and testament. Of this will and testament he appointed his brother, Alezo-y-Hernandez, sole executor and residuary legatee, who died in the lifetime of the testator. The testator was an orphan and unmarried at the time of his death, and left surviving him his natural and lawful sister and next of kin, Doña Concepcion-y-Hernandez (wife of Don Juan Andres Yzanga-y-Lara). The only property within the jurisdiction of the court consisted of 595*l.* 1*l.* 4*d.* standing on deposit in the Bank of England, and there were no creditors of the estate in this country. The matter had been before the Cuban courts, which had decreed that Doña Concepcion-y-Hernandez was entitled to one-third part of the said sum of 595*l.* 1*l.* 4*d.*, and the present applicant to the remainder. It was in respect of this sum that a grant of administration, with the will annexed, was now sought from the Probate Division, and a notarial copy of the decree of the Cuban tribunal, with a notarial translation thereof, was duly deposited in the registry.

Doña Concepcion-y-Hernandez, who was resident in the island of Cuba, had by a power of attorney duly appointed the present applicant to receive and collect the estate of the deceased in this country.

Searle moved the court for a grant of administration, with the will of Teodoro Yzanga-y-Hernandez annexed, to Alezo-y-Hernandez. The applicant was only resident in this country for the purpose of concluding this business, and having no friends here was unable to procure

(a) Reported by L. D. POWLES, Esq., Barrister-at-Law.

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sureties, but he had plenty of friends in Paris who were willing to execute the requisite bond. He read an affidavit from Maître Bourdanchon, Avocat to the French Embassy in London, from which it appeared that such sureties could be sued in the French court, and asked the court to allow the bond to be executed by them, notwithstanding the fact that they were resident out of the jurisdiction of the High Court of Justice. Such sureties would be accepted if the grant were made directly to the party entitled, and he submitted that the present case was undistinguishable, the applicant being the attorney of the person so entitled. He quoted

*In the Goods of Thomas Reid*, 3 Sw. & Tr. 439;

*In the Goods of Houston*, L. Rep. 1 P. & D. 85; 35 L. J. N. S. 41, P. & M.

The PRESIDENT (Sir James Hannen).—I can draw no distinction between the two classes of case. It is a reasonable relaxation of the practice, but the sureties must justify.

*Application granted.*

Solicitors: *Druce, Son, and Jackson.*

#### DIVORCE BUSINESS.

ON APPEAL TO THE FULL COURT.

*Tuesday, April 29.*

(Before the Right Hon. the PRESIDENT, Sir ROBERT PHILLIMORE, and LOPES, J.)

MANSEL v. THE ATTORNEY-GENERAL. (a)

*Legitimacy Declaration Act 1858, sect. 7—Citation to see proceedings.*

*The court will not cite a party to see proceedings under sect. 7 of the Legitimacy Declaration Act 1858 merely because he may have an adverse claim, which it is to the interest of the petitioner to bar by making him a party to the suit.*

*The party it is proposed to cite to see proceedings must be directly interested in disputing the facts it is proposed by the petitioner to set up, otherwise such citation will not be permitted to issue.*

THIS was an appeal to the full court from a judgment of the Probate, Divorce, and Admiralty Division, delivered on the 23rd July 1878, refusing to order a citation to see proceedings herein to issue against Edward Berkeley Mansel as claiming to have an interest under the will of the petitioner's father, Courtenay Mansel, deceased.

These were proceedings under the provisions of the Legitimacy Declaration Act 1858 (21 & 22 Vict. c. 93), and were commenced in May 1877 by Mr. Richard Mansel, as a person claiming to be interested in real estate in England, in order to establish the validity of a marriage which took place on the 7th June 1847 between his father, the said late Courtenay Mansel, by his then name of Courtenay Phillips, and his mother (then Eliza Sidney, spinster), and that the petitioner, who was born on the 2nd Dec. 1850, is the lawful son of the said parties, and a natural born subject of the Queen.

The sections of the Legitimacy Declaration Act which are material to the present proceeding, are the sixth, seventh, and eighth, and run as follows:

Sect. 6:

A copy of every petition under this Act, and of the affidavit accompanying the same, shall, one month at least previously to the presentation or filing of such

(a) Reported by L. D. POWLES, Esq., Barrister-at-Law.

petition, be delivered to Her Majesty's Attorney-General, who shall be a respondent upon the hearing of such petition, and of every subsequent proceeding relating thereto.

Sect. 7:

Where any application is made under this Act to the said court, such person or persons (if any) besides the said Attorney-General, as the court shall think fit, shall, subject to the rules made under this Act, be cited to see proceedings or otherwise summoned in such manner as the court shall direct, and may be permitted to become parties to the proceedings, and oppose the application.

Sect. 8:

The decree of the said court shall not in any case prejudice any person, unless such person has been cited or made a party to the proceedings, or is the heir-at-law or next of kin, or other real or personal representative of, or derives title under or through a person so cited or made a party; nor shall such sentence or decree of the court prejudice any person if subsequently proved to have been obtained by fraud or collusion.

The person it was sought to cite, Capt. Edward Berkeley Mansel, was the son of the same parents as the petitioner, but born previously to the marriage the validity of which it was sought to establish, and it appeared, on the application for the citation, that the real object for which it was sought was to establish the illegitimacy of Edward Berkeley Mansel, and so bar him and his descendants from setting up a claim to a baronetcy which is in the family, and to some real property to which, in certain events, the right heir of his father would be entitled. Under these circumstances the President, before whom the application was made, refused to grant the citation, and from this decision the petitioner appealed. The following is a copy of the judgment which it was now sought to reverse.

July 23, 1878.—The PRESIDENT (Sir James Hannen).—This is an application to me to exercise the powers given to me by the 7th section of the Legitimacy Declaration Act to require a particular person to be cited. The 7th section is, "where any application is made under this Act to the said court such person or persons (if any) besides the said Attorney-General as the court shall think fit shall, subject to the rules made under this Act, be cited to see proceedings," and the question is, therefore, whether I ought, in the exercise of my discretion, to deem it fit that Mr. Edward Berkeley Mansel should be cited. That must depend upon whether I think that he has an interest, or a possible interest, of course, in disputing any fact which this court is competent to determine. Now the object of the Act is made clear in almost every part of it. It is by its title "an Act to enable persons to establish legitimacy and the validity of marriages"—the other part is not pertinent to this inquiry—and then it goes on, "whereas it is expedient to enable persons to establish their legitimacy, and the marriage of their parents and others from whom they may be descended, and also to enable persons to establish their right to be deemed natural born subjects"—that of course is not of importance here. The 1st section says that the application is to be to the court "praying the court for a decree declaring that the petitioner is a legitimate child of his parents"—that of course the petitioner can do by proceedings in this case, and showing "that the marriage of his father and mother was a valid marriage." That, as I say, may be determined in this case, and Mr. Edward Berkeley Mansel has no interest in disputing the legitimacy of the petitioner, he has

no interest in disputing the validity of the marriage of his father and mother. Then it goes on to say that the decree of the court is to be one declaring that the particular marriage was or was not a valid marriage, and to make such decree declaratory of the legitimacy or illegitimacy of such person (that is, the person making the application), "or of the validity or invalidity of such marriage." Now it is clear that Edward Mansel is not interested in contesting the legitimacy of the applicant, or the validity of his parents' marriage; indeed, from what has appeared when this matter came before me on other occasions, it is clear it would be to his interest to support the affirmative of both these propositions. It has been said by Dr. Deane that the court ought not to be prejudiced by its knowledge or surmise of what are the motives which influence the petitioner in making this application; and, of course, I quite agree. If it appeared that he has the right which he is insisting upon I should not refuse his application because I thought he had another motive; but it is clear in this particular case that the petitioner does not by this affidavit establish that Mr. Edward Berkeley Mansel whom he desires to cite is interested in the matters which will be brought before the court. He fails to establish that, and indeed does not attempt to establish it. It is perfectly plain that the petitioner's object is to establish not merely his own legitimacy, not merely the validity of the marriage of his father and mother, but also the illegitimacy of Mr. Edward Berkeley Mansel. Now the clauses I have read of the Act of Parliament plainly, as far as I can see, were not intended to give me any such powers as that. It was only intended to give me the power of determining the legitimacy of the person putting the court in motion, and, of course, as a necessary incident to his legitimacy, the validity of the marriage of his parents; but it was not intended, as far as I can see, to cast upon this court the duty of determining what children of the reputed married persons were born before and after wedlock. I therefore reject this application.

April 29, 1879.—Dr. Deane, Q.C. (Dr. Tristram with him), for the petitioner, submitted, in support of the appeal, that the petitioner had a right to the assistance of the court, not merely to establish his own legitimacy and the validity of the marriage of his parents, under which he claimed as eldest legitimate son, but also in requiring his brother Edward, if he had an adverse claim, to appear and set it up.

A. G. Hardy, for the Attorney-General, in support of the order.—The Act gave the court power to determine the legitimacy of a petitioner, but not the illegitimacy of another party. When it was admitted that Edward Berkeley Mansel had no interest in disputing the legitimacy of the petitioner, there was no ground for the application for a citation against him. As a matter of history, the Scotch Act, which was in existence previous to the passing of the English Act, contained a clause, enabling petitioners to take proceedings with a view to bastardising other parties, but this clause was expressly omitted when the English Act was passed.

Sir ROBERT PHILLIMORE.—I am of opinion that this order ought not to be disturbed. The ques-

tion is, whether Edward Berkeley Mansel ought or ought not to be cited. That question is answered by considering whether it is his interest to dispute the legitimacy of the petitioner. I am of opinion that he has no interest in contesting it, and therefore I think that the discretion exercised by the court in refusing to allow him to be cited for some other purpose was properly exercised. I am of opinion that Edward Berkeley Mansel ought not to be cited, and that the appeal must be dismissed.

LOPES, J.—I am of the same opinion.

THE PRESIDENT (Sir James Hannen).—The argument urged on behalf of the petitioner has not induced me to vary my opinion. I have nothing to add to the judgment I have already given in the matter.

*Appeal dismissed.*

Solicitors for the petitioner, *Nelson, Son, and Hastings* (for O. Norton, Swansea); for the Attorney-General, *E. L. Rowcliffe*.

#### ADMIRALTY BUSINESS.

April 7 and 8.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

THE MARY HOUNSELL. (a)

*Damage—Collision—Lights—Infringement—Pilot vessel—Vessel in tow—Regulations for preventing collision at sea—Articles 5 and 8—36 & 37 Vict. c. 85, s. 17.*

*A sailing vessel of any description when in tow is bound to carry at night the two coloured side lights prescribed by Articles 3 and 5. The white mast-head light prescribed by Article 8 for sailing pilot vessels is only to be carried by those boats when independent, and not in tow of any other vessel. A sailing vessel, and, semble, any other vessel, towing another vessel, is responsible for the lights carried by both vessels being in accordance with the regulations, and an infringement by the towed vessel brings the towing vessel within the scope of sec. 17 of the Merchant Shipping Act 1873.*

THIS was an action for damages by collision brought by the owners of the British brigantine *Bessie* against the British brigantine *Mary Hounsell*. The owners of the *Mary Hounsell* counter-claimed against the *Bessie* for the damages sustained by their vessel in the same collision.

The *Bessie* was bound from Cardiff to Cadiz with a cargo of coals. The *Mary Hounsell* from Youghal to Llanelli in ballast. The collision occurred on the 23rd Feb. 1879, off Barry Island, in the Bristol Channel, about 6.45 p.m.

The case for the *Bessie* was that, the wind being N.N.W., and the weather cloudy, but clear, she was sailing close hauled on the starboard tack, heading W. by N., and making four or five knots, and that she had a pilot on board, whose boat was in tow astern of the *Bessie*, and had her own sails set as well; that she observed a red light on her port bow; that as the vessel exhibiting it approached the red light was obscured, and a green light became visible; that the helm of the *Bessie* was ported, and the other vessel hailed to port, but the collision took place, the other vessel, which proved to be the *Mary Hounsell*, with her stem striking the *Bessie* on her port bow with such violence that the *Bessie* soon after sunk.

(a) Reported by J. P. ASPINALL and F. W. RAINE, Esq., Barristers-at-Law.

ADM.]

THE MARY HOUNSELL.

[ADM.]

The lights exhibited by the *Bessie* were the ordinary regulation sailing lights for a vessel under sail (Art. 5), and the pilot boat in tow astern of her had the white light prescribed (Art. 8) for sailing pilot vessels.

The case for the *Mary Hounsell* was that, the wind being N.E. by N., and the weather clear and dark, she was sailing by the wind on the port tack, heading E. by S. half S., making about four knots; that she observed the red and green lights of the *Bessie*, and the white light of the pilot boat about half a point on the starboard bow; that she supposed the lights to be those of a steamer (Art. 3), and held her course, until the *Bessie*, whose red light had been obscured for some time, rendered a collision imminent by porting; that the *Mary Hounsell* then put her helm hard down, but the collision nevertheless happened.

It was proved that the pilot on board the *Bessie* had no certificate as a pilot, and that there was no one on board of or belonging to the pilot boat who had a certificate, that the persons using her were in the habit of piloting vessels in the absence of certificated pilots, and were in the habit of exhibiting the light prescribed for pilot boats (Art. 8). They had not on the occasion of the collision exhibited the flare-up light spoken of in the latter part of Article 8, within fifteen minutes, or at all.

The argument principally turned upon the true direction of the wind, as affecting the question of the credibility of the witnesses on either side as to their vessel being close-hauled, and on the question of lights, as to whether those carried by the *Bessie* and the pilot boat in tow were proper under the circumstances; and if not, whether by the exhibition of them the *Bessie* was to be held to blame for the collision.

The articles and sections of the Act referred to are as follows:

*Merchant Shipping Act 1862* (25 & 26 Vict. c. 63.  
Table (C).

*Regulations for preventing collisions at sea—Rules concerning lights.*

Art. 2. The lights mentioned in the following articles, numbered 3, 4, 5, 6, 7, 8, and 9, and no others, shall be carried in all weathers, from sunset to sunrise.

*Lights for steam ships.*

Art. 3. Sea-going steam ships when under weigh shall carry:

- (a) *At the foremast head*, a bright white light, so fixed as to show an uniform and unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the ship, viz., from right ahead to two points abaft the beam on either side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles.
- (b) *On the starboard side*, a green light, so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.
- (c) *On the port side*, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

- (d) The said green and red side lights shall be fitted with inboard screens, projecting at least three feet forward from the light so as to prevent these lights from being seen across the bow.

*Lights for steam tugs.*

Art. 4. Steam ships, when towing other ships, shall carry two bright white mast-head lights vertically, in addition to their side lights, so as to distinguish them from other steam ships. Each of these mast-head lights shall be of the same construction and character as the mast-head lights which other steam ships are required to carry.

*Lights for sailing ships.*

Art. 5. Sailing ships under weigh, or being towed, shall carry the same lights as steam ships under weigh with the exception of the white mast-head lights, which they shall never carry.

*Lights for pilot vessels.*

Art. 8. Sailing pilot vessels shall not carry the lights required for other sailing vessels, but shall carry a white light at the mast head, visible all round the horizon, and shall also exhibit a flare-up light every fifteen minutes.

The Merchant Shipping Act 1873 (36 & 37 Vict. c. 85, s. 17):

If in any case of collision it is proved to the court before which the case is tried that any of the regulations contained in or made under the Merchant Shipping Acts 1854 to 1873 has been infringed, the ships by which such regulation has been infringed shall be deemed to be in fault, unless it be shown, to the satisfaction of the court, that the circumstances of the case made departure from the regulation necessary.

Dr. W. G. F. Phillimore (with him Butt, Q.C.) for the plaintiffs, owners of the *Bessie*.—We were justified in what we did; being on the starboard tack close-hauled we were bound to keep our course, and we did so until by the action of the *Mary Hounsell* a collision became inevitable, when we threw ourselves into the wind, which was the proper course to pursue:

*The Marmion*, 27 L. T. Rep. N. S. 255; 1 Asp. Mar. L. C. 412.

If the pilot boat exhibited a wrong light we cannot be held to blame under the Merchant Shipping Act 1873, s. 17, for that is a penal enactment and confined to the ship guilty of an infringement of the regulations; it cannot be said that the *Bessie* infringed the regulations. There is no special provision for sailing vessels towing, as there is for steamers under Art. 4; we therefore had only to be obey Art. 5, and we have done so. But the pilot boat exhibited her proper light. To make a vessel a pilot boat, it is not necessary to carry licensed pilots; it is enough if those on board of her are and act as pilots (*The Columbus*, 2 Hagg. 178, note), and the fact that at the time of the collision there was no one on board who could act as pilot, does not alter the case, for the rule as to lights attaches to the character of the vessel, not to the condition in which she may happen to be. This is shown by the article relating to fishing boats lights (Art. 9), where, when the nature of the light to be exhibited depends on the condition of the vessel, it is so stated. "Sailing" in Art. 8 refers only to the character of the vessel as opposed to a steam vessel or a rowing boat, not to the way in which she is progressing, or the fact of her progressing at all; this is shown by the interpretation which has been put on Art. 5 universally, where it has been held that a vessel tripping her anchor, but not yet under weigh, has to carry the lights for a "sailing" ship or a "steamship" as the case may be.

*Milward*, Q.C. for defendants, owners of the



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*Mary Hounsell*.—The boat is not a pilot boat at all. If she ever was a pilot boat she was at this time *functus officio*, as she had no professing pilots to give to ships in want of them. But, even assuming that under any circumstances she would be entitled to show the lights of a pilot boat under Article 8, she could not do so when in tow. Article 5 is the article which governs the case; there can be no question but that, whether pilot boat or not, she was a sailing vessel, and as such, and in tow, she is bound by Article 2 to exhibit the side lights prescribed by Articles 3 and 5, and no others; by showing a white mast-head light, she has infringed the provisions of all three of those articles, and there can be no question but that that infringement might, as in fact it did, cause or contribute to the collision; the lights shown by these two vessels would resemble those of a steamer, and so induce us to continue our course (Article 18) in the expectation that she would alter hers (Article 15).

Dr. Phillimore in reply.

Sir ROBERT PHILLIMORE, after consultation with the Trinity Masters.—I am of opinion that the *Bessie*, with the pilot cutter attached to her by a rope, must be considered in the application of the navigation rules as one vessel; and I am of opinion, and the Elder Brethren agree with me, that the white light which the pilot vessel carried might have been a misleading light. Whether the 5th article or the 8th article applies, it appears to me that either is hostile to the case set up on the part of the *Bessie*. If the 5th article applies—i.e., if the pilot cutter was a ship “under weigh or being towed”—she falls under the express provision of the article, which goes on to say that she “shall never carry” a white mast-head light. But if she falls under the 8th article, that article says, “Sailing pilot vessels shall not carry the lights required for other sailing vessels, but shall carry a white light at the mast head, visible all round the horizon,” and in my opinion contemplates the case of a pilot vessel, not being towed by another vessel, but in an independent condition, and in that case the light would not be misleading. It appears, therefore, that the cutter was to blame for showing this white light, and the other vessel, the *Bessie*, was to blame for allowing herself to proceed with three lights on or connected with herself, and if so, there was an infringement of the regulations under the Merchant Shipping Act 1862. The 17th section of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85) enacts that “the ship by which such regulation has been infringed shall be deemed to be in fault, unless it be shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary.” There are no circumstances in this case that “made a departure from the regulation necessary,” and a construction has been put upon these words by the Privy Council, namely, “If by possibility the infringement of the regulation could be contributory to the collision” (*The Fanny M. Carvill*, 32 L. T. Rep. N. S. 646), the ship shall be deemed to be in default; I therefore pronounce the *Bessie* in fault for towing the other vessel exhibiting a white light. The next question is this, whether the *Mary Hounsell* is not also to blame? and after conference with the Elder Brethren on this

point we are all of opinion that the story told by the *Bessie* is the true story, and that she was heading W. by N., and was close-hauled on the starboard tack, and that the *Mary Hounsell* had the wind free, and ought to have got out of the way, which she did not do. The evidence preponderates greatly in favour of the story of the *Bessie*. I ought to observe that the man at the helm of the *Mary Hounsell*, greatly prevaricated. On the whole the evidence preponderates in favour of the fact that the *Bessie* was close-hauled on the starboard tack, while the *Mary Hounsell* had the wind free; I therefore pronounce the *Mary Hounsell* also to blame. The result will therefore be that the damages will be divided, and no order will be made as to costs.

Solicitors for plaintiffs, owners of the *Bessie*, Stokes, Saunders, and Stokes,

Solicitors for defendants, owners of the *Mary Hounsell*, Ingledew, Ince, and Greening, agents for Ingledew, Ince, and Vachell, Cardiff.

## Judicial Committee of the Privy Council.

Wednesday, March 12.

(Present: The Right Hons. Sir JAMES W. COLVILLE, Sir BARNES PHACOCK, Sir MONTAGUE SMITH, and Sir ROBERT COLLIER.)

COHEN v. SANDEMAN. (a)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

*Bankruptcy—Contract—Completion by surety—Right of assignee in bankruptcy to sue.*

A. contracted with the appellant for the performance of certain work at a price agreed upon, and W. became surety to the appellant for the performance of the contract by A. The contract contained a provision, that if the contractor should become bankrupt, the employer might require the surety to proceed with the work.

A. became bankrupt before the completion of the work, and the appellant gave notice to W. to proceed with the work, which W. completed.

Held (affirming the judgment of the court below), that the official assignee under the bankruptcy of A. was entitled to sue for the price of the work so completed by W., it being a substituted performance of the original contract by A.

THIS was an appeal from a judgment of a majority of the Supreme Court of New South Wales (Hargrave and Fawcett, JJ., Martin, C.J., dissenting), overruling a demurrer to the plaintiff's replication. The facts appear fully from the judgment of their Lordships.

Benjamin, Q.C. and R. T. Reid appeared for the appellant, and contended that the plaintiff, as official assignee in Allen's bankruptcy, could not sue for work done by Watson, but only for work done by the insolvent. Allen abandoned the work, and now his assignee sues on the contract. The defendant was not bound under the contract to employ Watson; he might have completed the work himself, or have employed a third party, who would have been entitled to the price. As far as concerns the assignee, Watson is in the position of such third party called in by the defendant. They cited

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

*Ex parte Davis, Re Smeezum*, 3 Ch. Div. 463; 34 L. T. Rep. N. S. 805; 35 L. T. Rep. N. S. 389; *Knight v. Burgess*, 33 L. J. 727, Ch.; 10 L. T. Rep. N. S. 90; *Tooth v. Hallett*, L. Rep. 4 Ch. 242; 20 L. T. Rep. N. S. 155.

*Watkin Williams, Q.C., J. C. Mathew, and J. E. Solomon*, who appeared for the respondent, were not called upon to argue.

Their LORDSHIPS gave judgment as follows:—The facts of this case are not in dispute and may be shortly stated. Allen, a builder, agreed with Cohen, the defendant, to build for him an hotel for the price of 4470*l.*, to be paid by instalments at the rate of 75*l.* per cent. on the work actually performed, on the certificate of the supervisor of works, and the balance on a certificate that the whole of the works had been completed. Contemporaneously with this contract a bond was entered into whereby two persons, one of the name of Watson, bound themselves in the sum of 250*l.* to Cohen, the condition of the bond being the due and faithful performance of the contract by Allen. The agreement for building, which was by deed, contains this provision, having reference to the bond, "If the contractors shall become bankrupt or compound with or make any assignment for the benefit of their creditors, or shall suspend or delay the performance of their part of the contract"—except for certain causes, "the employer, by the architects, may give to the contractors, or their sureties, or assignee, or trustee, as the case may be, notice requiring the works to be proceeded with; and in case of default on the part of the contractors, or their sureties, or assignee, or trustee, for the period of thirty days," then the employer may complete them himself. It appears that Allen did a considerable portion of the work, and obtained certain payments at the rate of 75*l.* per cent. on the certificate of the supervisor. Upon his becoming bankrupt, the event contemplated by this clause, the defendant gave notice, in pursuance of the clause, to Watson, one of the sureties, to proceed with the works. Watson did proceed with and did complete the works. The assignee of the bankrupt thereupon treating the completion of the works by Watson as a completion under the contract, sued the defendant for what remained due. The Supreme Court of New South Wales held by a majority that he was entitled so to sue. This is the judgment under appeal. The form in which the question is raised on the pleadings is this: The declaration is upon the agreement alleging a completion of the work to the full satisfaction of the supervisor appointed by the defendant, and claiming the remaining moneys due. The pleas aver the abandonment of the work by Allen, and its completion by Watson under notice, the first plea stating the abandonment to have been before his bankruptcy, the second after. In his replication the plaintiff sets out the bond and the clause of the building agreement above set forth, and proceeds to aver: "After the making of the said bond, and in pursuance of the said condition in that behalf, the defendant gave the said William John Watson, as such surety as aforesaid, notice requiring him to proceed with the said works, and the said William John Watson thereupon proceeded with and duly completed the said works in accordance with the said contract, specifications, and conditions, and under the provision of the said deed in the said pleas

respectively mentioned, and not otherwise; and the plaintiff further says that upon such due completion as aforesaid the right of action under the said deed vested in the plaintiff as official assignee of the insolvent estate and effects of the said Charles Frederick Reid Allen, and that he is suing in this action in order to recover from the defendant, partly for his own benefit as such official assignee as aforesaid, and partly for the benefit of the said William John Watson, the balance of the moneys due by the defendant under the said deed upon the due completion of the said work." (a) Their Lordships are of opinion that the effect of the clause in the agreement which has been read with respect to notice being given to the surety, is to provide for a substituted performance of the contract, which took place, and of which the plaintiff, as official assignee, is entitled to avail himself. There was no right on the part of Watson to sue the defendant; no new contract was entered into between them; the defendant, in pursuance of the agreement with Allen, and treating it as in operation, gave a notice to Watson, which Watson complied with in order to escape the penalty to which he would otherwise have been liable; this is the only agreement on which the defendant can be sued, and Allen only, or his assignee, can sue upon it. The judgment affirming the plaintiff's right to sue is therefore correct. It has indeed been suggested that the plaintiff, as official assignee, could not have any right to sue for the benefit of Watson. If it were necessary this allegation in the replication might be struck out, which would still show a good answer to the pleas. Watson will certainly have a claim against the estate in respect of the work that he has done, and therefore what is recovered will, in one sense, enure to his benefit. For these reasons their Lordships will humbly advise Her Majesty that this judgment be affirmed and the appeal dismissed with costs.

Solicitors for the appellant, *Waltons, Bubb, and Walton*.

Solicitors for the respondent, *Parker and Co.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT LINCOLN'S INN.

Feb. 28 and March 3.

(Before JESSEL, M.R., and JAMES and BRAMWELL, L.JJ.)

DUNCAN, FOX, AND CO. v. THE NORTH AND SOUTH WALES BANK. (b)

*Principal and surety—Banker and customer—Securities held by principal creditor—Bill of exchange—General security given by acceptor to banker—Bill discounted by banker for indorser—Rights of indorser to security—Co-surety—Contribution.*

*One of the partners in a firm, customers of the*

(a) This was the replication demurred to, on the ground that no right of action passed to the plaintiff in respect of the amounts sued for, and that neither the plaintiff nor Watson was in any way bound to complete the said work.

(b) Reported by H. PRAT, Esq., Barrister-at-Law.

defendant bank, deposited with the bank the title deeds of real estate, which was his separate property, to secure the balance for the time being owing to them by the firm for discounts and advances, and for all other moneys in or for which the firm, whether alone or jointly with any other person, were or might thereafter be or become indebted or liable to the bank, or the bank was or might be or become indebted or liable on their account, or which the bank might at any time claim against the firm.

After the security had been given to the bank, the plaintiffs received, in payment for goods which they had sold to the firm, certain bills of exchange accepted by the firm. These bills the plaintiffs indorsed to the bank, who discounted them for them. Before the bills matured, the firm had executed a deed of inspectorship for the benefit of their creditors, and the plaintiffs, having become liable to pay the amount of the bills to the bank, brought their action claiming a declaration that they were sureties to the bank for the payment of the bills, that the above-mentioned security extended to the bills, and that, on paying the amount of the bills and whatever else might be due to the bank on the security, they were entitled to have the security handed over to them.

*Held (reversing the decision of Little, V.C.), that the plaintiffs were principal debtors to the bank, and, although they might be in the position of sureties in regard to the acceptors or prior indorsers of the bills, they were not entitled to be treated as for all purposes sureties in respect of the bills, so as to prevent the bank from dealing with the security which they held from the acceptors.*

*Held, also, that the plaintiffs' claim failed because, the partner who deposited the title deeds being a surety for his firm for the balance for the time being due to the bank, the plaintiffs had no right to require the bank to apply his security to that for which the plaintiffs were primarily liable.*

THIS was an appeal from a decision of the Vice-Chancellor of the County Palatine Court of Lancaster.

The facts of the case were as follows:—

In Nov. 1874 Messrs. Samuel Radford and Sons, who carried on business as millers at Liverpool, had overdrawn their account with their bankers, the North and South Wales Bank, and were required to give security.

Accordingly, on the 1st Dec. 1874, Samuel Collins Radford, one of the partners in the firm of Samuel Radford and Sons, deposited with the bank the title deeds of some freehold property belonging to him, accompanied by a memorandum, signed by him, which stated that the deeds had been delivered by him to the bank in pledge to secure to the bank the balance for the time being owing to the said bank by the firm of S. Radford and Sons for discounts and advances, and for all other moneys in or for which the said firm, whether alone or jointly with any other person or persons, were or might from time to time thereafter be or become indebted or liable to the said bank, or the said bank was or might be or become indebted or liable on their account, or which the said bank might at any time claim against the said firm.

Subsequently Samuel Collins Radford deposited the title of other freehold property, accompanied by another memorandum in the same form.

In Nov. 1875 the plaintiffs, Messrs. Duncan, Fox, and Co., sold, through Maxwell Brothers, of Liverpool, corn brokers, a cargo of wheat to Radford and Sons, for cash to be paid on delivery. Radford and Sons paid part of the price in cash, but were unable to pay the whole amount in cash, and ultimately the plaintiffs consented to take bills of exchange for the unpaid balance. Three bills for sums amounting to 8000*l.* were accordingly drawn by Maxwell Brothers upon and accepted by Radford and Sons, and were indorsed to the plaintiffs.

The plaintiffs indorsed these bills to the North and South Wales Bank, who discounted them.

In Jan. 1876 Radford and Sons stopped payment, and on the 24th Feb. 1876 they executed a deed of inspectorship for the benefit of their joint creditors.

At the time of their stoppage Radford and Sons were largely indebted to the bank, who sold the property of Samuel Collins Radford comprised in the memorandum of deposit, and realised upwards of 30,000*l.*

The plaintiffs, who had become liable to pay the amount of the bills to the bank, declined to execute the inspectorship deed, and in May 1877 they commenced the present action in the County Palatine Court of Lancaster against the bank, Samuel Collins Radford, Radford and Sons, and Balfour, Williamson, and Co., who, under an order of the court, represented the unsecured creditors of Radford and Sons, claiming a declaration that they were sureties to the bank for the payment of the bills, and that the security of the 1st Dec. 1874 extended to the balance due upon those bills, and that, in the character of sureties, the plaintiffs were entitled, on paying to the bank the balance due to them from Radford and Sons, to have the security which the bank held on the property of S. C. Radford handed over to them.

The Vice-Chancellor held that the plaintiffs were entitled to the relief which they claimed, and from this decision Balfour, Williamson, and Co., on behalf of themselves and other the unsecured creditors of Radford and Sons, appealed.

*Benjamin, Q.C., Marten, Q.C., and F. Thompson, for the appellants.*—The plaintiffs are principal debtors to the bank in respect of these bills, and the security does not extend to these bills at all. The plaintiffs have therefore no right to the security to the exclusion of the other general creditors of Radford and Sons. They cited

*Cook v. Lister*, 7 L. T. Rep. N. S. 712; 13 C. B. N. S. 543;

*Antrobus v. Davidson*, 3 Mer. 569;

*Wade v. Coope*, 2 Sim. 155;

*Newton v. Chorlton*, 10 Hare, 646; 2 Dr. 333;

*Pearl v. Deacon*, 24 Beav. 186; 1 De G. & J. 461;

*Re New Zealand Banking Corporation; Levi and Co.'s case*, 20 L. T. Rep. N. S. 256; L. Rep. 7 Eq. 449.

*Robinson, Q.C. and Neville, for the plaintiffs.*—As between ourselves and Radford and Sons we are mere sureties, and are entitled to have the securities deposited by Samuel Collins Radford applied for the purpose of reducing the balance owing by Radford and Sons to the bank. In *Wulf v. Jay* (27 L. T. Rep. N. S. 118; L. Rep. 7 Q. B. 762) Cockburn, C.J. said that it is "a common and well-known proposition, that where a debt is secured by a surety, it is the business of the creditor, where he has security available for the payment and satisfaction of the debt, to do

whatever is necessary to make that security properly available. He is bound, if the surety voluntarily proposes to pay the debt, to make over to the surety what securities he holds in respect of that debt, so that, being satisfied himself, he shall enable the surety to realise the securities and recoup himself the amount of the debt which he has had to pay. That is now a well-known proposition." We are entitled to require the bank to apply these securities to the reduction of the balance of Radford and Sons' debt. If not, we are at least entitled to contribution. [JAMES, L.J. —You cannot have contribution till you have paid.] We are willing to pay, and having paid, we shall be entitled to stand in the shoes of the principal debtors. Radford and Sons are the principal debtors, and we are mere sureties.

Sir Henry Jackson, Q.C., Botch, and C. J. Peile, for the bank.

Without calling for a reply,

JESSEL, M.R. said:—This is an appeal from a decision of Little, V.C., and certainly it raises a very important point as regards commercial law. The facts which it is necessary to state are not numerous. There was a firm of Samuel Radford and Co. who were indebted to the North and South Wales Bank, and, the bank requiring security, one of the partners in that firm, Samuel Collins Radford, signed two memoranda with reference to real estate, the property of Samuel Collins Radford, which real estate he pledged with the bank by these memoranda for securing the balance for the time being owing to the bank by the firm of Samuel Radford and Sons on any account whatever. That is the substance of the memoranda. At a subsequent time two firms, of which I need only mention one, because they stand on the same footing, one of them being Duncan, Fox and Co., sold a cargo of corn to Samuel Radford and Sons, paid for it in part, and were unable to pay for the other part, and thereupon they told Duncan, Fox, and Co.—it was not Samuel Collins Radford, but one of the other partners, James Radford, that told them—that the firm of Samuel Radford and Sons would give them a bill, and they could discount the bill with the North and South Wales Bank, who were the bankers of Duncan, Fox, and Co. Accordingly, Duncan, Fox, and Co. took the bill, discounted it with the North and South Wales Bank, and applied the proceeds in payment of the debt due to them from Samuel Radford and Sons for the cargo of corn. That was an ordinary discount transaction between the bank and Duncan, Fox, and Co. Duncan, Fox, and Co. did not even know of the existence of the two memoranda of deposit by Samuel Collins Radford, by which he pledged his real estate as security for the balance for the time being owing by Samuel Radford and Sons. The position of Duncan, Fox, and Co. was simply the position of any other indorser of a bill of exchange who discounts a bill. They were principal debtors as regards the bank, who advanced the money. They might be, and in certain circumstances undoubtedly were, in the position of sureties as regards the acceptors or prior indorsers of the bill of exchange. Then what was their position as between the bank and Duncan, Fox, and Co.? Is it to be tolerated that without the consent of the bank, without their knowledge of the real position of Duncan, Fox, and Co., and Samuel Radford and Sons, as to

whether, for instance, the bills were accepted for the accommodation of the drawer, or for value given by the acceptors, or were or were not liable to set off, they should be treated as sureties for all purposes as between the bank and the discounters of the bill, so as to prevent the bank at any time thereafter dealing with these securities deposited by Samuel Collins Radford, or interfering in any way with these securities? The consequences of such a doctrine would be alarming. No bank which held a security either by way of suretyship or by way of deposit from its customers could venture to discount a bill with eight or ten names without examining carefully to see if any one of the names was the name of a debtor of the bank who had given them security, and if they did they might be put in the position of being incapacitated from carrying on their dealings with their customers by varying the securities given by their customers to the bank. It shows at once that to extend the doctrine to such a case as this would paralyse the business of discounting bills of exchange, and that it would be unwise, as far as this court is concerned, to extend for the first time the doctrine of principal and surety, which for certain purposes extends to bills of exchange, to such a transaction as this. On this ground alone, I think the decision cannot be supported. But there is another ground which appears to me equally fatal to the claim put forward by the plaintiffs in this case. The deposit by Samuel Collins Radford was a deposit itself in the nature of a suretyship. Samuel Collins Radford was the owner in fee of this property which was his own separate property, and by making it chargeable to the bank for the debt of the firm, he put this property in the position of a surety for the debts of the firm. He was not liable for these debts at all except as partner. Therefore, as between himself and the firm and the bankers, this estate was in the position of a surety. Now, surety for what? Surety for the balance for the time being owing from the firm to the bank on any account whatever. Assuming that the respondents are entitled to put themselves in the position of sureties for any purpose as between the bank and the firm of Samuel Radford and Sons, still they are sureties who, as between themselves and the bank, have had the money and are principal debtors to the bank, and are special sureties therefore in respect of the particular transaction. Now, as between two sureties, assuming there is no speciality in the contract for suretyship, the utmost right they could have would be that of contribution. It cannot be said that in every instance a surety is entitled to stand in the place of the principal creditor as regards other securities. That is true as regards securities given by the debtor, but is not true as regards securities given by co-sureties. As I said before, in the ordinary case, if there is no speciality in the matter, if they are contemporaneous suretyships and relate to the same transaction, they have a right to contribution. Therefore that would not support the decree made. But when you come to look at the nature of this transaction, it is plain that there is no right to contribution. The primary right to suretyship, so to say, is with Samuel Collins Radford. He made his property surety for the balance for the time being owing, but he had a right to say as regards the subse-

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quent transaction, "You lent money to Duncan, Fox, and Co.; they are the parties liable to you; sue them and reduce the balance." They had no right, as between themselves and Samuel Collins Radford, to call on the bank first of all to apply his property to that for which they were primarily liable, and it appears to me that the peculiar relation of the parties negatives this right of contribution. Even assuming that for this purpose they were entitled to occupy the position of sureties, they were sureties, not only subsequently in order of date, but with a primary liability as distinguished from the general liability. Therefore it appears to me that they could have had no right of contribution, and no right at all, and that on this ground also the action should have been dismissed.

JAMES, L.J.—I am of the same opinion, and I do not think it necessary to add anything to what the Master of the Rolls has said on the one point which of itself seems perfectly fatal to the plaintiffs' case, and which seems to have been overlooked in the argument in the court below, that is, that Samuel Collins Radford's estate was really in fact not a principal debtor at all, and was not liable to be dealt with as a principal debtor, that his estate was only a surety, and that if there was any contribution at all (I do not mean to say that there is that equity), Samuel Collins Radford would certainly have more ground for saying to Duncan, Fox, and Co., "Contribute to relieve me," than they would have for calling upon him to contribute to relieve them. But what I desire to say is this, that as a matter of mercantile law—and I say this for the purpose of preventing any embarrassment which would be certain to arise from an extension of the rule in mercantile cases of this kind—the equities of principal and surety cannot arise accidentally and promiscuously from the position of names on the face or the back of a bill of exchange which a man hands to his bankers or to a merchant in the ordinary course of business, and that where a man takes a bill of exchange to a banker or a bill broker, and asks him to lend him money on it, which he does, he is still the principal debtor and he has no right to ask, nor has the banker or bill broker any right to tell him, whether any of the other names on the bill are customers of his, or what security he holds from any of them, or anything of the sort.

BRAMWELL, L.J.—I am of the same opinion, and have nothing to add.

*Appeal accordingly allowed with costs.*

Solicitors: *Stone and Fletcher; Garnett, Tarbet, and Tinne; Duncan, Hill, and Dickinson; T. and T. Martin, Liverpool.*

*Tuesday, Nov. 5, 1878.*

(Before BAGGALLAY, BRETT, and COTTON, L.JJ.)

BROWN v. SMITH. (a)

*Infant—Maintenance—Allowance for past maintenance.*

*On the death of her father an infant became absolutely entitled to a small property producing an annual income of 140l., of which he had been tenant for life, and, the infant's mother being wholly without means of support, the court directed the trustees of the property to pay the whole income to*

*the mother for the maintenance of the infant. One of the trustees died, and the mother married again, and the surviving trustee, without making any further application to the court, continued to pay the whole income to the mother till the infant came of age.*

*The infant, who married on attaining twenty-one, then filed her bill alleging that after her mother's second marriage the payment of the whole income to her was improper, and praying for an account of the past income, and that the balance might be paid to her after deducting a proper allowance for her maintenance and education. The defendants adduced evidence that the plaintiff had been well educated, that her position had been much improved by her mother's second marriage, and that the income, so far as not expended on the infant personally, had been applied towards the expenses of her stepfather's establishment, of which she had had the benefit:*

*Held, that although the order for maintenance ceased to be operative on the death of one of the trustees, or, at all events, on the second marriage of the mother, the court would have sanctioned the payment of the whole income if application had been duly made, and that the whole income ought therefore now to be treated as having been properly applied.*

THIS was an appeal from a decision of the Master of the Rolls.

The facts of the case were as follows:—

On the death of John Rattray, in May 1853, certain property to which he was entitled under a will as tenant for life, and which produced a net annual income of 140l., devolved upon his infant daughter, the plaintiff, who was his only child.

On the 17th June 1853, Mark Smith and Michael Paterson, the trustees of the will, applied in chambers, in the matter of the infant, for an order appointing a guardian, and for maintenance.

On the 8th Nov. 1853, the summons having been amended by direction of the judge, by making it an application by the infant by her next friend, Stuart, V.C., upon evidence that the infant's mother was wholly without means of support, made an order that the whole of the income should be allowed for the maintenance and education of the plaintiff from the date of her father's death, and should be paid by Smith and Paterson to the mother for that purpose during the minority of the plaintiff, or until further order.

Paterson died in March 1861, and Smith, the surviving trustee, continued to pay the income to Mrs. Rattray.

In 1863 Mrs. Rattray married one Captain Weatherley.

Smith, without making any application to the court, still continued to pay the whole income to the infant's mother, and went on doing so till the 29th July 1873, when the plaintiff attained twenty-one, till which time the plaintiff resided with her mother.

Captain Weatherley died in 1872, having appointed Mrs. Weatherley his executrix.

On the 29th July 1873 the plaintiff intermarried with Thomas Watson Brown, and on the 11th Sept. 1873 she filed her bill against Mark Smith, Mrs. Weatherley, and the representatives of Paterson, the deceased trustee, alleging that after Mrs. Weatherley's second marriage the payment

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

of the whole income to Mrs. Weatherley was improper, and that the balance of the income, after deducting 50*l.* a year, or such sum as the plaintiff's maintenance and education cost, or ought to have cost, ought to be repaid out of the assets of Captain Weatherley, so far as he received it, and by Mrs. Weatherley, so far as she received it, and ought, if necessary, to be decreed to be made good by the trustees, and praying for relief accordingly.

At the hearing of the cause, the Master of the Rolls held that on the death of Paterson the surviving trustees ought to have applied to the court to sanction the continuance of the payments, and that the payments from that time were made without authority; and his Lordship made a decree directing an inquiry "whether the whole of the net income of the plaintiff, after expenses and repairs, as from and after the 4th March 1861, the date of the death of the said Michael Paterson, was, under the circumstances, proper to be allowed for the maintenance and education of the plaintiff during her minority; and, if not, to inquire how much is proper to be allowed," and, if it should be found that the whole of such net income was not proper to be allowed, then an account was directed of income of the plaintiff come to the hands of Mark Smith, and of Capt. and Mrs. Weatherley after the 4th March 1861, during the minority of the plaintiff.

By his certificate, dated the 27th May 1878, the chief clerk certified that the whole of the net income of the plaintiff, from and after the 4th March 1861, was, under the circumstances, proper to be allowed for her maintenance and education during her minority.

The plaintiff made an affidavit complaining of the way in which she had been treated during her minority, and alleging that much less than the whole of her income had been expended on her maintenance and education, for which she contended 80*l.* would have been a proper allowance. On the other hand, evidence was adduced that Capt. Weatherley was a gentleman of good position, though of small means, and that the plaintiff had always been treated by him with great kindness, and that her social position had been very much improved by her mother's marriage.

The plaintiff took out a summons to vary the chief clerk's certificate.

JESSEL, M.R., after stating the facts of the case, said:—The question I have to consider is, whether a fair allowance was made to the mother under all the circumstances, and whether the child was fairly and properly maintained and educated. It is not the practice of the court, when it allows such moderate sums as 100*l.* or 200*l.* a year to a parent or relative, to inquire too minutely into the mode in which the sum is expended. It is supposed that the person who takes a child into his or her house does not keep separate accounts of every item of rent and taxes, of every bit of furniture bought for the use of the infant, or bought for the use of other people, and of the number of rides in the carriage the infant takes as compared with the other members of the household. That is not the way the court looks at the matter. What the court does is to allow a fair sum for the maintenance and education of the infant, and to see that the infant is fairly maintained and edu-

cated, having regard to the sum allowed. The court frequently allows a larger sum than is actually required for the maintenance of the infant on purpose. For instance, it may be that it is more to the advantage of the infant to pay a larger sum in order to induce the person to take the infant. I will give an illustration of that by mentioning a case which occurred not very long ago in my chambers. There was a young lady of very large fortune who had attained an age at which it was desirable to introduce her into society. She had neither mother nor father. It was represented to me that a lady of excellent rank, but whose income was by no means such as to enable her to live in the style she desired to do, was willing to take the young lady and introduce her into society on receiving a very considerable allowance. On considering it, I came to the conclusion that it was a very desirable arrangement for the young lady, and I made this allowance, which was more than was required for the infant, the balance being expended on the establishment, which would, no doubt, ultimately tend to the infant's benefit, although the sum expended very much exceeded anything which was the actual cost of the infant's maintenance. In all these matters we look to the infant's benefit. It constantly happens in the case of relatives that they would be willing to take the infant as a member of their family. Nothing would be more advantageous for an orphan girl, for instance, than that she should be brought up by a relative, and with her cousins and other relatives; but you cannot expect that a person would take the infant for the bare cost of her maintenance and education. As a general rule this would not be done; and then the question arises, how much is it worth the while of the guardian to pay, having regard to the interest of the infant, over and above the cost of maintenance, to induce these people to undertake the charge? In the case of girls, I have been often willing to pay a very considerable sum, because I know how essential it is for their interest that they should have around them the protection of members of their own family of mature age who have an interest in their welfare, and who would guard them from the numerous temptations and dangers to which girls between the ages of sixteen and twenty-one are especially liable. It by no means follows that it was not a proper thing, and not the best thing in the world, to pay to the stepfather more than the cost of the infant's maintenance and education, in order to procure for her the right to remain in his house, and to visit with his friends, and to enjoy the society and other advantages which are annexed to such a position. I think it is wrong to reckon up exactly the number of shillings, or the number of pounds, that the infant costs. You must look at the whole of the circumstances together, and say whether the allowance made was not a fair allowance. Looking to these circumstances, having regard to the evidence which has been adduced, and not saying a word against the desire to tell the truth on both sides (I think probably some deduction should be made from the statements of both sides), I do not think the court would have hesitated for one moment in granting this allowance of 140*l.*, or thereabouts, for the maintenance of the young lady until she attained the age of twenty-one. I think it not only not an unfair allowance, but a fair and moderate

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allowance. Therefore I think that the chief clerk's certificate must be affirmed with costs.

From this decision the plaintiff appealed.

*Waller, Q.C. and Bunting* for the appellant.—On the death of one of the trustees the order for payment to the mother came to an end. [COTTON, L.J.—A power given to two persons comes to an end by the death of one; but this is a positive direction to do an act involving no exercise of discretion.] At all events, the order for payment came to an end on the mother's marriage. A fresh application should then have been made to the court. The Master of the Rolls was wrong in treating this as a case of prospective maintenance; it is a case of past maintenance, and *Bruin v. Knott* (1 Ph. 572) applies. That case shows that in allowing past maintenance the court cannot allow more than has been actually expended for the benefit of the infant. The inquiry leaves the question open whether the whole income has been expended on the infant, and our evidence shows that it has not, that she was maintained and educated for a much smaller sum, and that a large portion of the income went to the general expenses of the household or for other purposes which did not benefit the infant.

*Rosburgh, Q.C. and Russell Roberts*, for the surviving trustee;

*Chitty, Q.C. and Crossley*, for the representatives of the deceased trustee; and

*Marten, Q.C. and Phillpotts*, for the mother, were not called upon.

BAGGALLAY, L.J.—At the hearing of this cause the Master of the Rolls directed an inquiry whether the whole of the income as from the 4th March 1861 was, under the circumstances, proper to be allowed for the maintenance and education of the plaintiff. This inquiry has been answered in the affirmative, the certificate has been confirmed by the Master of the Rolls, and I entertain no doubt that he was right in dismissing an application to vary it. The circumstances of the case are peculiar. The order made by Stuart, V.C. in 1853 was one quite in accordance with the practice of the court. Where the mother of an infant has no means the court will grant her an allowance out of the infant's income beyond what would be the expense of having the child maintained by a stranger, it being considered to be for the benefit of the child that it should reside with the mother, and that the allowance should be of such an amount as to make this practicable. The order directed that the whole income should be allowed for the plaintiff's maintenance and education, and directed the trustees to pay it to the mother for that purpose until the infant attained twenty-one, or until further order. One trustee died in 1861, and the survivor continued to make the payments. A suggestion has been made that the order ceased on the death of one of the trustees, because it was an order upon the two. It is not, in my opinion, necessary to decide that question; for if a surviving trustee goes on making payments which the two have been ordered to make, without any discretion being given to them, he ought, in my opinion, to be indemnified in respect of the payments so made by him. A more serious question is whether the order did not cease to be operative upon the mother marrying. I am of opinion that it did, and that the

proper course would have been for the surviving trustee, or the next friend, to bring the case before the court. We must then consider what the court would probably have done if the matter had been brought before it. The court had thought it right during the child's early infancy to allow the whole income, having regard to its being for the child's benefit to live with the mother. Suppose the mother had died, and a proposal had been made that the child should be placed with a married woman whose husband was in the same social position as Captain Weatherley, and that the whole income should be allowed for the child's maintenance and education. I think the court would have sanctioned such a scheme as being for the infant's benefit. If in such a case the court would have allowed the whole income, would it not have done so in the case, which happened, of the mother marrying a gentleman of good position but small means? The advantages the infant enjoyed in his house, where it is shown that she was treated with great kindness and brought up as a lady, could not have been obtained if only a sum sufficient for her bare maintenance had been allowed. I collect from the judgment of the Master of the Rolls that this was his view when he directed the inquiry in the decree. We, however, have now only to deal with the answer to that inquiry; we cannot consider whether the inquiry is in the proper form, as there is no appeal from the order directing it. *Bruin v. Knott* (1 Ph. 572) has been referred to, but I am not sure that it is applicable. In that case the mother had applied money for the child's maintenance without any authority. She might not have expended as much as the court, if applied to, would have allowed, and if she had not expended the whole there was no reason why she should be allowed the whole. Here there is no doubt that the whole sum was expended, for it is not attempted to show that the mother made savings out of it. We must proceed, then, on the footing that the whole was expended in keeping up the establishment of the mother and stepfather, of which the plaintiff had the benefit. Did the plaintiff thus receive a benefit which she would not have had if confined to the sum necessary to be expended directly on herself? It appears to me that she clearly did, and that the course of proceeding adopted was to her advantage. There was an irregularity in not applying for directions on the mother's marriage, but I think that the expenditure was such as the court, if then applied to, would have sanctioned, and that neither the trustee nor the persons to whom he paid the income can be held to be subject to any liability in respect of it.

BRETT, L.J.—The inquiry under which the certificate before us was made was directed after the whole income had been expended without the sanction of any order that remained in force, the order having become inoperative by the marriage of the mother, and it is therefore an inquiry as to past maintenance. It appears to me, whether *Bruin v. Knott* (*ubi sup.*) supports that view or not, that there must be a great difference between the cases of future and past maintenance. In the first case there cannot be any inquiry as to what has been expended, but only as to what ought to be allowed to be expended. In the second case two questions arise: first, what would the court have allowed? and, secondly, what amount has



been expended? The court cannot allow the trustee all he has expended if he has expended more than it would have sanctioned; and it cannot allow him as much as it would have sanctioned if he has not expended so much. One phrase may comprise both or only one of these questions. "What is proper to be allowed" may mean "What do I now judge that the court would have allowed if applied to at the time," or "What amount ought to be allowed to the trustee in passing his accounts." I take it in favour of the plaintiff that the inquiry in the decree meant what ought now to be allowed so as to include the two questions. If that is not the true construction of the order, the plaintiff is driven to the contention that the order left the wrong question to the chief clerk, which contention cannot be raised, as there is no appeal from the decree. But I take it, as I have said, to include the two questions. Now, on the evidence, it is clear that the money was expended. If any of it had been applied in making up a purse for the mother, the case would have been entirely different; but it is clear that the whole money was expended either in the maintenance and education of the plaintiff, or in keeping up the establishment of which she had the benefit. It is urged on her behalf that nothing ought to be allowed but what was directly expended on herself. That is not the right way of looking at the case; we must consider what the court would have allowed, having regard to the advantage of her living in a family in this position. I think the test proposed by Baggallay, L.J. is the true one. What would the court have allowed to secure to the young lady the advantage of being brought up in such a family as this, if they had been strangers? And I cannot doubt that the court would have allowed the whole income. The decision of the Master of the Rolls, therefore, appears to me clearly right.

CORROD, L.J.—The only question before us is, whether a right answer has been given to the inquiry. If that inquiry was not such as to leave it open to the plaintiff to raise some of the questions which have been argued, we cannot alter it. I give no opinion whether the case of *Bruin v. Knott* is applicable. The trustee in the present case paid the income of the plaintiff's property to the mother, under the mistaken idea that the order which had been made authorised such payment, which, after the marriage of the mother, was not the case. I give no opinion whether the inquiry directed by the Master of the Rolls was in substance the same as that of the Vice-Chancellor in *Bruin v. Knott*, or was to the same effect as that of the Lord Chancellor. I will assume that it was of the latter character. The money was expended for the purposes of the establishment of which the plaintiff had the benefit. If the mother had made a purse out of it, very different considerations would have arisen. It is clearly shown that the plaintiff was educated properly and brought up as a lady, in a way much superior to what was to be expected from the circumstances of her father, and the amount of her property. Then, adopting the principle of *Bruin v. Knott*, we have the question, was this money expended for the benefit of the infant, and was it properly so expended? I am of opinion that both questions must be answered in the affirmative, and that the decision of the Master of the Rolls is right. Having regard to the circumstances, I think the

income was expended in a way which the court would have sanctioned if an application had been made at the time of the mother's second marriage.

*Appeal accordingly dismissed with costs, liberty being given to apply at the Rolls for payment out of the estate of such costs as could not be recovered from the next friend.*

Solicitors: J. W. Hickin; E. W. Busby; Smith, Fawdon, and Low.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Friday, Dec. 6, 1878.

(Before JESSEL, M.R.)

#### Re SPURWAY'S SETTLED ESTATES. (a)

*Settled estates—Settled Estates Act 1877—Petition for sale of settled estate together with estate to which the testator was absolutely entitled—Opposition of contingent remainderman.*

*Where in the opinion of the court it would be more advantageous to sell a settled estate together with property of the testator to which he was absolutely entitled as one estate, the interest of a person opposing who was interested only in the event of four children all dying under the age of twenty-one years without having issue living at their death, held to be too remote for consideration.*

#### PETITION.

John Purlevant Spurway, who died on the 14th Aug. 1877, by his will dated 12th Aug. 1877, devised all his real estate to the petitioners upon trust for sale.

He left four children him surviving, viz., three boys and a girl, the eldest, a boy, being twelve years old and the youngest two. The testator was at his death seised in fee of real estate, and had a defeasible interest in other real estate called the Spring Gun estate under the will of his mother, who, by her will, in exercise of a power of appointment, devised the said estate (subject to the life interest of her husband) to the use of her son, the said J. P. Spurway, in fee, but if he should die without leaving any lawful issue either immediate or remote living at his decease, or having any such issue, if such issue should all die under the age of twenty-one years, and no one of them should have any lawful issue living at his or her decease, then to the uses therein declared in favour of her son William Henry Spurway, with remainder in certain events to the uses therein declared in favour of his son Edward Spurway in fee.

The Spring Gun estate consisted of a large house and about 165 acres of land. The other real estate of the said J. P. Spurway consisted of about 300 acres adjoining or intermingled with the Spring Gun estate. In some places J. P. Spurway had caused the hedges separating the Spring Gun estate from his other real estate, so that the fields belonging to the one were thrown into one with the fields belonging to the other.

The petition was presented under the Settled Estates Act 1877, and asked that the Spring Gun estate and the other real estate of the testator should be sold together, on the ground

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

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that a greater price would be thus obtained than if they were sold separately, and that such a sale would be to the advantage, not only of those who were interested in the will of John Purlevant Spurway, but also of all who were interested in the Spring Gun estate. It was also prayed that an apportionment should be made of the purchase money.

The petition was served on William Henry Spurway and Edward Spurway.

Evidence was adduced on behalf of the petitioners to show that the value of the estate would be depreciated if it were sold separately, and contrary evidence was given on behalf of the respondent W. H. Spurway.

*Davey, Q.C.* and *Whitehouse* for the petition.

*Chitty, Q.C.* and *Dryden* for the respondent, W. H. Spurway.—The respondent has an interest in the Spring Gun estate to justify his opposition, as it may devolve on him in case his brother's children should die under twenty-one without issue, which is not too remote a contingency. It is the case of a mansion house which was occupied by the testator, and has been a long time in the family:

*Ex parte Taylor*, L. Rep. 1 Ch. Div. 426.

*Skinner* for the other respondents.

JESSEL, M.R.—The ground upon which I decide this petition is very simple; it is, that though the respondent might have had something to say if he had had sufficient interest, his interest is so slight that I may safely and properly disregard it. According to the view of the petitioners, and also according to my own view, it is more advantageous to sell the two properties together than to sell either of them alone; and therefore I ought to direct a sale, as requested by the petitioners, of the whole as an entire estate. If the properties are sold separately, you have a large house or mansion, with only 165 acres of land. The testator occupied with that 165 acres 350 acres more, in all nearly 500 acres. If I sell a good house or mansion with nearly 500 acres of land, I sell a very eligible residential property. If I sell such a house—the larger it is the worse for this purpose—with only 165 acres, and sell away the other land, it appears to me that I am not so likely to obtain an advantageous price. In my opinion it is very beneficial to the owners of the fee simple to sell the two estates together. Of course I can arrange an apportionment of the price by a reference to chambers. This is said to be a family mansion, but it is not really so. The whole property, consisting of the house and the 165 acres, were only purchased in 1846, and it is not entitled to the name of a family mansion in the sense in which there is anything in the nature of a *pretium affectionis*. It is in fact nothing more than a residuum which one or two members of the family want. The next objection is that the contingent remainderman says he should like to keep it. In a proper case his views ought to be attended to; but in my opinion this is not a proper case. His interest is too remote for his views to be regarded to the detriment of the petitioners, whose interest in the property is a substantial one. How does the matter stand? The estate in question belonged to a testator in fee, subject to a gift over in case of his dying without leaving issue at his

death, which has not happened, or leaving such issue, if they should all die under twenty-one, and none of them should leave lawful issue living at his or her death. What is the state of the family? He has left four children—three boys and a girl; the eldest twelve years old, the youngest two. It is a shocking thing to contemplate that all these children should die under twenty-one years of age; besides there is the possibility of the girl's marrying, and dying under twenty-one leaving a child. It is, of course, not impossible that this contingency should happen, but it is very remote, far too remote, in my opinion, for me to consider the interests of the contingent remainderman. I had a similar case before me some time ago; a case of strict settlement. In my opinion, there is no difference between this case and a case of strict settlement. The chance of the remainderman's getting possession is exactly the same. In that case there were four tenants for life, with remainder to their children in tail, and in default of issue, over. The position of the remainderman in that case would certainly not be better than in this case. There is, in my opinion, no substantial distinction. It makes no difference whether the gift is on the dropping of four lives without issue living at their death, or on the dropping of four lives with failure of issue. This respondent, therefore, is strictly in remainder. That being so, I may safely and properly disregard his interest, and make the order as asked. The question of apportionment will go to chambers, and the respondent will have liberty to attend in chambers; the apportioned price of the settled money will be paid into court.

Solicitors: *Robinson, Preston, and Stone; Kingsford, Dorman, and Kingsford.*

Saturday, Jan. 25.

(Before JESSEL, M.R.)

BENNET v. BENNET.(a)

*Parent and child—Widowed mother—Advancement—Loan or gift.*

*There is no such legal presumption that money advanced by a widowed mother to her child is intended as a gift and not as a loan as there is in the case of a father; as there is no such legal obligation upon her to maintain and provide for her children. The question is one of evidence in each case.*

*Where a widowed mother mortgaged her jointure and insured her life in order to make an advance to her son, and the son paid the interest on the sum borrowed, and the premiums on the policy:*

*Held, that a loan was intended and not a gift.*

*Sayre v. Hughes* (18 L. T. Rep. N. S. 347; L. Rep. 5 Eq. 376) considered.

THIS was an adjourned summons taken out in an action for the administration of the estate of Philip Bennet by his mother Ann Bennet, by which she claimed to be a creditor of the estate in the sum of 3000*l.* which she alleged she had advanced to her son without security. The advance was not denied, but it was alleged that it was by way of gift, not loan.

By her affidavit Mrs. Bennet stated that, after the death of her husband in 1866, it was found.

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

necessary to raise money for the discharge of certain of his liabilities. The amount was so large that the interest upon it would materially have diminished the son's income, which was derived from a settled estate upon which the sum was charged. Under her marriage settlement she was entitled to a jointure of 1000*l.* a year, and she consented to have the jointure reduced to 600*l.* and to occupy the house, and have the use of the furniture in consideration of the remaining 400*l.*

In 1868 the son desired to raise 3000*l.*, and to enable him to do so Mrs. Bennet insured her life for that sum, and mortgaged the policy and her jointure to the insurance office, the son undertaking to keep down the interest and to pay the premiums. The whole 3000*l.* was paid to the son, and he paid interest and premiums, his mother continuing to reside in the house and to receive her jointure of 600*l.* a year. The son was married, and kept a separate establishment. He died in July 1875, insolvent, and since his death Mrs. Bennet paid the interest of the loan and the premiums. She now claimed to be a creditor of her son's estate for 3000*l.* with interest at 5 per cent.

*Herbert Lake* for the summons.—This is a clear case of loan, and not of gift. The doctrine of advancement does not apply as between mother and child, but is confined to the case of a father.

*H. A. Giffard*, for a creditor, who had obtained conduct of the proceedings.—The doctrine of advancement applies to a widowed mother as much as to a father:

*Lewin on Trusts*, 6th edit., p. 158;

*Sayre v. Hughes*, 18 L. T. Rep. N. S. 347; L. Rep. 5 Eq. 376.

JESSEL, M.R.—The first question is, what is the law upon the subject? for I must confess to being embarrassed by the authorities. The doctrine of equity is, when one person stands in such a relation to another that there is a moral obligation on the one to provide for the other, and there is an investment by the one in the name of the other, or in their joint names, of an amount to constitute something like a provision for that other, a presumption arises of an intention to discharge that obligation. The presumption of gift arises from the moral obligation to give. This principle reconciles all the cases upon the subject but one; and it is well established that a person, not the father of a child, may put himself *in loco parentis*, and so incur the obligation as if he was the father. But what does the term *in loco parentis* mean? I cannot do better than apply the definition of Lord Eldon in *Ex parte Pye* (18 Ves. 140), referred to and approved by Lord Cottenham in *Powys v. Mansfield* (3 My. & Cr. 359). Lord Eldon says, it is a person "meaning to put himself *in loco parentis*—in the situation of the person described as the lawful father of the child." Upon this Lord Cottenham observes: "But this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference—viz., to the office and duty of the parent to make provision for the child; the office and duties of a parent are infinitely various, some having no connection whatever with making a provision for a child, and it would be most illogical, from the mere exercise of any such offices or duties by one not the father, to infer an intention of such person to assume also

the duty of providing for the child." So that a person *in loco parentis* means a person taking upon himself the duty of a father in making a provision for his child. It is clear, therefore, that the presumption arises from the obligation, and the doctrine can have reference only to the father's obligation to provide for his child and to nothing else. There is no necessity to prove the father's obligation, for that arises from his being the father. In the case of the father you have only to prove that he is the father; in the case, however, of a person *in loco parentis* you must show that he took the obligation on himself. But in our law there is no moral or legal obligation—I cannot express it more shortly—on the mother to provide for her child. A court of equity recognises none such. From *Holt v. Frederick* (2 P. Wms. 357) downwards it has been held that no such obligation exists, and therefore, when a mother makes an advance to her child, that does not in itself afford a presumption that a gift was intended, because equity does not presume an obligation to make the gift. But there is a decision of Stuart, V.O., the other way, *Sayre v. Hughes* (*ubi sup.*) decided in 1868, although there was a prior decision of the Court of Appeal in *Re De Vieme* (2 De G. J. & S. 17), in which the law is assumed to be as I have stated it. The latter was the case of a married woman living apart from her husband. Whilst so living she invested the savings of her separate estate in the joint names of her son and daughter. She died, having appointed her daughter executrix. The son became a lunatic, and the daughter presented a petition for the transfer to her of the whole fund as executrix. The petition was unopposed, and the counsel for the petitioner said this: "In *Re Collinson* (3 De G. M. & G. 409), where a father had made investments in the name of his son, Lord Cranworth, though he held them not to be intended as an advancement, declined to act upon that view without a bill being filed. I submit, however, that such a course is not necessary here, there being no presumption that a purchase by a mother in the name of a child is intended for an advancement, though such a presumption does arise when the purchase is made by a father." Upon that their Lordships made the order; that is, they made it on the ground that the presumption did not exist in the case of a mother, and therefore no suit was necessary to inquire whether such a presumption could be rebutted. That decision was in 1863. In *Sayre v. Hughes* (*ubi sup.*) Stuart, V.O., says this: "It has been argued that a mother is not a person bound to make an advancement to her child, and that a widowed mother is not a person standing in such a relation to her child as to raise a presumption that in a transaction of this kind a benefit was intended for the child. But the case of a stranger who stands *in loco parentis* seems not so strong as that of a mother." That is not the question; there is no rule upon the point of strength. The question is one of equitable obligation. Then the Vice-Chancellor goes on: "In the case of *Re De Vieme* (*ubi sup.*) it was said that a mother does not stand in such a relationship to a child as to raise a presumption of benefit for the child. The question in that case arose on a petition in lunacy, and it seems to have been taken for granted that no presumption of benefit arises in the case of a

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Re THE GLOBE NEW PATENT IRON AND STEEL COMPANY (LIMITED).

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mother. But maternal affection, as a motive of bounty, is perhaps the strongest of all, although the duty is not so strong as in the case of a father, inasmuch as it is the duty of a father to advance his child. That, however, is a moral obligation and not a legal one." That is not quite right; it is a moral obligation known to courts of equity. The Court of Appeal only decided that there was no such obligation on a mother's part as the court could take notice of. The Vice-Chancellor's argument then falls to the ground; the only question is whether the presumption is a presumption of law. I may say that I should have had no hesitation in deciding *Sayre v. Hughes* in the same way as the Vice-Chancellor did upon the evidence, but not irrespectively of the evidence. We arrive, then, at this conclusion, that in the case of a widowed mother it is easier to prove a gift than in the case of a stranger. In such a case very little evidence is wanted beyond relationship. In the present case there is strong evidence that a loan and nothing else was intended. The circumstances stated shortly are these: A widowed mother has a jointure of 1000*l.* a year. She made an arrangement with her son, who was entitled to the income of the estate on which the jointure was charged, to accept a reduced jointure of 600*l.* a year, in return for which she was to have the use of the house rent free. The son, being in difficulties, wanted 900*l.* Not being able to get it on his own security, he applied to an insurance company, which agreed to lend it on a mortgage of his mother's jointure, and a policy on her life. The money was paid to the son, who himself paid the premiums and the interest on 3000*l.* during his life. Unfortunately for the mother, the son died in her lifetime insolvent, upon which the insurance office called upon her to pay the premiums, and she claims to prove against her son's estate for 3000*l.* This is certainly as little like a gift as possible. The mother's object was to provide for the repayment of the money which was borrowed for the son's benefit, and it was no doubt anticipated that the obligation would be discharged upon the very probable event of the mother's death in the son's lifetime, when the company would pay the money in the usual way. This transaction, therefore, has every characteristic of a loan, and not of a gift, and I cannot accept the argument that it was a gift, and the mother is entitled to prove for the 3000*l.* against the son's estate. As to the unpaid interest at 5 per cent. as fixed by the mortgage deed, there is sufficient evidence of a contract to pay 5 per cent, and the mother is entitled to prove for interest at that rate.

Solicitors: *Lake, Beaumont, and Lake; W. and A. Ranken Ford.*

Saturday, Jan. 25.

(Before JESSEL, M.R.)

Re THE GLOBE NEW PATENT IRON AND STEEL COMPANY (LIMITED). (a)

*Company — Director — Trust — Mortgage deed — Debentures — Companies Act 1862, s. 43.*

*A deed was executed in favour of trustees who were not directors of a company, charging all the property of the company in favour of the holders of debentures issued thereunder.*

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

*The trustees were not directors; but certain directors held debentures.*

*The liquidators asked that the debentures held by directors should, under sect. 43 of the Companies Act 1862, which imposes a penalty on the officer of a company who omits to register a mortgage or charge on the company's property, be declared void, and the money secured thereby distributed among the general creditors.*

*Held, that the debentures created no charge on the company's assets, but derived force simply from the mortgage deed; that there was nothing to show that the directors "knowingly and wilfully authorised or permitted" the omission to register; and that there was nothing in the Act and nothing in the general principles of equity to deprive these directors of their charge.*

*It is the function of equity to relieve from penalties and not to inflict others in addition to those imposed by an Act of Parliament.*

*Re Wynn Hall Company (23 L. T. Rep. N. S. 348; L. Rep. 10 Eq. 515; Ex parte Valpy and Chaplin, 26 L. T. Rep. N. S. 228; L. Rep. 7 Ch. 289); Re Native Iron Ore Company (34 L. T. Rep. N. S. 777; L. Rep. 2 Ch. Div. 345), discussed, and held not to apply.*

#### ADJOURNED SUMMONS.

A large number of debentures were issued by the company and secured by a deed mortgaging all the property of the company to trustees for the debenture-holders; some of these trustees were directors of the company; but some of the directors were debenture-holders, and the liquidator sought to avoid these debentures under the 43rd section of the Companies' Act 1862, on the ground that neither the debentures nor the mortgage deed had been registered pursuant to that section.

The trustees had realised the property secured by the deed and debentures, and the liquidator asked that the amount realised should be paid over to him as assets to be distributed among the general creditors of the company.

*Romer (Chitty, Q.C. with him) for the liquidator.*—Each debenture ought to have been registered. The Act requires that the "names of the mortgagees or persons entitled to such charge" should be entered on the register; and these directors are obviously entitled to the charge created by the debentures which they held, although the company's property is mortgaged by the trust deed. It is true that non-registration does not in itself avoid the charge, as that would involve injustice to persons advancing money who had no means of seeing that the registration was effected. But it is inequitable that directors or other officers of a company should have the benefit of a concealed charge, which it is their duty to register, to the detriment of the general creditors. No doubt there is a penalty on the officers of the company for not registering, and as a general rule when a penalty is fixed, no other loss or damage is to be inflicted. But the penalty applies when charges in favour of third parties are created, and an officer of the company is not to be allowed to neglect his duty at the price of paying the penalty. If he had a charge in his favour, it might be well worth his while to pay the penalty if he could keep his charge. The question is amply covered by authority. See

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*Re Wynns Hall Company*, 23 L. T. Rep. N. S. 348; L. Rep. 10 Eq. 515;  
*Es parte Valpy and Chaplin*, 26 L. T. Rep. N. S. 228; L. Rep. 7 Ch. 289;  
*Re Native Iron Ore Company*, 34 L. T. Rep. N. S. 777; L. Rep. 2 Ch. Div. 345.

*Davy, Q.C.* and *Bodwell*, for the director debenture holders, were not called upon.

JESSEL, M.R.—I have no reason to complain of the mode in which this case has been argued by Mr. Romer. He is perfectly well aware of my view of the decisions of the appeal court on this subject; and he is perfectly well aware, as I have already said in the case of the *Borough of Hackney Newspaper Company*, that they are decisions which I probably should not myself have made if the decisions had rested with me. It by no means follows from that, that the decisions are wrong, or that I should not have been wrong in not having made them. It only means that, so far as I can gather the meaning or opinions of the judges who gave those decisions, I do not concur with them in opinion. That would not at all make me the less bound to follow the decisions if I could extract a principle from them. I take it to be the duty of every judge of first instance, to implicitly follow the decisions of a court of superior rank, and that means this: if a principle is laid down, he is to follow out that principle to its full extent. If he cannot ascertain any principle at all, then of course he must follow the case when it directly applies, but he is not bound to follow the dictum of any one of the judges, but merely the decision; and try to apply his mind to find out the reason for the decision, and discover a principle. Beyond that he is not bound to follow them at all. That becomes all the more important when he thinks there is an Act of Parliament quite plain and quite clear, the provisions of which have not been followed by the court whose decision he is asked to follow. He must then be satisfied either that there is some equitable principle, or that the court has applied its mind to the construction of the Act, and has put upon the section some construction which, of course, he would then be bound to adopt; but when he can find neither—when he can find neither a general principle of equity laid down, nor any evidence that the court above has construed the Act of Parliament, he must do his best to find out the meaning of the Act of Parliament for himself. The case before me is a simple one. A mortgage is made by a company to secure a loan. That loan is not to be raised from one person, but a good many; and therefore the mortgage is made to two persons as trustees for the lenders to secure the payment of certain documents which are called debentures, in the hands of the bankers. There were a great many debentures. The trustees of the deed were not officers or directors of the company, but some of the lenders were; at least one of them was a director of the company, and in his case I am called upon to decide. A debenture was issued to him in the form specified in the deed which, as I read it, is not a mortgage or charge on the property of the company. It states a loan, contains a promise to repay, and then states that the sum in question is part of the sum secured by the mortgage. It does not, therefore, create the charge itself. It merely recites that it was a sum secured by another charge or mortgage. Under those circumstances

I am asked to say that the director, who has advanced his money *bonâ fide*, and got his mortgage, loses his security, and for this reason. It was not his duty to register. He was not the registrar nor secretary of the company liable to do so. He was a director, and it is a duty cast on the directors by the section of the Act of Parliament which relates to mortgages. Now, I take it to be plain, that the Act of Parliament does not affect the mortgages. On that point all the appeal judges who have expressed an opinion agree. The mortgage is, therefore, valid. Is there anything to avoid the mortgage *pro tanto* as against a particular director; because that is what it comes to? This is going far beyond any decided case. There is no decision that I can find which, when a security is valid, avoids a portion of it only against the directors. Now nothing can be better established than what the equitable principle is. If a man has a charge or mortgage on the property of another, and he lets a third person advance his money on the security of the property, knowing that a third person advances it under the belief that the property is free from incumbrance, and he stands by and does not tell the third person, then he is a party to a fraud, though he does nothing except conceal, that is to say, he does not state what he ought to state, and he is not allowed in equity to take advantage of his security, for if it would enable him to take advantage of a fraud he would allow a third person to advance his money, knowing that person was under the belief that there was no incumbrance. That is intelligible. The case goes a step further, when the owner of the incumbrance represents the property free from incumbrance—that is a stronger case than merely concealing, but it is on the same principle, and it is a fraud on the person advancing his money. If, therefore, it was the duty of the director to enter it in a register, and if the effect of not entering it would be a representation to the ordinary general creditors that there was no mortgage, I can understand the principle which would say that the director would lose the benefit of his security; but that cannot be so. The moment it is settled that there may be a thousand mortgages in favour of strangers, which are perfectly valid, although not registered, the mere fact of there being no entry in the register, would not at all show that the general creditors would give credit to the company. There is no pretence under the general rules of equity, for saying that any one of these creditors who advanced his money was in any way deceived. There is not a particle of evidence to show that one even believed that in the absence of the register there was no mortgage. If, therefore, there was no statute and no decision, I should have said that equity would not deprive this gentleman, who *bonâ fide* advanced his money to the company, of the benefit of his security. So much for the general law. Now I will come to the statute law on the subject, and see if that makes any difference. The statute law is contained in the 43rd section of the Companies Act of 1862: "Every limited company under this Act shall keep a register of all mortgages and charges specifically affecting the property of the company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the

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names of the mortgagees or persons entitled to such charge." That is a direction to the company, but directing a company to do a thing is of very little use, unless you go on to say who is to do it. Then the section goes on, "If any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company who knowingly and wilfully authorises or permits the omission of such entry shall incur a penalty not exceeding 50*l*." Then there is a direction that the register shall be open to the inspection of creditors and members of the company. What does that mean? That section shows the property may be wholly mortgaged and charged without being entered, for it not only does not affect the mortgage, but talks of property being mortgaged and charged without being entered, and if the mortgage or charge was not a good one, the omission would not hurt anybody but the mortgagee himself. But other persons are entitled to know what is going on. Members of the company, for instance, are entitled to know the company's proceedings; and it is not only open to creditors but members are entitled to see the book. Now what does the Act say? It says, "every director or manager of the company authorising or knowingly and wilfully permitting such refusal, shall incur a penalty not exceeding 5*l*." Now I am going to give my interpretation of this section which is probably wrong, because it is not the same interpretation which seems to follow from some of the cases which I am going to cite presently; because as I said before, there is no authentic interpretation. A director is one of the managing partners in the concern. The next one is the manager. He is the man who has the control of the business. The next one is "other officer of the company who knowingly and wilfully authorises and permits the omission of such entry shall incur a penalty not exceeding 50*l*." What other officer? It is an officer who has some authority. What authority? Authority to direct the omission. He is a man, therefore, who has some control. Then, again, there is the word "permits." A man cannot permit an omission by not interfering. He must be a person having some authority over the matter. Again, you do not permit a thing to be done unless you can prevent a thing being done, as I understand the English language. Therefore, whoever the officer is, it is an officer. That points to the solicitor who is generally the secretary. There may be another officer, but to my mind it does point out clearly that whoever the man is who is liable to the penalty, it must be a man who can authorise or permit the omission; and the penalty is not exceeding 50*l*. If, therefore, the Act of Parliament is to be read as I read it, it seems to me, speaking for myself alone, to be clear beyond reasonable controversy, that the mortgage or charge remains valid; and that the utmost penalty you can exact is not to exceed 50*l*., and you can only exact it from the director, or manager, or some other officer who has the power to authorise or permit the omission in the register. That is the only other officer who is liable, and beyond that the section has no force whatever. If that is so, then non-registration of the mortgage does not affect its validity, and to deprive the director, manager, or such other officer as I have mentioned, of the benefit of the security, supposing that security secures him more than 50*l*., is

directly contrary to the reading of this enactment. Then I come to the next question, is it true that in addition to the Act I have mentioned, there is an equity, superadded to an Act of Parliament, that if a man does not obey it he forfeits all his rights which are otherwise given him by the law? I am not aware of any such rule. That would be adding to the Act of Parliament, and would not be a superadded equity. If a man is directed to do an Act, and does not do it, and is made liable to a penalty by Act of Parliament, equity has no right to add an additional penalty; on the contrary, the ordinary principle of equity is to relieve from penalties and forfeiture, but in no case that I know of, to inflict them. Therefore, there not being any general principle with which I am acquainted, and no special equity, and nothing in the Act of Parliament, if this were a matter *res integra* and there were no decisions, I should say that the point was not fairly open to argument. Of course I should be wrong, because not only has that been argued, but decided. Now I must come to the reconsideration of the authorities which bear on this subject. The first was a case decided by Malins, V.C. That is not binding upon me, because I have dissented from it before, except so far as it has been adopted by the Court of Appeal, and it has been adopted as I will show presently. That is the case of *The Wynn Hall Coal Company* (23 L. T. Rep. N. S. 348; L. Rep. 10 Eq. 515) the head note to which is this: "In the winding-up of a company registered under the Companies Act 1862, directors will not be allowed to set up against the general creditors a mortgage of or charge on the property of the company not registered pursuant to the 43rd section of the Act." It is rather a long judgment; and in it the Vice-Chancellor says: "But can the directors stand as mortgagees? I think that it is a fatal objection to any such claim on their part, that they have omitted to register their mortgage or charge in the register of mortgages, which they were required by the 43rd section of the Companies Act 1862 to keep. The object of that section is, that a person who is about to have any dealings with a limited company may go and inspect the register of mortgages and charges." Here again I have the misfortune to differ. It has, no doubt, regard to any creditor or member of the company. But, as I understand, the creditor must be a creditor before he can look at it. It is not a man who is going to become a creditor. He has no sort of right to look at it. The words of the section are. "The register of mortgages required by this section shall be open to inspection by any creditor or member of the company at all reasonable times." A man about to lend money to the company, or to sell goods to the company, has no right to inspect it. I can see what the object of the thing was. It was that persons interested in the company already, either by being creditors or members, might know how the company's business was being carried on. It is not a right given to a person about to deal with the company; and therefore, speaking with great deference to the Vice-Chancellor, I cannot agree with him. I daresay I am wrong in my opinion, because I differ from so many judges. He says, "If he finds the property of the company heavily incumbered he will probably not have any dealings with them." His reason, in my views, does not apply to the

section at all. Then the Vice-Chancellor says, "It is not necessary that I should go into the question, whether a mortgagee of the property of a company who does not see that his mortgage is registered, is entitled to set up the mortgage against the unsecured creditors." That has been decided the other way. What is the mortgagee to do? He cannot register his mortgage until after it is executed; and in the ordinary case where the Registration Acts avoid the mortgage, if it is not registered, those Acts allow the mortgagee to register. That is perfectly intelligible—it is his own fault. Under this Act it is the company who is to register—that is, the mortgagor; and it would, it appears to me, speaking deferentially, be a monstrous thing to hold that, where it is the duty of the mortgagor to re-register, the mortgagee who cannot do it is to lose his security because the mortgagor did not do it. Then the Vice-Chancellor says: "In this case the mortgagees are the directors, who have committed an illegal act by not registering the mortgage." What is an illegal act by not registering? It is an omission to do an act. How can it be an illegal act? The Act says they shall do a thing; and if they do not do it, it may be illegal not to do it, and they are subject to a penalty. Then, says the Vice-Chancellor, "Upon the strict construction of the language of the Act I think that they are precluded from setting up the mortgage." Consequently this decision was founded not upon the general principle of equity, which a Lord Justice thought was settled, but upon what the Vice-Chancellor terms a strict construction of the language of the Act. Upon this point the Lord Justices differed from him, as I shall show presently. They did not go upon the construction of the Act. There is not a syllable in the Act beyond what I have read affecting the mortgage in any way, and, as I read it, there is nothing of the sort to be found in it; but there again I suppose I am wrong. Then, says the Vice-Chancellor, "But independently of the language of the Act, I am of opinion that upon general principles" (now we get to general principles after the decision on the Act of Parliament) "it cannot be permitted that directors who get a charge on the property of the company, and who omit to register it, but keep it as a pocket security concealed from the creditors, should set it up against the general creditors." That does state a general principle, but the virtue of the general principle is in the word "concealed." Concealing a thing means not stating it when there is a duty to state it; and I do not find any fault with the statement of the principle if the Vice-Chancellor put the proper meaning on the word "concealed." If a man conceals from another an incumbrance, there must be on him a liability to discover it, and, therefore, he is a party to a fraud, as I have explained before, if he does not state it. Then the Vice-Chancellor goes on: "I think, therefore, that there has been, on the part of these directors, such a degree of negligence that I cannot allow them to stand as mortgagees under these resolutions." That is all. As I said before, there was no evidence of concealment because the creditor did not ask whether there was a mortgage or not. That would have been concealment. He did not inquire; and, as I have explained, he had no right to see the register of mortgages

until after he was a creditor. You could not conceal that from him which he had no right to inspect; and I entirely differ most respectfully and deferentially from the Vice-Chancellor as to there being any concealment in the absence of inquiry. Then, as regards negligence, what does that mean? How can a man lose a mortgage by negligence? Neglect to do what? It must be negligence to register; but if the negligence does not hurt you, why do you lose your mortgage? If the negligence hurts a third person that may be to his damage and injury, but why your neglect to take a precaution should deprive you of the benefit of the security is not explained by the Vice-Chancellor, because those are the only reasons I can find in the *Wynn Hall Coal Company's* case. Now, I will take the next case. After the decision in the *Wynn Hall Coal Company's* case there was a decision of the Vice-Warden of the Stannaries in the *Native Iron Ore Company*, which came before the Court of Appeal, and is reported in the L. Rep. 2 Ch. Div. 345; 34 L. T. Rep. N. S. 777. The head-note is this: "Three directors of a company advanced money to the company, and took, as security, a debenture giving a general charge on the undertaking. The debenture was registered, but the register contained no description of any property as charged." That was not in accordance with the 43rd section, which required it to state a short description of the property. It was, therefore, an insufficient registration, but it was a registration, and consequently if a creditor, who was actually a creditor, wanted to advance more money, and in that way would be entitled to look at it, he might have said it was insufficiently registered, but it was notice; and there was no concealment. Therefore, on the general principle of equity he could not have postponed the mortgage. Now, then, on what ground could he get rid of the mortgage? Only if the statute had avoided it, because there is no pretence of concealment in that case. However, the Vice-Warden of the Stannaries made an order, first declaring it good, and then he discharged it on the ground that the register was insufficient. That was appealed. Now, we come to the judgment, and Mellish, L.J., says: "I am of opinion that the decision of the Vice-Warden, in this case is perfectly right. It is an established rule that where a director or officer of a limited company advances money on the security of a debenture or mortgage of the company, and omits to register it in accordance with the Act, the consequence is that he has no charge against the creditors." Where did he find it established? There is literally a solitary decision of Malins, V.C. in that case of the *Wynn Hall Company*. [Bomer.—There was *Valpy and Chaplin's* case, 26 L. T. Rep. N. S. 228; L. Rep. 7 Ch. 289.] Yes, I should have said with the exception of a subsequent decision of the Master of the Rolls which was then under appeal and could not be said to establish anything. [Lawrence.—I think it was not, my Lord.] It was confirmed on appeal. It was before the *Native Iron Ore Company*, and, therefore, I should have taken it next in order. I will correct what I said because I find there were two cases, the case of the *Wynn Hall Company*, and the case before the late Master of the Rolls of *Ex parte Valpy and Chaplin* (*ubi sup.*) afterwards confirmed on appeal. It would



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be more convenient to take that first to see what the rule was. Then the second case in order of date is *Re Valpy and Chaplin*. That went to the Court of Appeal, and is reported in the 7th vol. of the Chancery Appeals, p. 289. This, I must say (speaking deferentially, and, no doubt, being entirely wrong), is about as extraordinary a case as I ever read in my life. The head-note is this: "A solicitor not usually employed by a company, was employed by them to act in a particular matter, and having required security for costs they gave him a charge on certain debts due to them. About five weeks after this a winding-up petition was presented on which an order was shortly afterwards made. The charge had not been registered. Held, affirming the decision of the Master of the Rolls, that though under the Companies Act 1862, sect. 43, the want of registration did not make the charge void, yet that the solicitor could not avail himself of the charge for that it was his duty, as being the solicitor of the company in this transaction, to see that the directions of the Legislature as to registration were obeyed." Now, the reason why I say that in my humble judgment that appears an extraordinary decision, is this. In the first place it did not appear that, during the five weeks there were any persons who even became creditors. It did not appear that he hurt anybody. Here was only a period of five weeks, and the company was already in extremis when he got his charge. If it had been avoided against a subsequent creditor, it would have been, to a certain extent, intelligible, although I still think erroneous. It was avoided altogether against people who had lent their money before, to whom it was utterly immaterial whether it was registered or not. In the next place Messrs Valpy and Chaplin were not officers of the company at all. Here, again, I speak with deference, because the point has been decided, not only by the judges of the Court of Appeal, but by judges who are entitled to be spoken of respectfully, from their eminence, even if they had only been judges of first instance, or judges of an inferior court. An officer of the company is an intelligible thing; but a solicitor is not an officer, nor is the company's solicitor, as a general rule. There are some companies who may make him an officer, and pay him a salary. The person employed professionally only gives advice, and acts when he is asked, and only obeys the directions and instructions of the clients when he is requested so to do; he is not an officer of the company as a rule. I say he may be so, because a solicitor is sometimes employed at a salary expressly as an officer; but as a rule he is an officer of the company, and to suppose that a gentleman, not the ordinary solicitor of the company—using the word "ordinary" in the ordinary sense, viz., the gentleman whose advice and assistance is usually sought, and who may hold a formal appointment—if in one particular matter he is asked to act for himself and the company, is to be treated as an officer of the company, is to give a meaning to the word "officer" which it does not ordinarily bear. I go beyond that; the question is whether he could in any sense be called an officer of the company, and I do not think he could. I am clear, so far as I can be clear about anything (and here again I speak with great timidity and trepidation), he is not an officer within the meaning of the 43rd section of the Act, whose functions

are clearly different from those of what I may call the casual solicitor of the company. He has no control over the register, and can neither wilfully authorise, nor wilfully permit anything as regards the register. Therefore, in that subordinate sense, I am satisfied he is not an officer of the company, as far as I can be satisfied of anything when an opposite opinion is entertained by judges for whom I have the greatest respect. That being so, I do not think this decision can be supported on either of these grounds. Now let me examine the decision to see what it is. James, L.J. says: "I agree with the argument for the appellant that there was power to give such a mortgage as this, and that it is not made void by want of registration." There is a valid mortgage. So far he takes the same view of the Act as I do, and differs from Malins, V.C., who thinks, according to the strict construction of the Act, the mortgage is void. Then he says: "But as it is the duty of the officers of the company to see that every charge specifically affecting property of the company is registered, I am of opinion that no director, manager, or other officer of the company can avail himself of a charge which is not registered." His words are "the duty of the officers of the company." What officers? Not the duty of the hall porter, not the duty of the running messenger, but the duty of the officer who has the charge of the register—the duty of the officer, part of whose functions it is to make entries in the register; that is, the officer—there may be more than one—but that is the officer meant, and that must be the officer to whom the Lord Justice refers. Then he goes on, "Every one standing in a fiduciary position towards the company is bound to see that the company obeys the directions of the Legislature." If that stood alone, I confess I should say I take an entirely opposite view; I agree that, every director, every manager is bound to obey the directions of the Legislature, that is, every man who can obey. The Lord Justice cannot mean that every trustee for the company of a bit of land, or of a sum of stock, is bound to see it. It is impossible that that sentence can be read in that way, and I cannot imagine that the Lord Justice intended to say, I own any such proposition. What has it got to do with it? Why is he bound to see? A man obeys the Legislature because he is the trustee for the company of some portion of the property. The persons bound to obey the directions of the Legislature are those to whom the directions are given. The company is to do it; and it is said that everybody also is bound to see that the company does. I have no idea why. Then the judgment goes on, "I am of opinion that the failure of the appellant to do so is fatal to his case." It did not fail at all. It was not his duty to register: it was not his duty even to give notice, because the company knows without notice by the mortgages of the mortgage. The mortgagor always knows of the mortgage, and the company, who knows of the mortgage, is bound to register it. No notice is required to be given. The company has notice, and more than notice—it has knowledge. What has the mortgagee got to do with it? If he left it for registration, it would not help the matter. It would only be notice, and they have actual knowledge, and they are bound to do it. How can their failing to perform their duty affect him? I am

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utterly at a loss to understand that. Then the Lord Justice says: "It makes no difference that he was not the regular solicitor of the company." I think not. I agree, the regular solicitor had no more to do with the registration than the casual solicitor. Then his Lordship says, "He acted as their solicitor in this matter." Now comes another sentence: "It was therefore his duty to see that, so far as this particular transaction was concerned, the register was properly kept." There I have the misfortune to differ entirely from the Lord Justice. How it could be his duty, as solicitor, to see anything about the register I cannot imagine. It was the duty of the proper officer of the company, who, of course, included the directors who knew of the mortgage, and could see the register; but how they could transfer that duty to the solicitors I do not for one moment understand. The duties of a solicitor are well known; but they do not include the duty of keeping the register of the mortgages of a company. It is quite enough for a solicitor to be answerable for negligence in the performance of his proper duties, without having additional duties cast upon him which he has never agreed to perform, and for the non-performance of which, in my opinion, he cannot be made liable. I find it so laid down, and therefore, if this was the case of the casual solicitor, I should be bound probably to follow the decision. It is not; it is the case of a director. It is not, as far as I can see, within the decision in this case, because he is not in a fiduciary position, except so far as being director, as such, is in a fiduciary position as the directors mentioned in the Act of Parliament, and therefore we do not want the authority of this case. Then his Lordship says: "The judgment of the Master of the Rolls proceeds on a wholesome principle"—now I am going to read the wholesome principle—"that a solicitor who allows the directors to omit the registration of a mortgage in respect of which he is acting for them shall not be allowed to take the benefit of it." That is called a "wholesome principle." What is the meaning of "allow?" "Allow" is like "permit." It only means, as I understand it, in English, that you allow or permit a thing to be done when you can prevent it. What has the casual solicitor to do with the register? How can he make the directors enter it, or not make them enter it? If he asks them to do it, it would be the utmost he could do. He could not make them do it. How could he allow them to omit it? I really do not understand it. Is it part of the duty of a solicitor, who takes a mortgage for them, to advise them to obey the 43rd section of the Act of Parliament? For myself, I think it is not. I see no obligation on him; it does appear to me, with great respect for the Lord Justice, that he has confounded two things—the omission to register when it is part of the solicitor's business, like registering a deed in the register of a county, and the registry of a deed when it is no part of the solicitor's business, but the business of other people, which he has nothing to do with. I think there is no principle, and therefore no "wholesome" principle, in it. I am quite unable to agree with that. If you bring me a case of a casual solicitor taking a mortgage which is not registered, I should be bound to follow that decision, and should follow it. Now let me say a little about the word "allow." The Act of Parliament has nothing

about "allow" except this, "knowingly and wilfully authorises or permits." If the Lord Justice had turned to the Act, he would have seen that "allow" would not do; it is "knowingly and wilfully." He must first of all know the intention of the directors not to register it. How can he tell that they neglect their business if there is no evidence of the kind? They must "knowingly and wilfully" do it. It does not appear to me that the mere fact of its not being done is evidence that it was "knowingly and wilfully authorised or permitted" to remain undone. I am utterly unable to understand it from beginning to end; and it follows, therefore, that I am utterly unable to extract a principle from it. As I said before, I wish to speak most respectfully of all judges, more especially of a judge of a Court of Appeal; and it is quite probable, more than probable, that I am entirely wrong and ought to understand the case better than I do. Now I come again to the case of the *Native Iron Ore Company* (*ubi sup.*); and the Vice-Warden there, without any evidence that I can find of anything being done "knowingly or wilfully," or anything of that kind, actually disallowed a mortgage when it had been registered, and by a slip the property had not been described. He was affirmed by the Court of Appeal. According to my view, nothing in the shape of injustice was ever more clearly perpetrated by those two decisions in the Court of Appeal. I will explain why I think so. The Act of Parliament directed a register to be made, and to contain a short description of the property. The main object of the Act of Parliament was, that the mortgage should be entered; and you could always inquire what was known of it, if you had notice of it. That is the main thing. It was to be a short description of the property mortgaged or charged. The amount of the charge created and the names of the mortgagees were there; but by a slip there was no description of the property. The Act of Parliament imposes a penalty on those who "knowingly and wilfully authorise," and nobody suggested that that was the case. It was a mere slip, and if they intended to comply with the Act of Parliament they, to a certain extent, endeavoured to comply with it, and instead of "wilfully and knowingly" omitting to do a thing, they made a slip. They did not want to keep anything back. They were not even liable to a penalty, as I read the Act of Parliament, because it would be a criminal offence with a penalty not exceeding 50*l.*, for "knowingly and wilfully authorising and permitting" the omission of such entry. As far as I understand, they were not liable to any penalty; and accidental omissions of that kind are not within the Act. There was nothing at all to affect them, as it appears to me. However, as I said before, no doubt that is all wrong, because the Court of Appeal affirmed the decision of the Vice-Warden, and affirmed it in this way. I will read what Mellish, L.J. says. My respect for his memory is so great that I should much hesitate to think he could make such a mistake, if I had not gone over these cases so often, and come to the conclusion to which I have come to-day, not for the first time. He says: "It is an established rule that, when a director or officer of a limited company advances money on the security of a debenture or mortgage of the company, and omits to register it in accordance with the Act, the con-

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sequence is that he has no charge as against the creditors." There is no such established rule, the only two cases being the *Wynn Hall Coal Company* (*ubi sup.*) and *Re Valpy and Chaplin*. Then he says: "The rule so established is, in my opinion, founded on a good equitable principle." I am sorry to say that not only have I been utterly unable to discover the principle, but every counsel whom I have asked, in every one of the cases argued before me—and this is either the fourth or the fifth—has been unable to tell me what the principle is. I think, therefore, there is none such; the only principles I am acquainted with on the subject being those I have already stated. Now is there such a rule? Really the Act of Parliament does not say, "omit to register;" but "wilfully and knowingly authorise or permit." Now what right, speaking deferentially, has the Court of Appeal to make a new Act of Parliament to substitute the word "omit" for those words? It does appear to me that there never was any such rule established; and it could only be established by an Act of Parliament, and the Lord Justice thinks it is established by some equitable principle. Then he says: "The question now raised is whether there is any distinction in principle between not registering a mortgage at all and registering, but omitting the essence of that which the Act intended to be stated on the register, viz., a description of the property intended to be charged." I do not know—it was no doubt a very important particular; but is it more important than the date, the names of the mortgagees and the amount advanced? It is one of the particulars and a very important one, an essential particular if you like; but it does not appear to me to be of the essence. Then his Lordship says, "It would be absurd to make such a distinction." There again I do not agree. There is all the distinction in the world between "knowingly and wilfully" omitting and making a slip in your entry, to my mind, and therefore I do not see the absurdity. Then his Lordship says: "Indeed the omission of the statement of the property charged would be more calculated to deceive than an omission to register at all." Deceive whom? I really am utterly at a loss to follow this. As I said before, there is one fact which does not appear to have struck the Lord Justice, which is, that a man must be a creditor before he can look at the register. Supposing a man was entitled to look at it before he was a creditor, is it true that a statement of a mortgage debt, the names of the parties, and the amount advanced is more likely to deceive the creditors than an omission to register at all? The only person is the person who is going to advance his money with or without security, and he would ascertain directly. In equity it would be sufficient notice. He would say, "You have a mortgage; what property does it affect?" As far as I understand it, the exact contrary of the proposition would be correct, and that he would not be deceived at all; and that is the whole of the judgment of Mellish, L.J. The next is the judgment of Baggallay, L.J., and he says, "I entirely concur in and adopt the language of James, L.J. in the case of *Ex parte Valpy and Chaplin*." Then he quotes these words, which I do not understand: "Every one standing in a fiduciary position towards the company is bound to see that the company obeys the direction of the Legisla-

ture." That language he adopts. As far as I am aware, as I have already said, there is no such obligation. A man is bound to obey the directions of the Legislature himself, but he is not bound to see that other people do so. Then his Lordship says: "In the present case the duty of these directors was to see that their debenture was registered according to the provisions of the Act." So it might have been. They are directors, and this is a case of directors and not of anybody else. Then his Lordship says, "The provisions of the Act are strict, distinct and precise." I think they are strict, for they are penal and I think they are distinct and precise. They were bound to see it done. I agree they were. Then his Lordship says: "*Re Wynn Hall Coal Company* was an exactly similar application, and it was decided in that case that the debenture holders had no lien." I do not think it was so, because in this case it was registered, although the register was imperfect. I have already commented on the words of the section "wilfully and knowingly." Then his Lordship goes on to say: "In the case of the *General South American Company* none of the debenture holders were directors; that is another case reported in the same volume (34 L. T. Rep. N. S. 202, 706; L. Rep. 2 Ch. Div. 337), where it was held that the section did not affect third parties." Then his Lordship says: "There also the register was not perfect; but the defect was held not to be the fault of the debenture holders, but of the directors, and the debenture holders established their charge—that is, the charge was not avoided by the neglect of the mortgagor to register the charge." That is all. Now I have dealt with every word of these judgments, because it is so important that a judge of first instance, however wrong he may think a decision to be, should not differ from it, but should always follow it. Now I have got to consider this case. I do not think the debenture was a charge. I think the mortgage was established as a security without being registered at all. The trustees for the mortgagees were entitled to the benefit of their mortgage. I do not think the debenture required registration at all, and therefore I think the directors were guilty of no offence in not registering it. Now then it comes to this, was he guilty of any offence in not registering the original trust deed? Then comes the question, is it found that he "wilfully and knowingly authorised or permitted" it? There is not a particle of evidence that he knew even it was not registered at all. The duty of the officer, the secretary, or whose ever duty it was to keep the register, was not performed. It is not shown that he knew anything about it; much less that he "knowingly or wilfully permitted" it. These are words imposing a penalty, making it a criminal offence. Am I to impute that this was "knowingly and wilfully" done without evidence, because it turns out that there is no entry in the register? I think not. I think, therefore, he did not commit an offence. It is not proved that he did upon the evidence; and I shall not assume it. Again, I say, in addition to that, the trustees had a duty to the *cestuis que trust*. Are they to be personally liable for not getting it registered? They could not register it. It was not their business, but the business of the company, the mortgagor. They are the trustees for this gentleman; and if he loses, he would have a

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right to resort to them. It is now sought to say, it is not void against every body else—a perfectly valid mortgage against the company, but void *pro tanto* as regards the amount held in debenture by this particular director. Why? If the theory is the theory of deception, third persons are not deceived more or less because it happens accidentally that one debenture is held by a director. What they have a right to call for, as I understand, according to the decisions, is registration of an original mortgage. I do not see why, if that mortgage is valid, and the trustees take the property under it, you can say they are not to pay a portion of it, according to the terms of the deed, to the debenture holders and every one of them merely because one of them happens also to be a director. I must therefore decide, expressing it in the strongest terms I can, speaking with all respect, as one ought to do, of the decision of any judge, and especially of the Court of Appeal, that there is no foundation for this application, and that it ought to be refused, as I do refuse it, with costs.

Solicitors: Milne, Riddle, and Mellor; Minet, Smith, Son, and Harvie.

Thursday, March 27.

(Before BACON, V.C.)

#### Re ROTHERHAM AND SONS' TRADE MARK. (a)

*Trade mark—Registration—Name of a firm in Arabic characters—Regulations by Commissioners of Patents—Direction to registrar to refuse registration—Ultra vires—Trade Marks Registration Act 1875 (38 & 39 Vict. c. 91), sects. 5 and 10—Trade Marks Registration Amendment Act 1876 (39 & 40 Vict.), sects. 1 and 2—Form of order.*

*The owner of a device in Arabic characters (which, before the passing of the Trade Marks Registration Act 1875, would have been a trade mark), which was impressed or printed on watches manufactured for the Eastern markets, applied for registration of this device. Registration was refused by the direction of the Commissioners of Patents on the ground that the symbol not being in English the commissioners had no means of verifying the applicant's statements that the symbols meant any particular word in any given language, and that they ought to know what it was they presented to the British public as a trade mark. On motion under sect. 5 of the Trade Marks Registration Act 1875, to rectify the register:*

*Held, that the applicant was entitled to have his device registered as a trade mark, and that the directions to the registrar by the Commissioners of Patents were ultra vires.*

**MORION.**

This was an application on behalf of Messrs. Rotherham and Sons, of Coventry, watchmakers, that the register of trade marks might be rectified by inserting therein the names of Rotherham and Sons as the proprietors of the trade mark advertised under the number 15543, in the *Trade Marks Journal*, of Wednesday, the 4th Dec. 1878, p. 678.

By an arrangement with Messrs. Tod, Müller, and Co., of Alexandria and Cairo, general merchants, Messrs. Rotherham and Sons had been in

the habit for the last fifteen years of manufacturing for, and supplying to, Messrs. Tod, Müller, and Co., watches with the letters T O D in Arabic characters, printed or impressed on the dials thereof. It was stated that the watches bearing this trade mark had gained a high reputation, and had a distinct value in the Eastern markets, and were known as the goods sold by Messrs. Tod, Müller and Co.

In Dec. 1878, application was made by Messrs. Rotherham to have this device registered under the Trade Marks Registration Acts, and a notice of this application was duly advertised. On the 30th Dec. 1878, Messrs. Rotherham and Sons were informed by the registrar of trade marks that the commissioners had, upon consideration of the mark claimed as the word "Tod," written in Arabic, decided that the same could not be accepted as a trade mark within the meaning of the Trade Marks Registration Act 1875. The reason for this refusal was stated in a subsequent letter of the registrar's as follows:

The fact of the name not being printed in English is what occasions the difficulty; the Commissioners of Patents have no machinery by which they can verify the statement that certain symbols mean a particular name in some given language. They think they ought to know what it is which they present to the British public as a trade mark, and therefore they feel obliged to direct the registrar to decline such a mark as that proposed in this instance.

The Commissioners of Patents offered to give Messrs. Rotherham and Sons a certificate of refusal under the Trade Marks Registration Amendment Act 1876, s. 2, so as to enable them to institute proceedings, if necessary, under sect. 1 of the Amendment Act to prevent any infringement of their trade mark. But, as a certificate of refusal could not have been equally beneficial in other respects, the present application was now made to the court. There was an affidavit by the editor and publisher of various classic Arabic books to the effect that the symbol proposed to be registered as a trade mark was an Arabic word which, if taken letter by letter would be represented in the English language by "Tod," and that the said word so set out and printed in Arabic did not signify or imply anything scandalous or improper in the Arabic language, and that it meant literally "a huge mountain," and was so used in the Koran.

Sir H. M. Jackson, Q.C. and Moloney for the motion.—The certificate of refusal under sect. 2 of the Trade Marks Amendment Act 1876, which the commissioners offer us, will not do, because, though it will enable us to protect our rights against infringement in England, it will not help us abroad, for foreign countries having similar registration Acts give no protection to an English trade mark, unless actually registered. But, further, we have a right to be registered. This symbol, the Arabic for Tod, is within the definitions of a trade mark given by sect. 10 of the Trade Marks Registration Act 1875. It represents the name of a firm, our agents for the Eastern market. If it were in English characters, the registration, as the registrar admits, could not be refused. The fact that this is in Arabic, or any other foreign language can make no difference: (*Broadhurst v. Barlow* before Wickens, V.C. Dec. 1872.) The fact that the Commissioners of Patents don't understand Arabic is no reason

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why they should decline to register. This mark is a very valuable trade mark, and one that before these Acts could have been protected. [The VICE-CHANCELLOR referred to *Gout v. Aleplogles* (6 Beav. 69, n.), where an injunction was granted restraining a defendant from sending to Turkey watches having the plaintiff's name, or the word "Pessendede," signifying "warranted" in Turkish letters engraved thereon in imitation of the plaintiff's watches.] We are clearly entitled to have this symbol registered as a trade mark.

*Rigby* for the Commissioners of Patents.—The registrar having been directed not to register this device was obliged to refuse. I am not going to argue that such a device is not capable of being a trade mark, the only question is whether the regulations laid down by the Commissioners of Patents, under whose authority the registrar acts under rule 68 of Trade Mark Rules 1876, as to marks of this class, are reasonable or not. By refusing registration we do not thereby deprive the owners of an old mark of any legal or equitable right they had prior to the Act, we merely do not give them the special benefits of these Acts:

*Re Orr Ewing's Trade Marks*, 38 L. T. Rep. N. S. 695; L. Rep. 8 Ch. Div. 794;  
Sebastian on Trade Marks, 222.

It is not every mark as defined by the Act that can *ex debito justitiæ* go upon the register. Some trade marks, which were only names in foreign languages have certainly been admitted to the register, but at that time the commissioners had not arrived at the conclusion they now have upon this point. *Prima facie* the register is a register for English trade marks, and if words in foreign languages are to be introduced and registered as trade marks it will create great difficulties, for the registrar may not understand the meaning of the marks presented to him for registration, and may register something that means the same thing though in different languages. Under these circumstances the regulations laid down by the Commissioners of Patents are only reasonable, and this registration should not be enforced contrary to their carefully considered decision.

BACON, V.C.—It cannot be said that the question raised before me is not one of importance; because the construction of this Act of Parliament—being passed as it was for general, public, and useful purposes—is matter of interest and importance to everybody concerned in the trade, and probably other people. The Act of Parliament is plain. The policy of the law was this: Disputes having existed heretofore about trade marks, now for the future we will have registration, so that there shall be no doubt about a man's title to a trade mark when it is registered. Then it points out in very distinct terms what may be registered, and what does constitute a trade mark; and the things which constitute a trade mark are: "The name of an individual or a firm printed, impressed, or woven; a written signature or copy; a distinct device, mark, heading, label, or ticket, and any special or distinctive word or words, or combination of words, letters, or figures." Therefore the statute confers upon the whole community a plain legal right to have these marks registered if they come within that description. It is not disputed that the description here is perfectly accurate. The mark upon the watch dial is a distinctive device or mark; the meaning of it is explained by

the affidavit, and that shows that it was in itself a very proper mark to distinguish these goods. The case I have referred to of *Gout v. Aleplogles* (6 Beav. 69 n.) was hardly distinguishable from the present. The Vice-Chancellor there granted an injunction to restrain the defendant "from sending or permitting to go to Constantinople and Turkey or any other places, and from selling or disposing of any watches with the name of the plaintiff thereon in Turkish characters, and also to restrain the defendant from manufacturing such watches." If it stood upon the old law, therefore, there can be no doubt about the plaintiff's right to maintain an injunction to restrain that which he says is to be done in this case. But then he applies under the Statute for Registration, and the registrar, acting under the direction of the Commissioners of Patents, declines to give him the registration he asks for, and furnishes the reason why he refuses it; he says it is that this mark is not in English, and that, therefore, he does not know what he is presenting to the English public if he registers this mark. That of itself is a most insufficient reason, because the right conferred by the statute is "any device." Suppose there was in Turkish characters the word "Victory" or "Glory" (perhaps it would be a happier thing to say "Peace and Plenty") that would be a device he would be entitled to have registered; and what have the English public to do with that? If there was any word to be found in the statute which required the owner of a trade mark in England to express that in English, there might be some ground for the suggestion, that the reason afforded by the registrar, (derived from the commissioners I am aware) justified his refusal. The commissioners' power to make rules is very extensive but they have no power, and cannot make rules, to repeal an Act of Parliament. The Act of Parliament has given the plaintiff the right which he asks for here. I am of opinion, therefore, that even if there had been a more distinct rule, and if it had echoed that suggestion contained in the correspondence, upon which I do not desire to lay unnecessary stress, it would have been a most insufficient reason and one which I could not consider would have been binding upon me, because I could not recognise any authority in the Commissioners of Patents to repeal an Act of Parliament or take away from any of Her Majesty's subjects the right which that statute has conferred upon them. But then it is said that a thing something like this existed in the case of *Orr Ewing and Co. (supra.)* Well, first of all that case is under appeal in the House of Lords, and that would prevent me from following it implicitly; although, of course, I should treat it, as I always do the decision of the Court of Appeal, with the utmost respect and with perfect readiness to follow anything that they decided. But the difference is most marked. The plaintiff here does not want to sue anybody; he wants to be in the enjoyment of his own property. He desires to have his trade mark registered that he may assert the rights which the statute gives him, and there the question arises not with any other person, he has nothing to do with committees of experts or with considering whether they decide wisely or not; and the reason given in the Court of Appeal was this, they said, "You may have the certificate in the mean time which will dispense

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with the necessity imposed upon you by the statute of registering your trade mark before you sue for infringement." But that is not the case before me. Nor has the case of *Orr Ewing and Co.* any application whatever to this case. What I find here is a clear legislative title given to the applicant to the trade mark; the words of the statute are clear and plain, and the reason suggested why effect has not been given to that is to me a most insufficient reason, for it is that the Commissioners of Patents said, "We will not register any trade mark which is not expressed in English words or letters, or intelligible to the English public." I say that would be *ultra vires* of those Commissioners; that would be repealing an Act of Parliament; that would be adding an enactment which the Act of Parliament at present does not contain, and therefore I could not attend to that. In my opinion the applicant is perfectly entitled, upon the evidence before me and the words of the statute, to have his trade mark which is shown upon the watch dial before me, and described in the journal in much larger characters, but identical in shape and form, registered as his property under the Trade Marks Registration Act.

Sir H. Jackson, Q.C. proposed to take the order in the terms of the notice of motion.

Rigby suggested that the proper form was "That the registrar proceed with the registration."

BACON, V.C.—I prefer having the order in plain words, that my meaning may be understood by the words I use. I will not have anything vague. I think the words suggested by Sir H. Jackson are the right words. The applicant says, "I have a right under the statute, the registrar has withheld that right; I ask you to enforce that right." The court does enforce that right by saying that he is entitled to have registered as his trade mark that device, which I can conveniently refer to, because it is before me in the journal; the identity being no longer questioned or questionable, for that mark is admitted, I will put that mark in my order.

Solicitors: *Whateley, Milward, and Whitehead; Solicitors to the Treasury.*

Wednesday, Jan. 20.

(Before HALL, V.C.)

Re SMITH'S ESTATE; CLIFFORD v. WASHINGTON. (a)

*Husband and wife—Trust—Breach of trust—Husband's liability for breach of trust by wife—Tenant for life and remaindermen—Wasting property—Conversion—Rule in Howe v. Lord Dartmouth (7 Ves. 137).*

*A testator, after appointing his wife and two others trustees of his will, directed that his business premises in P.-street (which were leasehold) should be sold, if a fair price could be obtained, and bequeathed all the residue of his freehold and leasehold estates, and all he had, to his wife, expressing a wish that, if she married again, it should be so settled as to be "quite out of the control of her future husband." He then bequeathed the house in P.-street, "if not sold, and the money settled as above stated, to be share and share alike" between certain persons in the will named.*

*The widow married again, survived her co-trustees, and died in 1876, leaving her husband surviving. She and her husband enjoyed the income of the testator's estate, unconverted, for nearly thirty years. Neither the husband personally nor the co-trustees ever acted in the trust. Several of the leaseholds had nearly run out. The persons entitled in remainder brought their action against the husband, whom they sought to make liable for his wife's breach of trust.*

*Held, that the leaseholds ought to have been converted on the second marriage, and that, in accordance with Smith v. Smith (21 Beav. 385), the husband was liable for his wife's breach of trust; and that the measure of liability was the excess received by the husband and wife, or either of them, over what they would have received if the leaseholds had been converted and the proceeds invested in consols.*

CHARLES SMITH, by his will dated Oct. 1837, after appointing his wife and two others executors, and expressing his wish that his business and house should be disposed of if a fair price could be obtained, giving some pecuniary legacies and directing the payment of his debts and funeral and testamentary expenses, bequeathed all the residue of his freehold and leasehold estates, with all moneys and everything he was or might become entitled to "unto my beloved wife Mary Ann, and it is my further wish that, should my wife Mary Ann get married again, I wish my property to be so settled upon her as to be quite out of the control of her future husband. I mean for her to enjoy all interest arising from it during her lifetime, then I bequeath the leasehold house in Percival-street, if not sold, and the money settled as above stated, to be share and share alike between the lawfully begotten children of John Powers Washington, if any," and of his brothers and sisters to be paid to them at the age of twenty-one years. "But if my wife Mary Ann should not get married again, then I leave it to her own disposal at her death."

The testator died in Oct. 1844, and his widow in 1846 married the defendant, William Clarke. She survived her two co-trustees, and died in July 1876, leaving her husband surviving. During the period from her first husband's death to her second marriage the widow enjoyed the income of the testator's estate, and during the second coverture she and her husband applied the rents and profits to their own use.

The plaintiffs, who are the children of one of the testator's brothers, and their husbands, instituted an administration action and contended that within twelve months of the testator's death, or at least at the time of his widow's second marriage, there ought to have been conversion of the whole of the testator's estate, and an investment in consols or other securities recognised by the court, and that the widow was only entitled to the proceeds of such investment. Part of the testator's estate was of a wasting nature, being leaseholds for terms which would expire between the years 1881 and 1887. The plaintiffs claimed the excess of rents and profits actually received by Mr. and Mrs. Clarke during the coverture over what they would have received if the whole estate had been converted and invested in one of the securities authorised by the court. Mr. Clarke had never personally received the rents or interfered with the property.



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Re SMITH'S ESTATE; CLIFFORD v. WASHINGTON.

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*Dickinson, Q.C. and Everitt* for the plaintiffs.—The husband is liable for his wife's breach of trust:

*Smith v. Smith*, 21 Beav. 385;

*Clough v. Bond*, 3 Myl. & Cr. 490;

and under *Howe v. Lord Dartmouth* (7 Ves. 137) it was the duty of the trustees to convert either on the testator's death or the second marriage of the widow, and to invest the proceeds in consols. See

*Brown v. Gellatly*, 17 L. T. Rep. N. S. 131; L. Rep. 2 Ch. 751.

There is nothing here, as there was in *Robinson v. Robinson* (1 De G. M. & G. 274), to authorise an investment in any other security.

*Pearson, Q.C. and Charles Browne* for the defendant Clarke.—The statements of Lord Romilly, M.R., in *Smith v. Smith* (*ubi sup.*), go beyond what the circumstances of the case required, and are therefore only *obiter dicta*. At law the husband's liability for his wife's debts is clear and precise, and lasts only during the coverture. The rule of equity is laid down by Lord Redesdale in *Adair v. Shaw* (1 Sch. & Lef. 243). Equity will hold the husband liable after the determination of the coverture only in cases where the funds are specifically found in the husband's possession; the *devastavit* must be traced distinctly to the husband. But the question does not really arise in this case. There was no obligation to convert; the widow was entitled to enjoyment in specie. Therefore, there can be no obligation to make good the loss arising from non-conversion. First, assume the breach of trust to have been anterior to the marriage, which it was if there was any breach at all. For that breach Mr. and Mrs. Clarke were liable during the coverture, but Mr. Clarke's liability, both at law and in equity, ceased on her death. Or, secondly, if there was a continued breach of trust and a continuing liability, it was so continued by the wife only during the coverture. In either case the liability ceases after the coverture. *Howe v. Lord Dartmouth* does not apply here:

*Hinves v. Hinves*, 3 Hare, 609.

Where there is an implied direction as to one of several objects, and no such direction as to the others, the rule applies, *expressio unius est exclusio alterius*. The direction that the house in Percival-street was to be sold implies that the other leaseholds were to be retained in specie:

*Wilday v. Sandays*, 20 L. T. Rep. N. S. 861; L. Rep. 7 Eq. 455.

It has been held over and over again that the doctrine of *Howe v. Lord Dartmouth* is not to be extended, and that slight evidence will prevent its application.

*Cary* for other defendants.

*Dickinson, Q.C.* in reply.

HALL, V.C.—The first question is as to whether this is property which should on the second marriage of the wife have been converted into a fund of a permanent character, as moneys invested in consols. The testator, having a business and a house, directed that the business should be sold if a fair price could be obtained. There was, therefore, a latitude of time as to the disposal of the business. So far as that was concerned there was a discretion not to sell at all, as the sale depended upon whether in the judgment of the representatives a fair price could be obtained.

The testator then directs payment of his debts, and funeral and testamentary expenses, and bequeaths all the residue of his freehold and leasehold estates with all moneys and so on to his wife; and then he provides what is to take place in case of her marriage again and after her death. He then directs that, if she does not marry again, all is to be left at her disposal at her death. It may be that no conversion was necessary until the second marriage; I am disposed to think so, but it is not necessary to decide that question. But on her marriage again there are directions given for a settlement: "I wish my property to be so settled upon her as to be quite out of the control of her future husband." If it stopped there, perhaps it would not have been necessary to convert. But the testator goes on to say that he wishes her to enjoy the interest during her life, and then he bequeaths it over. The whole property is included in that clause, and it is not contended that leaseholds are not included. But the property so settled is described as "the money" and "all moneys." It appears to me, therefore, that from that time it is described as being a money fund. That being so, conversion is involved as a necessary consequence—conversion being according to the ordinary rule. This case, therefore, comes within the principle of *Howe v. Lord Dartmouth* (7 Ves. 137). It has been contended by Mr. Browne that the direction to convert part excludes the rest. But the direction to convert the business and house if a fair price could be obtained is reasonable as applied to that kind of property, and that particular property is only for special reasons made the subject of express provision. That being my view of the construction, I now come to the other question, which is well worthy of consideration, and not without difficulty. The question is, under that state of circumstances, what liability had her husband incurred in respect of the leasehold property? It is said that the liability on the second marriage was a liability arising previously to that second marriage; and then it is argued that, that being so, the liability is in the same position and subject to the same rules as an antecedent debt of the wife—a liability which only lasts during the coverture. It appears to me that that involves an incorrect construction of the will. The conversion would not take place until after the marriage. That is clear on the words. "It is my wish," says the husband, "that the property be so settled as to be out of the control of her future husband." It does not mean future to the time of settlement; it means future to her original husband. He directs something to be done if she shall get married. Sometimes marriages do not take place; they go off. It would be premature to make the change in contemplation of marriage. That being the state of things, what was the position of the leasehold property with respect to the husband and the wife? The legal title was in the three trustees. On the marriage the wife's individual share became vested in her husband in her right. He immediately became, at all events, a constructive trustee. There are two views of this will as regards the settlement. The property is to be "out of the control" of her future husband. One view is, that there should be an actual settlement of that property. Who would make it? The two trustees and the husband in right of the wife. Another view which



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crossed my mind was this: it might not be necessary in point of form to make a settlement, but the words of the will are a mode of expressing that the property was to be settled in this particular way in which the husband would become a trustee for the wife. It is not said that you must appoint new trustees; but the property is to be settled. But it may be said that it must be so settled as to be quite out of the husband's control, and that this view negatives the idea of a settlement by which the property would be out of the husband's control. It seems to me on the whole that there ought to have been a settlement. A settlement being made, the property would have remained vested in the husband in right of his wife. He became trustee, in fact, of this property for whoever was interested in it. Having it so vested, he allows it so to remain, and the moneys are actually received by him; at least they must be considered to have been received by him and his two co-trustees. They must be taken to have been received by him through the agency of his wife. Whether it was so in fact or not, the property in the husband ought to have been settled, and was not settled. In these circumstances, if we turn to what Lord Redesdale says in *Adair v. Shaw*, we find this expression, p. 262: "The sole ground on which courts of equity proceed in cases of this kind is the execution of a trust; and if we advert to the cases on the subject, we shall find that trusts are enforced, not only against those persons who rightfully are possessed of the trust property as trustees, but also against all persons who come into possession of the property bound by the trust, with notice of the trust; and whoever so comes into possession is considered as bound, with respect to that special property, to the execution of the trust." That being so, if Mr. Pearson's argument founded on *Adair v. Shaw* be taken to be correct and applicable, it appears to me that the case before the court is one in which the property came into the legal control of the trustees and of the husband. That being so, the case must be treated according to the principle of trust, and the husband must be held liable, having been himself guilty of a breach of trust in allowing the property to remain unsettled. He is therefore liable for the amount which ought to have been impounded. That liability, it appears to me, on the part of the husband, existed and exists, and independently of this, as it seems to me, whatever view I might be disposed to take irrespectively of the authorities, and notwithstanding the observations and criticisms which have been made on the case of *Smith v. Smith* (*ubi sup.*) and the other cases cited, I must take it that the law is as it has been laid down, and it is not for me, as a judge of first instance, on general principles, to adopt my own view as against other judges of first instance. Such a practice has recently been deprecated, and as the case is practically governed by *Smith v. Smith* (*ubi sup.*), and there being this liability, my judgment on this part of the case will be framed in accordance with that decision.

Pearson, Q.C., as to the measure of damages, suggested that, as the husband had received no personal benefit, he should only be required to make up the difference between the present value of the leaseholds and that of the consols which might have been purchased at the time when conversion should have been effected.

HALL, V.C. directed that the measure of liability should be the amount of overpayment received by the husband or wife: (Seton on Damages, p. 217, note.) The minutes of judgment on this point were as follows:—Declare, that upon the true construction of the testator's will, Mary Ann Clarke was entitled, as from the date of her marriage with the defendant William Clarke, to such income only as would be equal to the dividends which would have been produced by a sale and conversion of the testator's leasehold messuages and other personal estate (not consisting of Government stocks or funds) at the time of his marriage with the defendant William Clarke, and by the investment of the proceeds thereof in Bank Three per Cent. Annuities. Declare, that the defendant Clarke is personally liable to make good the difference between the annual rents and profits of the testator's leasehold messuages and other personal estate (not consisting of Government stocks or funds) received by him and the said Mary Ann Clarke, or either of them, during the coverture, and the dividends which would have been produced by a sale and conversion of the testator's leasehold messuages and other personal estate (not consisting of Government stocks or funds) at the time of her marriage with the defendant William Clarke, and by the investment of the proceeds thereof in Bank Three per Cent. Annuities. And it appearing that Mary Ann Clarke, between the respective dates of her marriage with the defendant William Clarke and her death, received 1876*l.* 13*s.* 3*d.* in respect of income arising from the testator's leasehold messuages, and that the defendant William Clarke between the same dates received on behalf of the said Mary Ann Clarke, in respect of such income, the sum of 63*l.* 18*s.* 6*d.*, making, with the said sum of 1876*l.* 13*s.* 3*d.* the sum of 1940*l.* 11*s.* 9*d.*, inquire what amount of dividends would have been produced by the sale of the said leasehold messuages at the date of the marriage of Mary Ann Clarke with the defendant William Clarke, and the investment of the proceeds of sale in Bank Three per Cent. Annuities. And let the defendant William Clarke, within one month from the filing of this certificate, pay into court, &c., the difference, &c., certified in answer to such inquiries.

Solicitors: *Apsley Eben Briant; West, King, Adams, and Co.*

March 17, 18, and 19.

(Before FRY, J.)

KNIGHT v. PURSELL. (a)

*Injunction—Party wall—Metropolitan Building Act 1855 (18 & 19 Vict. c. 122), ss. 3 and 88.*

*On one side of and against a wall within the boundary of his land, the plaintiff had constructed certain closets. On the other side of and against the same wall, the defendant, whose land adjoined that of the plaintiff, had constructed a shed.*

*Held, that the wall was a party wall within the Metropolitan Building Act 1855, so far as the structures of the plaintiff and defendant were co-terminous.*

THE plaintiff commenced an action against the defendant, claiming an injunction to restrain him from pulling down or building upon or otherwise

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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interfering with a wall belonging to the plaintiff and situate at the back of his leasehold messuages Nos. 6 and 7, Surrey-row, Blackfriars-road, in the county of Surrey, and for a mandatory injunction to compel the defendant to pull down the building already erected by him upon the plaintiff's said wall, and to restore the same wall to its former condition.

The action was tried without a jury, and it appeared in evidence that in 1877 a fire occurred on the premises of the defendant's lessor, and that on the 30th Oct. in that year, the defendant, who was the owner of the premises at No. 172, Blackfriars-road, south of the plaintiff's land, sent to the plaintiff the following notice:

I hereby give you notice, as required by the Metropolitan Buildings Act (18 & 19 Vict. c. 122), that is intended to take down such portions of the party walls or all of the same as may be necessary, which divide your premises from the above, and to rebuild the same according to the provisions of the Metropolitan Buildings Act, such said walls now being in a dangerous condition.

The other facts are sufficiently stated in the judgment of his Lordship.

The question was, whether the wall in question was or was not a party wall within the meaning of the statute.

*North, Q.C.* and *E. T. Holland*, for the plaintiff, argued that the wall was not a party wall, and cited

*Metropolitan Buildings Act 1855*, ss. 3, 82, 83, 85;  
*Matts v. Hawkins*, 5 Taunt. 20;  
*Cubitt v. Porter*, 8 B. & C. 257;  
*Standard Bank of Africa v. Stokes*, 38 L. T. Rep. N. S. 672; L. Rep. 9 Ch. Div. 68.

*Fischer, Q.C.* and *Maidlow*, for the defendant, contended that user had made the wall a party wall, and cited

*Stephens v. Gourley*, 1 L. T. Rep. N. S. 33; 7 C. B. N. S. 99;  
*Weston v. Arnold*, L. Rep. 8 Ch. App. 1084;  
*Angus v. Dalton*, 38 L. T. Rep. N. S. 510; L. Rep. 3 Q. B. Div. 85;  
*Sheffield Industrial Society v. Jarvis*, W. N. 1871, p. 206; W. N. 1872, p. 47.

*North, Q.C.*, in reply, cited

*Pattison v. Gifford*, L. Rep. 18 Eq. 259.

*Fry, J.*—The only question which I have to determine is as to the wall. The wall runs east and west at the back of the plaintiff's land. This plot of land was demised to the predecessor in title of the plaintiff. The predecessor left a yard behind his buildings, and at the back of the yard he built a wall well within his own boundary. This wall, no doubt, originally belonged to the plaintiff. It appears to me to be clear from the evidence that, about Sept. 1849, a Mr. Oakey was in occupation of the defendant's land, and constructed, on his side of the wall, a shed or coke-hole. Towards the north of it was a wooden structure supported by beams and covered with feather-edged boards. The roof was a lean-to against the defendant's house. Mr. Oakey's structure was taken down in 1868, and another similar but higher structure was carried up, consisting of a timber weather boarding and a roof, which was made partly of tiles and partly of skylights. In 1877 a fire occurred on the property of the lessor of the defendant. The question which arises is this, Had that wall become a party wall within the provisions of the Metropolitan Buildings Act? By the 3rd section of that Act it is provided

that the "party wall" shall apply to every wall used or built in order to be used as a separation of any building "from any other building, with a view to the same being occupied by different persons." Upon that clause several questions arise. The object of the Act is to define the wall as a party wall with reference to its user, and not with reference to the rights of ownership possessed by the proprietors of the adjoining land. It is the object of the Act to limit the rights of private owners for the public good, and the physical condition, position, and user of the wall, not the rights of owners, must be considered. The first question is whether that wall was used as "a separation of any building from any other building." I think it was so used as between the defendant's shed and the plaintiff's closets, which were buildings. These structures were built with the intention that they should be used. Mr. North argued that, because the plaintiff had no view that the buildings on each side should be occupied by different persons, the wall was not a party wall within the meaning of the Act; but I think the words mean that the users of the wall on each side have a "view to occupy it" differently. Mr. North also contended that the construction which I have adopted takes away the control of the wall from the owner of it; but the control of property is often taken away from the owner by Acts of Parliament for public purposes. I consider that this wall is a party wall; and the second question which arises is as to the extent to which the wall has become a party wall. The case of *Weston v. Arnold* is a distinct authority that a wall may be a party wall for some part only, and cease to be a party wall when the buildings on each side cease to be co-terminous; and I hold this wall to be laterally a party wall to the extent of the two closets only. The third question is, was there anything in the nature of an easement for the support of the buildings of the defendant? Mr. Oakey's building did rest on the wall, and that was so in the building of 1868, which was supported on half of the wall. But it appears that the building which was there at the time of the fire was preceded by a building of Mr. Oakey in 1849, and he has said that that building rested on supports put in the ground, and I believe that statement, as it is supported by other evidence. The conclusion is, that Mr. Oakey is correct as to the earlier building, and Mr. Davis (another witness) is correct as to the later building, which differed in being higher and resting on the wall. I cannot, from the nature of the structure, infer the existence of acquiescence on the part of the plaintiff. The defendant has failed altogether except as to his contention with regard to the part of the wall behind the plaintiff's closets being a party wall. I think that the defendant has interfered with the right of the plaintiff, who is bound to deliver up his land to his landlord at the end of the term in the same condition as when it was originally demised. The injunction must therefore go as to that part of the wall which is behind the plaintiff's closets until the defendant shall have complied with the provisions of the Metropolitan Buildings Act as to dealing with party walls. As to the remainder of the wall, there must be an injunction restraining the interference of the defendant.

Solicitors: *Withall and Compton*; *F. W. Mount*.

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Re THE KENT TRAMWAYS COMPANY—PENNY v. PENNY.

[CHAN. DIV.]

April 4 and 5.

(Before FRY, J.)

Re THE KENT TRAMWAYS COMPANY. (a)

*Company—Costs of obtaining special Act.*

By the special Act incorporating a company it was provided as follows: "All costs, charges, and expenses of and incident to the preparing for, obtaining, and passing of this Act, or otherwise in relation thereto, shall be paid by the company. Held, that a person who had done work towards obtaining the Act, but only as clerk to a promoter of the company, could not prove for his remuneration in the winding-up of the company."

THE Kent Tramways Company was incorporated by the statute 36 & 37 Vict. c. cxxiv., which obtained the Royal assent on the 5th Aug. 1873.

By the 69th section of the statute:

All costs, charges, and expenses of and incident to the preparing for, obtaining, and passing of this Act, or otherwise, in relation thereto, shall be paid by the company.

On the 19th Nov. 1875 an order was made to wind-up the company, and George Pike brought in a claim against the assets for 239l. 11s. 4d. for "work and labour done, and materials for the same, provided by me as a parliamentary agent in and about and incident to the preparing for, obtaining, and passing" the above-mentioned statute.

An objection taken by the liquidator that the company had never entered into any agreement with Pike, and that he was a clerk or servant to a Mr. Gough, the promoter of the company, was allowed by the chief clerk.

Pike now took out a summons to vary the clerk's certificate in respect to the disallowance of the claim.

*Terrell for the summons.*

*Glasco, Q.C. and Solomon, contra.*

FRY, J. said that the Act was silent as to the persons by whom the work, with regard to which costs had been incurred, had been done. The work might have been done by a promoter, who hoped to get the costs allowed by the company when formed, or it might have been done by a person who had agreed with the promoter for payment by the latter. His Lordship was of opinion, on the evidence in the present case, that the person asking for payment of costs under the Act was employed by the promoter, and could only look to him for payment. The only person entitled under sect. 69, as against the company, was the promoter.

*Summons dismissed with costs.*

*Solicitor for Pike, T. E. Watkin.*

*Solicitors for the liquidator, Keighley, Shea, and Bevan.*

Saturday, April 5.

(Before FRY, J.)

ANSTY v. NORTH AND SOUTH WOOLWICH SUBWAY COMPANY. (a)

*Practice—Summons for further answer to interrogatories—Order XXXI., r. 10.*

*A summons for a further answer to interrogatories must specify the particular interrogatories or*

*parts of interrogatories to which a further answer is required.*

THE defendant company delivered interrogatories for the examination of the plaintiff.

The plaintiff made the usual affidavit in answer but did not answer all the interrogatories.

The defendant company took out a summons for an order on the plaintiff to make a further affidavit in answer to the interrogatories. This summons was adjourned into court.

*Glasco, Q.C. and Loughborough for the defendant company.*

*Higgins, Q.C. and Mulligan for the plaintiff*—The particular interrogatories to which further answer is required ought to have been pointed out in the summons. They cited

*Chesterfield Colliery Company v. Black, 24 W. R. 783;*

*Altham v. Labouchere, 39 L. T. Rep. N. S. 207 L. Rep. 3 Q. B. Div. 654.*

FRY, J., after stating that he agreed with the decision of Hall, V. C., in the case of the *Chesterfield Colliery Company v. Black*, said that the interrogatories or parts of interrogatories to which further answers were required ought to have been specified in the summons, and directed the defendant company to deliver to the plaintiff a statement in writing, pointing out where a further answer was required, and that the hearing of the summons should be resumed in court without further expense being incurred by taking out a fresh summons.

*Solicitor for the defendant company, P. D. Cunningham.*

*Solicitors for the plaintiff, W. and J. Gibson.*

Saturday, April 5.

(Before FRY, J.)

PENNY v. PENNY. (a)

*Costs of administration suit—Direction to pay "testamentary expenses."*

*When a testator directed that his "testamentary expenses" should be paid out of his money invested in the City of London Brewery Company: Held, that the "testamentary expenses" included the costs of a suit for the administration of the testator's estate.*

C. W. PENNY, deceased, by his will directed all his just debts, funeral and testamentary expenses, to be paid out of his money invested in the City of London Brewery Company, and gave, devised, and bequeathed three houses at Dalston, and all his money invested in the City of London Brewery Company, and all other his real and personal estate, to his wife, upon trust to receive the income thereof for the support of herself and the testator's two children, a son and daughter, until they should respectively attain the age of twenty-one years, and upon the son attaining that age the testator gave the three houses to him absolutely, and upon the daughter attaining twenty-one, he directed that the money invested in the City of London Brewery Company, and all other his residuary estates, should be equally divided between his daughter, his wife, and his son.

The wife, who was sole executrix, proved the will.

A suit was commenced by the children, by their next friend, for the administration of the estate.

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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The children having now come of age, a summons was taken out for the division of the testator's trust funds.

The question which now came before the court was, whether the term "testamentary expenses" included the costs of the administration suit, so as to make them payable out of the money invested in the City of London Brewery Company.

*J. E. Woodroffe* for the plaintiff.

*Everitt* for the defendant.

The following cases were cited :

*Allan v. Gott*, 26 L. T. Rep. N. S. 412; L. Rep. 7 Ch. App. 439;

*Miles v. Harrison*, 30 L. T. Rep. N. S. 190; L. Rep. 9 Ch. App. 316;

*Harloe v. Harloe*, 33 L. T. Rep. N. S. 247; L. Rep. 20 Eq. 471.

FRY, J. was of opinion that the case of *Miles v. Harrison* showed that where a testator charged a particular fund with the payment of his testamentary expenses, the fund must bear the costs of an administration suit, and held that the costs of the present suit must be paid out of the money invested in the City of London Brewery Company.

Solicitor for the plaintiffs, *E. Kimber*.

Solicitor for the defendant, *Carter*.

April 5 and 9.

(Before FRY, J.)

COLLETT v. DICKENSON. (a)

*Practice*—*Married woman*—*Judgment against separate estate*—*Costs*.

*In an action brought against a married woman, having separate property, and her husband, the judge at the trial gave judgment declaring that all the property vested in her at that time, or in any other person in trust for her, was chargeable with the payment of the debt and costs claimed, and directing inquiries as to her separate estate. The master having certified in answer that she was entitled for her separate use to an annuity vested in a trustee (who was not a party to the action):*

*Held, on a summons for leave to sign judgment for the debt and costs, that the plaintiff's costs when taxed and the amount of the debt with interest on that sum at 4 per cent. must be declared to be a charge upon the annuity without prejudice to the claims of the trustee, and that the plaintiff must pay the costs of the defendant husband and add them to his own debt.*

In June 1877 the plaintiff commenced an action in the Exchequer Division against Caroline Dickenson for 34*l.* 19*s.* 5*d.* for goods supplied. Caroline Dickenson, in her statement of defence, alleged that she was married in 1848 and that her husband was still alive. The plaintiff in his reply stated that he was not aware when he gave her credit that Caroline Dickenson was married, but believed her to be a widow; that she obtained credit by representing that she was entitled to an annuity; that he had discovered since delivering his statement of claim that she was entitled under a separation deed to an annuity settled to her separate use, but was unable to discover who were the trustees of the deed. The defendant, Caroline Dickenson, rejoined that she was the wife of Isaac W. Dickenson, and she demurred to the first part

of the reply. Her demurrer was overruled. Her husband was, subsequently to her rejoinder, joined as a co-defendant. The action was tried at the Warwick assizes on the 3rd Aug. 1878, before Fry, J., when his Lordship made the following declaration, "That all the property now vested in the defendant Caroline Dickenson at this time, or in any other person in trust for her, is chargeable with the payment of the debt and costs in this action," and directed "that all proper inquiries should be made of what such separate property consists, and in whom it is now vested," and that the further consideration of the action should be reserved, and that any party should have liberty to apply.

In answer to the inquiries directed, Master Johnson made the following certificate :

1. That the separate property of the said defendant, Caroline Dickenson, consists of an annuity of 34*l.*, payable quarterly. . . and that the said annuity is secured by the covenant of the defendant, Isaac Wykeham Dickenson, contained in a certain deed of separation existing between the said Caroline Dickenson and the said Isaac Wykeham Dickenson.

2. And the said annuity is now vested in Archibald Erskine as the sole surviving trustee of the said deed of separation.

On the 4th Jan. 1879 the plaintiff took out a summons for the defendants to show cause why the plaintiff should not be at liberty to sign judgment in the action, upon the certificate of Master Johnson, for the amount of the debt, and costs to be taxed, and this summons was adjourned into court, and by consent, heard before Fry, J.

*T. Brett* for the plaintiff.—Your Lordship at the trial directed judgment to be entered in the form given in the report of *Picard v. Hine* (L. Rep. 5 Ch. App. 278).

*J. E. Woodroffe*, for the defendants, objected that judgment for costs could not be given against the husband for a debt incurred in respect of his wife's separate property, that the judgment could not be entered against the wife personally, and that the trustee ought to have been made a party.

*Brett* in reply.—The trustee ought not to be a party. The reason for not making him a party is sufficiently shown in the judgment of Hall, V.C. in *Davies v. Jenkins* (L. Rep. 6 Ch. Div. 728), viz., that "the form of the order in *Pickard v. Hine* goes to the length of charging 'any sum in anybody, and there would . . . be no advantage in alleging' a claim to any particular sum vested in some particular person." He also cited

*Newton v. Bootle*, 12 L. T. Rep. O. S. 242; 4*C.* B. 359;

*Morrell v. Cowan*, 37 L. T. Rep. N. S. 536, 122; 1 L. Rep. 6 Ch. Div. 172; 7 Ch. Div. 151;

*London and Provincial Bank v. Bogle*, 37 L. T. Rep. N. S. 780; L. Rep. 7 Ch. Div. 773;

*Morris v. Freeman*, 39 L. T. Rep. N. S. 125; L. Rep. 3 P. Div. 65.

*Our. adv. vult.*

April 9.—FRY, J.—Since this case came before me on Saturday last, Mr Registrar Leach has made inquiries as to what was further done in the case of *Davies v. Jenkins*, but he has been unable to ascertain that anything further was done. I must direct the costs of the plaintiff, including his costs of this application, to be taxed, and declare that such costs and the sum of 34*l.* 19*s.* 5*d.*, with interest on that sum at 4 per cent. from the date of this order, are a charge

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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upon the annuity payable by Archibald Erskine under the trusts of the separation deed, but that this order is to be without prejudice to any claims by such trustee. Plaintiff must pay the taxed costs of the defendant, the husband, and add them to his own debt.

Solicitors for the plaintiff, *Church, Sons, and Clarke*, agents for *Oerton and Westwood*, Birmingham.

Solicitors for the defendants, *Emanuel and Round*.

### QUEEN'S BENCH DIVISION.

March 25, 26, and 29.

(Before MELLOR and LUSH, JJ.)

MELLOR (app.) v. DENHAM (resp.). (a)

*School Board—Bye-laws—Attendance of children employed in factories—7 & 8 Vict. c. 15, s. 31—33 & 34 Vict. c. 75—37 & 38 Vict. c. 44, ss. 6 & 15—39 & 40 Vict. c. 79, ss. 5, 6, 7.*

*By the Factory Act 1844, s. 31, it is enacted that it shall be lawful to employ any child ten hours in a factory on alternate week days, provided (inter alia) that on the other alternate days, the child shall attend school for five hours a day, except Saturday.*

*By the Elementary Education Act 1870, s. 74, school boards may make bye-laws provided (inter alia) that no bye-law shall be contrary to anything contained in any Act for regulating the education of children employed in labour.*

*The respondent was summoned for breach of a bye-law made by a school board requiring all children to attend school twenty-seven hours a week, his child being employed and duly attending school under the Factory Acts.*

*Held, that the school board was not entitled to enforce their bye-law in respect of children who, although not obeying such bye-law, were fulfilling and observing the conditions of the Factory Acts; and that the justices were right in refusing to convict the respondent.*

THIS was a case stated by four of Her Majesty's justices of the peace in and for the borough of Oldham, in the county of Lancaster, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose as hereinafter stated.

(1.) At a petty sessions holden at Oldham aforesaid, in and for the said borough on the 3rd Oct. 1878, an information preferred by James Mellor (hereinafter called the appellant) against Thomas Denham (hereinafter called the respondent) under the bye-laws of the School Board for the district of the borough of Oldham duly made on the 12th March 1877, and confirmed in pursuance of sect. 74 of the Elementary Education Act 1870, charging that "the respondent, being the parent of a child called Joseph Denham, who was in his custody and not less than five nor more than thirteen years of age, did unlawfully neglect and omit to cause the said child to attend school the whole of the ordinary school hours as required by the said bye-laws, he, the said Thomas Denham, not having a reasonable excuse for such non-attendance," was heard and determined by the said justices, who dismissed the said information.

(2.) The appellant being dissatisfied with this

determination upon the hearing of the said information, applied in writing for a case setting forth the facts and grounds of such determination for the opinion of this court, and duly entered into a recognisance as required by the said statute in that behalf.

(3.) Therefore the said justices, in compliance with the said application and the provisions of the said statute, stated and signed the following case.

(4.) Upon the hearing of the said information it was proved on the part of and by the appellant, and found as a fact, that the said child did not attend school during the whole of the ordinary school hours, and that the child was ten years and six months old, and the bye-laws of the said school board, of which a copy was attached to this case, were put in evidence and proved.

(5.) It was also proved on the part of the respondent that the child was employed at the cotton factory of Messrs. Radcliffe and Sons in Oldham, and was attending an efficient elementary school regularly pursuant to the Factory Acts 1833 to 1874.

(6.) It was contended on the part of the appellant that, by virtue of the bye-laws of the board made in pursuance of the 74th section of the Elementary Education Act 1870, the board could, if they thought fit, compel children to attend school during the whole of the school hours; and that this applied notwithstanding that such children were working at a factory and attending an efficient elementary school in conformity with the provisions of the Factory Acts 1833 to 1874; and that there was nothing in the said Acts restraining the powers conferred on the board by the Elementary Education Act 1870, that there was nothing in the bye-laws contrary to anything contained in any Act for regulating the education of children employed in labour, and that the Elementary Education Acts 1870 and 1876 controlled the Factory Acts 1833 to 1874.

(7.) The justices, however, being of opinion that, as the child was attending an efficient elementary school pursuant to, and was otherwise fulfilling the conditions and provisions of the Factory Acts 1833 to 1874, the school board could not compel him to attend school during the whole of the school hours under their bye-laws; that the child was within the exemption created by the 5th bye-law; that the language of the Elementary Education Acts 1870 and 1876 keeps in force the provisions of the Factory Acts with respect to the education of children between the ages of ten and thirteen years employed pursuant to those acts; and that the bye-laws with reference to the case before them were *ultra vires*, gave their determination against the appellant in manner before stated.

(8.) During the hearing of the case reference was made to the bye-laws of the Oldham School Board, which were made under the authority of sect. 74 of the Education Act 1870 (33 & 34 Vict. c. 75): bye-law No. 5 was in effect the repetition of the proviso contained in that section: "Provided that no such bye-law shall be contrary to anything contained in any Act for regulating the education of children employed in labour."

The other bye-laws, all of which formed part of the special case, were immaterial to the point discussed, except bye-law No. 3, which required that the time during which children between the ages of five and thirteen residing in the district were

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law

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to attend school, should be the whole of the ordinary school hours, being not less than twenty-seven hours a week.

(9.) The questions of law arising on the above statement for the opinion of this court therefore were:

(1) Are the Oldham School Board able to enforce their bye-laws against children between the ages of ten and thirteen years, who although not obeying such bye-laws are attending efficient elementary schools, pursuant to and otherwise fulfilling and observing the conditions of the Factory Acts 1833 to 1874?

(2) Do the Elementary Education Acts 1870 & 1876 control the provisions of the said Factory Acts regulating the Education of Children employed in pursuance of the last-mentioned Acts?

(10.) And the court was humbly solicited according to the powers vested in the court by the said statute (20 & 21 Vict. c. 43) to remit the case to the said justices with the opinion of the court thereon, or to make such other order as to the court might seem fit.

By the Factory Act 1844 (7 & 8 Vict. c. 15), sect. 30, it is enacted,

That no child shall be employed in any factory more than six hours and thirty minutes in any one day, save as hereinafter excepted, unless the dinner time of the young persons in such factory shall begin at one of the clock, in which case children beginning to work in the morning may work for seven hours in one day; and no child who shall have been employed in a factory before noon of any day shall be employed in the same or any other factory, either for the purpose of recovering lost time or otherwise, after one of the clock in the afternoon of the same day, save in the cases when children may work on alternate days, or in silk factories more than seven hours in any one day, as hereinafter provided.

By sect. 31, after making provision for the employment of a child in a factory on three alternate days of every week, it is enacted (*inter alia*) as follows:

Provided always that the parent or person having direct benefit from the wages of any child so employed, shall cause such child to attend some school for at least five hours between the hours of eight of the clock in the morning and six of the clock in the afternoon of the same day on each week day preceding each day of employment in the factory, unless such preceding day shall be a Saturday, when no school attendance of such child shall be required: Provided also that on Monday in every week after that in which such child began to work in the factory, or any other day appointed for that purpose by the inspector of the district, the occupier of the factory shall obtain a certificate from a schoolmaster according to the form and directions given in the schedule (A) to this Act annexed, that such child has attended school as required by this Act.

Sect. 38:

Save as herein otherwise provided, the parent or person having any direct benefit from the wages of any child employed in a factory shall cause such child to attend some school on the day after the first employment of such child, and thenceforth on each working day of every week during any part of which the said child shall continue in such employment, so that on every such day except in the cases hereinafter provided, such child shall attend school during at least three hours after the hours of eight of the clock in the morning and before the hour of six of the clock in the evening: Provided always that any child attending school after one of the clock in the afternoon, shall not be required to remain in school more than two hours and a half on any one day between the first day of Nov. and the last day of Feb., and no child shall be required to attend school on any Saturday.

By the Elementary Education Act 1870 (33 & 34 Vict. c. 75), sect. 74,

Every school board may, from time to time, with the approval of the Education Department make bye-laws for all or any of the following purposes:—(1) Requiring the parents of children of such age, not less than five years nor more than thirteen years, as may be fixed by the bye-laws, to cause such children (unless there is some reasonable excuse) to attend school; (2) Determining the time during which children are so to attend school; provided that no such bye-law shall prevent the withdrawal of any child from any religious observance or instruction in religious subjects, or shall require any child to attend school on any day exclusively set apart for religious observance by the religious body to which his parent belongs, or shall be contrary to anything contained in any Act for regulating the education of children employed in labour; . . . Provided that any bye-law under this section requiring a child between ten and thirteen years of age to attend school shall provide for the total or partial exemption of such child from the obligation to attend school, if one of Her Majesty's inspectors certifies that such child has reached a standard of education specified in such bye-law.

By the Factory Act 1874 (37 & 38 Vict. c. 44), sect. 6, it is enacted that

In a factory to which this Act applies, the children may be employed either in morning and afternoon sets, or for the whole day on alternate days, and the following regulations shall be observed:

(1) When the children are employed in the morning and afternoon sets:

(a) A child who on any day except Saturday is employed before noon, shall not on the same day be employed after one o'clock in the afternoon, or if the hour of dinner be one o'clock, after such hour of dinner; and

(b) A child shall not be employed on Saturday in two successive weeks, nor on Saturday in any week, if on any other day in the same week he has been employed for more than five hours; and

(c) A child employed in the factory shall attend school in manner directed by sect. 38 of the Factory Act 1844; and the provisions of that Act with respect to such attendance, and certificates thereof, shall apply accordingly; and

(2) Where the children are employed on alternate days:

(a) A child may be employed during the same hours, and with the same hours for meals, as young persons and women in a factory; and

(b) A child shall not be employed in any manner on two successive days; and

(c) A child employed in the factory shall attend school in manner directed by sect. 31 of the Factory Act 1844; and the provisions of that Act with respect to such attendance, and certificates shall apply accordingly.

By sect. 15, it is enacted

That after the 1st Jan. 1876, attendance at a school in England, which is not for the time being recognised by the Education Department as giving efficient elementary instruction shall not, in the case of a child employed in a factory to which this Act applies, be deemed to be attendance at a school within the meaning of this Act or the Factory Act 1844.

By the Elementary Education Act 1876 (39 & 40 Vict. c. 79), sect. 5, it is enacted as follows:

A person shall not after the commencement of this Act take into his employment (except as hereinafter in this Act mentioned) any child—

(1) Who is under the age of ten years; or

(2) Who being of the age of ten years or upwards, has not obtained such certificate either of his proficiency in reading, writing, and elementary arithmetic, or of previous due attendance at a certified efficient school as is in this Act in that behalf mentioned, unless such child being of the age of ten years or upwards is employed, and is attending school in accordance with the provisions of the Factory Acts, or of any bye-law of the local authority (hereinafter mentioned) made under sect. 74 of the Elementary Education Act 1870 as amended by the Elementary Education Act 1873 and this Act, and sanctioned by the Education Department.

By sect. 6,

Every person who takes a child into his employment

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in contravention of this Act shall be liable, on summary conviction, to a penalty not exceeding forty shillings.

By sect. 7,

The provisions of this Act respecting the employment of children shall be enforced: (1) In a school district within the jurisdiction of a school board, by that board; and (2) in every other school district by a committee to be appointed annually by the town council or guardians, such board or committee being referred to in the Act as "the local authority." Provided that it shall be the duty of the inspectors and sub-inspectors acting under the Acts regulating factories, workshops, and mines respectively, and not of the local authority, to enforce the observance by the employers of children in such factories, workshops, and mines of the provisions of this Act respecting the employment of children; but it shall be the duty of the local authority to assist the said inspectors and sub-inspectors in the performance of their duty by information and otherwise.

*Hamilton* argued for the appellant.—This bye-law, requiring a child to attend school not less than twenty-seven hours a week, is not contrary to the provisions of the Factory Act 1844, that it shall be lawful to employ a child in a factory ten hours on alternate days, provided that the child attends school for five hours on the other alternate week days. The Factory Acts restrict the time for labour, and make even that time conditional upon school attendance. The School Board imposes a further condition of longer school attendance; but the consequent reduction of the hours of labour is not contrary to the Factory Acts. The meaning of these words in sect. 74 of the Elementary Education Act 1870, viz., that no bye-law "shall be contrary to anything contained in any Act for regulating the education of children employed in labour," was considered with regard to the provisions of the Workshop Regulation Act 1867 (30 & 31 Vict. c. 148), in the case of *Bury v. Cherrybohn* (25 L. T. Rep. N. S. 403; L. Rep. 1 Ex. Div. 457). By sect. 14 of that Act every child employed in a workshop was required to attend school for at least ten hours in every week; it was held by Bramwell, B., Mellor and Denman, JJ., that a bye-law requiring a longer attendance than ten hours a week was not contrary to this section. The present case was decided by the justices before the operation of the Factory and Workshop Act 1878 (41 Vict. c. 16); but there is nothing in the words used in sect. 23 concerning the education of children to alter the power of school boards over the school time of children employed under that Act.

*Aspland* for the respondent.—This case really involves the question whether a school board has the power to prohibit juvenile labour within its district. In the case of *Bury v. Cherrybohn* no one represented the respondent, and the recognition by the Legislature of the educational effect of labour was overlooked in the decision of the court. Throughout all the statutory enactments concerning education there is no provision for altering the school hours of children employed in labour under the Acts on that subject; and at all events in respect of the Factory Acts, the words used in sect. 74 of the Elementary Education Act 1870 cannot be interpreted to abridge the children's hours of labour. *Bury v. Cherrybohn* is no authority in this case; and the Legislature seems to have recognised the difference between the words used in the Factory Act 1844 and the Workshop Regulation Act 1867, and at the same time to have expressed its disapproval of the decision in *Bury v. Cherrybohn*, by enacting in

the 8th section of the Elementary Education Act 1876, that the words of the former Act are to be substituted in the latter for those upon which that case was decided. It was admitted in the argument of that case that if the Workshop Regulation Act had enabled a parent to employ his child in a workshop, provided that the child attended school for ten hours a week, the bye-law would have been contrary to the provision. Here is a case in which by the Factory Act the respondent is enabled to employ his child in a factory, provided the child attends school for a certain time; the bye-law therefore is contrary to that provision, when it requires a longer time of school attendance.

*Curs. adv. vult.*

March 29.—LUSH, J. delivered the judgment of MELLOR, and himself in these terms:—"We have gone through the various Factory Acts and the Education Acts, and the result is that we entertain no doubt that the decision of the justices, the propriety of which is submitted to us, was substantially correct. The question in this case, which, undoubtedly, is one of great and general importance, arose out of an information laid against the father of a boy between ten and eleven years old for neglecting to cause him to attend school during the whole of the ordinary school hours, as required by the bye-laws of the School Board for the district of the borough of Oldham. The defence set up was that the boy was employed at a cotton factory at Oldham, and was attending an efficient elementary school regularly, pursuant to the Factory Acts; and this the justices found to be the fact. The bye-laws of the school, which were put in evidence at the hearing, contained an express enactment that nothing therein should have any force or effect in so far as it may be contrary to anything contained in any Act for regulating the education of children employed in labour—thus following the words of the proviso in the 74th section of the Elementary Education Act 1870, which prohibits the making of any bye-law which shall be contrary to any such Act. We observe here in passing that the finding of the justices that the bye-laws were *ultra vires* cannot be sustained. They are, in our opinion, strictly within the powers conferred on the board by the 74th section, inasmuch as they contain the enactment above mentioned, together with the other provisions required by that section. The question is as to the meaning of the enactment above quoted and its application to the state of facts proved and found by the justices. The contention on the part of the school board was that the Education Acts overrode and controlled the provisions of the Factory Acts, and that children employed in factories, though receiving the education provided for and required by the Factory Acts, were in the same position as other children not so employed, and were, like them, compellable to attend school during the whole of the school hours. The argument was that the Factory Acts, which commenced at a time when no scheme of general education existed, are merely restrictive; that they do not enact that children shall or may be employed for a given number of hours in the factory, and while so employed shall receive a certain amount of education; but that all which they enact is that the children shall not be employed for a longer time in the



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factory, and shall not during such employment receive less than the given amount of education; and, further, that the policy of the Education Act, which passed long afterwards, was to secure to all children, however employed, a much larger amount of education than the Factory Acts provided; and that it cannot be said to be "contrary to" nor inconsistent with the provisions of the Factory Acts for the School Board to require that all children should attend school for a longer period than factory children had been required to attend, although the effect might and would be to put an end to child labour in factories. What the construction might have been if the Education Act had made no reference to the Factory Acts it is needless to consider. The meaning of the 74th section of the Education Act 1870, already adverted to, does not appear to us to admit of a doubt. That section says that the school board may make bye-laws for the following purposes, among which purposes is "determining the time during which children are to attend school, provided that no such bye-law shall prevent the withdrawal of any child from any religious observance or instruction in religious subjects, or shall require any child to attend school on any day exclusively set apart for religious observance by the religious body to which his parent belongs, or shall be contrary to anything contained in any Act for regulating the education of children employed in labour." Placed as a limitation of the power of fixing the time of school attendance, the meaning of this part of the proviso obviously is that the board shall not use the power given to them so as to interfere with the arrangements already made by the Factory Acts, which embrace both the time of working and the time of attending school, each being dependent on the other, and neither of which can be interfered with without disturbing the other. That this was the meaning intended is further shown by the later Acts. The Education Act of 1876 recognises the Factory Acts as an existing code for regulating the employment and education of children employed in factories, and the Factory Act of 1874 gives the Education Department the power to recognise or refuse to recognise a school as a proper school for the education of a factory child, and says in terms in another part of the Act that a child employed in a factory shall attend school in manner directed by the Factory Act 1844. We are therefore of opinion that the decision of the justices was right, and we answer the questions submitted to us as follows:—1. The School Board are not entitled to enforce their bye-law against children between the ages of ten and thirteen years, who, although not obeying such bye-laws, are attending efficient elementary schools, pursuant to and otherwise fulfilling and observing the conditions of the Factory Acts. 2. The Elementary Education Acts do not control the provisions of the Factory Acts regulating the education of children employed in accordance with those Acts.

*Judgment for the respondent.*

Solicitor for appellant, *J. Ponsonby*, Oldham.

Solicitor for respondent, *H. Booth*, Oldham.

EXCHEQUER DIVISION.

March 4 and 5.

(Before KELLY, C.B. and POLLOCK, B.)

RILEY (app.) v. READ (resp.). (a)

*Inhabited house duty — Act of 1851 — Working men's club.*

*A working men's reform club, which had never been furnished as a dwelling-house or slept in at night, and which was used in the day time as to the upper floor by an auctioneer for the purposes of his business, and as to the rest of the building for club purposes only, from 9 a.m. to 10.30 p.m., was by the commissioners held liable to be assessed for inhabited house duty.*

*Held, on case stated for the opinion of the court, that the premises did not constitute an inhabited dwelling-house, and were not liable to be assessed for the tax.*

*Statutes as to duty on dwelling-houses considered.*

*CASE stated under part 3 of the statute 37 & 38 Vict. c. 16.*

At a meeting of the commissioners for the general purposes of the income tax, and for executing the Acts relating to the inhabited house duties, held at the office of the clerk to the commissioners, Shorrock Ford, in the hundred of Blackburn, county of Lancaster, on the 18th July 1877.

The appellant, on behalf of the Working Men's Reform Club, William-street, in the township of Over Darwen, appealed against an assessment to inhabited house duty for the year ending the 5th April 1877, at 9d. in the pound upon 40%, the annual value of the building occupied by the club.

The appellant claimed exemption on the ground that the building was not an inhabited dwelling-house within the meaning of the Act 14 & 15 Vict. c. 36, inasmuch as the place was not and never had been since its erection furnished as a dwelling-house or slept in at night, and was used during the day time for club and trade purposes only. He stated that the upper floor of the building was let to an auctioneer, who used it during the day time as a place for the sale of goods, and contended that the building being a place used entirely for trade and club purposes was not liable to inhabited house duty.

The surveyor of taxes, the present respondent, stated that he had seen the premises, and found the building to consist of two storeys. The ground floor was occupied by the appellants as a club, and contained the usual rooms, namely, billiard-room, newsroom, lavatory, &c. The upper floor was let to an auctioneer, and used by him as a place of trade. The club was open each day from 9 a.m. to 10.30 p.m., and then closed for the night, no person remaining inside the premises. The surveyor contended that the building came within the scope of 48 Geo. 3, c. 55, sched. (B.) No. 5, and that it was not necessary for a building to be slept in to render it liable to inhabited house duty. In support of this view he referred to case 2760 decided by the judges on the 15th Feb. 1867, and contended that, as the place was not used for trade, but in the manner above stated, it was not within any of the exemptions contained in the Acts.

The appellant sought to distinguish the present

(a) Reported by W. WILLS, Esq., Barrister-at-Law.

case from the case No. 2760, inasmuch as the present building had never acquired the character of a dwelling-house by reason of its never having been slept in or furnished as such.

The commissioners were of opinion that the club was subject to the duty. The appellant expressed his dissatisfaction with their decision, and requested them to state a case for the opinion of the court, whereupon the above case was stated.

The sections and other portions of Acts of Parliament material to this question are the following:

The 48 Geo. 3, c. 55 (which as to the schedules (A.) and (B.) hereinafter mentioned was repealed by the Acts of 14 & 15 Vict. c. 36, and 4 & 5 Will. 4, c. 19, respectively) enacted that there should be assessed, raised, levied, and paid, &c., upon houses, windows, and lights, as set forth in the schedule (A.) to the Act annexed; and upon inhabited houses as set forth in the schedule (B.) to the Act annexed, the several new and consolidated duties respectively inserted, described, and set forth in the said respective schedules; the schedules and rules were to be deemed a part of the Act.

The schedules and rules, so far as material, are as follows:

#### SCHEDULE (A.)

A schedule of the duties made payable for every dwelling-house within and throughout Great Britain, according to the number of windows or lights in each dwelling-house, and the offices to be charged therewith.

After the rules characterising the mode of charging, follow the

#### *Exemptions from the said Duties.*

Case 1. Any house belonging to His Majesty, or any of the Royal Family, and every public office for which the duties heretofore payable have been paid by His Majesty, or out of the public revenue.

#### SCHEDULE (B.)

A schedule of the duties made payable on all inhabited dwelling-houses throughout Great Britain according to the value thereof, and of the offices and lands to be charged therewith.

Here follow the duties.

#### *Rules for charging the said last-mentioned Duties.*

1. The said last-mentioned duties to be charged annually on the occupier or occupiers for the time being of every such dwelling-house, being of the annual rent of 5*l.* or upwards, at the respective rates before mentioned, and to be levied on him, her, or them, or on his, her, or their respective executors or administrators, and in like manner, in case of a change in the occupation thereof, as is before directed in respect of the duties on windows or lights, and in addition to the duties contained in schedule (A.).

4. Every chamber or apartment in any of the inns of court, or of Chancery, or in any college or hall in any of the Universities of Great Britain, being severally in the tenure or occupation of any person or persons, shall be charged thereto as an entire house, and on the respective occupiers thereof.

5. Every hall or office whatever belonging to any person or persons, or to any body or bodies politic or corporate, or to any company that are or may be lawfully charged with the payment of any other taxes or parish rates, shall be subject to the duties hereby made payable as inhabited houses; and the person or persons, bodies politic or corporate, or company, to whom the same shall belong, shall be charged as the occupier or occupiers thereof.

#### *Exemptions.*

Case 1. [This exemption is the same as the first exemption to Schedule A. already cited.]

The statute 57 Geo. 3, c. 25, s. 1, after reciting the last-mentioned Act, and also that

It is become usual in cities and large towns, and other places, for one and the same person, or for each person where two or more persons are in partnership, to occupy a dwelling-house, or dwelling-houses, for their residence, and at the same time one or more separate and distinct tenements or buildings, or parts of tenements or buildings, for the purposes of trade, or as warehouses for lodging goods, wares, or merchandise therein, or as shops or counting-houses, and to abide therein in the day time only for the purposes of such trades respectively, which have been charged with the said recited duties, although no person shall inhabit or dwell therein in the night time; and it is expedient in such cases to exempt from the said duties such tenements or buildings, or parts of tenements or buildings, as are or shall be solely employed for the purposes herein mentioned,

enacted that persons should not be charged by the commissioners in respect of such last-mentioned buildings.

The statute 5 Geo. 4, c. 44, s. 4, after reciting the exemption granted as above mentioned in the last cited Act, enacts that the same shall be extended

To all and every person, or any number of persons in partnership together, for and in respect of any house, tenement, or building, or part of a tenement or building, in the said Act (57 Geo. 4, c. 25, s. 9) described, which shall be used by such person or persons as offices or counting-houses for the purposes of exercising or carrying on any profession, vocation, business, or calling, by which such person or persons shall seek a livelihood or profit, no person inhabiting, dwelling, or abiding therein, except in the day time only, for the purpose of such profession, vocation, business, or calling, such person, or each such persons in partnership respectively, residing in a distinct and separate dwelling-house, or part of the dwelling-house charged to the said duties, provided nevertheless, that the exemption herein authorised shall not extend to any chamber or apartment in any of the inns of court or of Chancery, or to any college or hall in either of the Universities of Oxford or Cambridge, now chargeable with any of the said duties.

By the 2nd and 3rd sections of the statute 6 Geo. 4, c. 7, certain provisions were made for exempting from the duty houses the building of which was completed or the occupation commenced after the beginning and in the course of the year of assessment, and for the exemption of unfurnished houses occupied only by a caretaker.

By the statute 14 & 15 Vict. c. 36, the duties in schedule (A.) of the statute 48 Geo. 3, c. 55, were repealed (those in schedule (B.) having been already repealed by the Act of 4 & 5 Will. 4, c. 19), and it was enacted that there should be assessed, raised, levied, collected, and paid, &c., upon inhabited dwelling-houses in and throughout Great Britain the several duties set forth in the schedule annexed to the Act, payable according to the annual value of such dwelling-houses; the schedule to be part of the Act.

#### SCHEDULE.

For every inhabited dwelling-house which with the household and other offices, yards and gardens therewith occupied and charged, is or shall be worth the rent of twenty pounds or upwards by the year, . . . where any such dwelling-house shall not be occupied and used for any such purpose and in manner aforesaid (i.e. for the purpose of a shop, licensed for sale of beer, farmhouse, &c., &c.) there shall be charged for every twenty shillings of such annual value thereof the sum of ninepence.

It was under the words of this schedule here set out that it was attempted to charge the building in question.

*Bush Cooper* for the appellant.—The short point raised by the case is, whether or not a building, which has not been used as a dwelling-house, or

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slept in by the occupier, is chargeable to the inhabited house duty under the 14 & 15 Vict. c. 36. It is attempted to charge this house under the last part of the schedule to that Act, and in order to see what is the meaning which the Legislature has attached to the term "inhabited dwelling-house," it is necessary to go back to the Act of Geo. 3, by which this duty was first imposed. On referring to the schedules (A.) and (B.) of the Act of 48 Geo. 3, c. 55, we find the distinction drawn between what is properly called an inhabited dwelling-house and an office or place where no person is sleeping, and rule 5 marks that distinction. Schedules (A.) and (B.) refer to dwelling-houses and inhabited dwelling-houses respectively; and the first rule of schedule (B.) makes the duties under that schedule chargeable on the "occupier or occupiers for the time being" of every such dwelling-house. Then rule 5 of the same schedule, charging the owners in certain cases, draws the distinction between that which is properly called an inhabited dwelling-house and an office or other place where no person is sleeping. In the case of an inhabited dwelling-house properly so called, the occupier is the person to be charged. Then, as it was thought that that would leave exempt offices or halls where no one slept, rule 5 provides for that case, not treating them as dwelling-houses, but making them liable to the same tax. The words of the Act of 14 & 15 Vict. c. 36, are distinct; to come under that statute a house must be an inhabited dwelling-house; it is not even sufficient that it should be built with a view to being dwelt in—it must be actually inhabited, and from rule 5 of the schedule (B.) to the Act of Geo. 3, I say it must be slept in. This house is not, in any sense, an inhabited dwelling-house; no person resides or sleeps in it, from floor to cellar; it is merely resorted to in the day time by the members of the club, and by an auctioneer; and it cannot be brought within the purview of the Act.

*Dicey* for the respondent.—My first contention is, that this house is an inhabited dwelling-house and comes directly within the Act. On this point my contention is supported by the authority of Bramwell, L.J., in the case of *Rusby v. Newsom* (L. Rep. 10 Ex. 322). There the question was whether there was exemption from inhabited house duty by reason of the premises then in question being used as to some part of them only (not constituting a separate tenement or house) for trade purposes; the court held they were not exempt. In the judgment of Lord Justice (then Baron) Bramwell, at p. 328, these words occur: "If it is said that our construction is harsh, possibly in one sense it is, but in another sense it clearly is not. The Legislature had said originally that all inhabited houses should be subject to the duty, and it was held, properly, no doubt, that a house which was not occupied at night, but was occupied in the day time for the purposes of trade, was an inhabited house and subject to duty. Very likely it was pointed out that that was in truth taxing the instruments of trade, and perhaps was injudicious as a tax upon machinery or tools, or other means by which trade was carried on; and thereupon the Legislature thought that it was reasonable to exempt buildings which were solely used for purposes of trade and for the other purposes mentioned," &c. I cite it to show what was the view entertained by that learned judge as to the

construction that had been put on the statute, and that it was a construction in which he acquiesced, namely, that occupation at night was not necessary to constitute inhabitancy. Further, by dwelling-house is meant any house used for human habitation for any considerable time or the whole day; that is the natural sense of the word, and it appears that the house in question was dwelt in from 9 in the morning till 10.30 at night. It is necessary to refer to the provisions of 48 Geo. 3, c. 55, which first imposed the duty, to discover the meaning of these terms, and as it is said that, "the exception proves the rule," so I rely on the exemptions from the tax to show what was the extent of the tax. The first exemption under schedules (A.) and (B.) includes "public offices" which presumably were used as offices only, but which were evidently deemed to be covered by the charging words of this enactment. It is clear from these exemptions that the word "dwelling-house" was used in the Act in a somewhat wider sense than that ordinarily given to it. Further it appears from the recital and first section of the statute 57 Geo. 3, c. 25, which is, I think, the first exempting Act, that "separate and distinct tenements or buildings, or parts of tenements or buildings," occupied "for the purpose of trade or as warehouses for lodging goods, wares, or merchandise therein, or as shops or counting-houses" in which persons abode "in the day time only for the purposes of such trades respectively" had been charged with duty under the former Act as dwelling-houses, although no person inhabited or dwelt in them in the night time. The term "dwelling-house," therefore, bore a meaning far more extensive than is ordinarily given to it. This explains and corroborates the statements made by Bramwell, L.J. in the judgment I have cited. The next Act I wish to refer to is the 5 Geo. 4, c. 44, s. 4; that section shows that houses or buildings used as offices or counting-houses for business purposes, and in which no person inhabited, dwelt, or abode except in the day time, and for the purposes of such business only, had been taxed as dwelling-houses, although in the ordinary sense of the word they would not be considered dwelling-houses, and that, too, in spite of the former exemption. Again, there are a series of exceptions in respect of warehouses and houses occupied solely for the purposes of trade, all of which are houses. The very question which has arisen in the various cases under the enactments has been, Are those houses occupied solely for the purpose of trade? and they all rest on the assumption that a house may, unless it can come within some specific exemption, be an inhabited dwelling-house even though it is a house used for the purposes of trade, and in fact for the purposes of trade in the day time only. It need not be a house in which a man actually has his residence. No one would say that a house used as a club-house or a coffee-house or an auctioneer's office thereby became a residence; yet the case of a club would go a good deal further in respect of "residence" than the case of a mere office; and yet—and that is my point—offices are distinctly within the purview of the Act. The next Act which I will cite is the 6 Geo. 4, c. 7. Ss. 2 and 3 tend to show that the meaning given to dwelling-house was very wide, and that the test of a dwelling-house chargeable under the Act was the fitness of the house for habitation, and its actual occupancy.

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See also sect. 7. See also rules 4 and 5 of schedule (B) of the Act of 48 Geo. 4, c. 55. The terms "dwelling" and "inhabited" have different values, and must be considered separately. First I say this is a dwelling-house, for it is a house built for human habitation. It is further an inhabited house, for it is inhabited for more than twelve hours in the day by a large number of persons who resort to it.

KELLY, C.B.—This claim of inhabited house duty by the Crown cannot be sustained. It appears from the case that this house has never been furnished as a dwelling-house, that no one sleeps in it, or has ever slept in it, and it is occupied and used for trade purposes and those of the club only. The effect of the statutes is that what is chargeable is an inhabited dwelling-house within the meaning of those statutes. If the word "inhabited" were there alone, we should have to consider whether there might not be an inhabitancy, and I am not prepared to say that there might not be an inhabitancy, which would make the building an inhabited house within these Acts of Parliament, as far as the word "inhabited" goes. But it appears from all the statutes that in order to be taxable a building must be an inhabited dwelling-house, so that we must put a construction not only on the word "inhabited," but also on the word "dwelling-house." Is, then, any part of this building a dwelling-house? I think it is not. In the absence of any interpretation by Act of Parliament and of any binding authority we are compelled to consider what is the proper meaning of this term. In my judgment the meaning of the word to "dwell" is to live in a house; that is to live there day and night, to sleep there during the night, and to occupy it for the purposes of life during the day. And there is nothing to show that that is not the natural meaning; and there is nothing shown to compel us to put any but this natural and well-established meaning on it. As to the recital in the Act of 5 Geo. 3, c. 25, it would seem that in the cases to which it refers the persons therein mentioned were assessed in respect of the value or rental of those separate buildings, in addition to the rental or value of the house in which they resided and lived; but if it mean anything else we should, I think, be compelled to conclude that the words of the recital, which is not grammatical in its composition, were incautiously used by the framers of the Act, and were misapplied; and it cannot under these circumstances avail to impose the tax which is warranted by no statute and no authority besides. I think the plain and natural meaning of the words in question is to dwell and live in a building day and night, to reside there, and occupy it as a residence, and, as this place has never been so occupied, in my opinion it is not a dwelling-house, and therefore the assessment must be disallowed.

POLLOCK, B.—In my opinion the members of this club are not assessable to the inhabited house duty. If in order to decide this it were necessary also to decide that, to charge a building as an inhabited dwelling-house, some person or persons must sleep in that house as well as occupy it by day, I should pause before I came to that conclusion, for the counsel for the respondent has certainly shown that there are passages in certain statutes, and certain dicta of learned judges, both in England and in Scotland, which are unfavour-

able to that conclusion. But the present case at any rate is quite different from those in which such a conclusion might possibly be applicable; for this is the case of a club, the members of which use this building not in any sense for the purposes of a dwelling-house. The purposes and object of such institutions, and the character of the occupation, are perfectly well known, and I am clearly of opinion that words should be used which properly and clearly comprehend such a case, if it is intended to bring it within the scope of the tax. When, however, I consider the ordinary meaning of the words "inhabited house," it seems to me that it is altogether a misapplication of language to say that it applies to the case of a club consisting of a great number of persons who simply have a house to carry out the purposes of their club. On these grounds, therefore, I think that the assessment is wrong, and cannot be supported.

*Judgment for the appellant with costs.*

Solicitors for the appellant, *Pritchard, Englefield, and Co.*

Solicitors for the respondent, *Solicitors for the Inland Revenue.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

*Friday, April 4.*

(Before JAMES, BAGGALLAY, and BRAMWELL, L.JJ.)

THE REPUBLIC OF COSTA RICA v. STROUSEBERG. (a)

*Practice—Discovery—Order for delivery of documents—Interlocutory application—Rules of Court 1875, Order XXXI., rr. 1, 11—Order LII., r. 6.*

*Where the delivery up of documents is the relief claimed in an action, the court has no jurisdiction on an interlocutory application to make a mandatory order for the delivery up of the documents.*

*It is not an absolute rule that under no circumstances will the court order production of documents before delivery of the statement of claim.*

*Cashin v. Cradock (34 L. T. Rep. N. S. 52; L. Rep. 2 Ch. Div. 140) commented upon.*

This was an appeal from an order of Fry, J.

The writ in the action claimed an injunction to restrain the defendant, who had conducted the litigation on behalf of the Republic of Costa Rica in the actions of the *Republic of Costa Rica v. Erlanger* and *Erlanger v. Republic of Costa Rica*, from parting with documents relating to those actions, otherwise than by delivering them to the plaintiffs, and an order that he should deliver the documents up to the plaintiffs.

Before any statement of claim had been delivered, the plaintiffs applied by an interlocutory motion for an order in the terms of the indorsement on the writ.

Fry, J. (sitting for Malins, V.C., in whose branch of the court the writ had been issued), heard the motion on affidavit of service, the defendant not appearing, and granted the injunction and

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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ordered the documents to be delivered within ten days.

From this order the defendant appealed.

*J. Pearson, Q.C., Locock Webb, Q.C., and Meidl* for the appellant.—The court has no jurisdiction to order delivery of documents on an interlocutory application:

*Lingen v. Simpson*, 6 Mad. 291;  
*Garner v. Irwin*, L. Rep. 4 Ex. Div. 49;  
*Grayham v. Campbell*, 38 L. T. Rep. N. S. 195;  
 L. Rep. 7 Ch. Div. 400;  
 Rules of Court 1875, Order XXXI, rr. 1, 11.

The court will not order production of documents before the statement of claim has been delivered:

*Cashin v. Cradock*, 34 L. T. Rep. N. S. 52; L. Rep. 2 Ch. Div. 140.

*Glassey, Q.C., Kekewich, Q.C., and H. A. Giffard* for the respondents.—The defendant is seeking to cause delay, and we have taken these proceedings to prevent collusion between him and Erlanger. They cited

*Lady Beresford v. Driver*, 14 Beav. 387;  
 Rules of Court 1875, Order LII., r. 6.

No reply.

*JAMES, L.J.*—Of course the injunction will remain; but, as to the mandatory part of the order, I am very sorry to say I think that the court had no jurisdiction to make it at this stage of the case. It seems to me that all the difficulties suggested, and all the injurious consequences, are just the same as those which result from anybody retaining property unjustly to the great damage of his neighbour. The mandatory part of the order is, in truth, a decree or judgment in an action of detinue made upon an interlocutory motion, calling upon a man to answer a claim made by affidavit. It appears to me that the practice of the court does not authorise it, and upon the affidavits, assuming them to be true, if such an order were made it should be without prejudice to any application which the parties may be advised to make either for a receiver or for production. With regard to the special ground which is alleged—that is to say, the danger of the bill being dismissed by reason of collusion between Mr. Strousberg and Baron Erlanger—if what is stated in the affidavits be true, I should think the Vice-Chancellor would have no difficulty whatever in preventing Erlanger from getting any benefit from that collusion or from the delay occasioned by that collusion; and beyond all question, speaking for ourselves, we shall take care, if those affidavits be true, that Erlanger gets no benefit, either by dismissing the bill or otherwise, from collusion with the agents of his opponents.

*BAGGALLAY, L.J.*—I have only one observation to make, and it is this. I desire to guard myself against expressing any opinion that there is no right under the new rules to apply for the production of documents previously to the delivery of the statement of claim. Bearing in mind the decision of Bacon, V.C., in *Cashin v. Cradock* (*ubi sup.*), I desire an opportunity of considering for myself whether I should take the same view that was come to there if the point ever came before me. I think the 11th rule of Order XXXI. is very wide.

*JAMES, L.J.*—If the Vice-Chancellor laid it down in *Cashin v. Cradock* as an absolute rule that there

can be no discovery before the delivery of the statement of claim, that is a decision which of course ought to be considered, if the point arose again.

*BRAMWELL, L.J.* concurred.

Solicitors for the appellant, *Lee, Houseman, and Brodie*.

Solicitors for the respondents, *Freshfields and Williams*.

Thursday, March 27.

(Before *JAMES, BAGGALLAY, and BRAMWELL, L.JJ.*)

Ex parte BROWN; Re YATES. (a)

*Bankruptcy—Jurisdiction—Transaction void as against trustee—Bankruptcy Act, 1869, s. 72.*

*Where an assignment by a person who has subsequently become bankrupt is impugned on the ground that it is void by the operation of the bankrupt law, and not on a ground which would have been available to the bankrupt himself, the Court of Bankruptcy will decide the case itself, and not leave it to be dealt with by the ordinary tribunals.*

THIS was an appeal from an order of Mr. Registrar Hazlitt, sitting as Chief Judge in Bankruptcy.

The order appealed from was made on the application of the trustee in the bankruptcy of George Yates, and it directed that a deed executed on the 20th July 1874, by the bankrupt, and purporting to be a mortgage to secure a sum of 1200*l.*, should be delivered up to be cancelled. The trustee impeached the deed on the ground that it was a mere contrivance to defeat the bankrupt's creditors, and also that it was a conveyance of substantially the whole of the bankrupt's available assets to secure a past debt.

The persons for whose benefit the deed was made appealed.

*Horton Smith, Q.C. and Alexander Young* for the appellants.—We are strangers to the bankruptcy, and the Court of Bankruptcy ought, therefore, to leave the matter to be dealt with by the ordinary tribunals:

*Morley v. White*, 27 L. T. Rep. N. S. 736; L. Rep. 8 Ch. 214;

*Ex parte Lyons; Re Lyons*, 26 L. T. Rep. N. S. 491; L. Rep. 7 Ch. 494;

*Re Motion*, 29 L. T. Rep. N. S. 757; L. Rep. 9 Ch. 192.

[*JAMES, L.J.*—This point is really not arguable. Cases of fraudulent preference and acts of bankruptcy are the very things that were intended to be dealt with by the Court of Bankruptcy. When the trustee claims only what the bankrupt might have claimed but for his bankruptcy, the matter should be left to the ordinary tribunals. But where, by the operation of the bankrupt law, the trustee claims by a higher and better title than the bankrupt, the matter is of the very kind which was intended to be dealt with by the Court of Bankruptcy.] At all events we contend that, upon the evidence, the registrar's order is wrong.

Without calling upon

*E. C. Willis*, who appeared for the respondent.

Their LORDSHIPS held that the registrar had come to a right conclusion on the evidence, and they dismissed the appeal with costs.

*JAMES, L. J.* added:—It may be as well to repeat that, where a deed or other transaction is

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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*Ex parte* ASTRUP; *Re* LEFEVRE.

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impugned on the ground that it is void by the operation of the bankrupt law, and not upon a ground which would have been available to the bankrupt himself, the case is pre-eminently one which the Court of Bankruptcy should decide, and should not leave to the ordinary tribunals.

Solicitor for the appellant, *H. D. Illerton*.  
Solicitor for the respondent, *H. Montagu*.

Thursday, March 27.

(Before JAMES, BAGGALLAY, and BRAMWELL, L.JJ.)

*Ex parte* ASTRUP; *Re* LEFEVRE. (a)

*Bankruptcy—Debtor's summons—Bankruptcy petition—Tender of part of debt—Refusal to accept—Bankruptcy Act 1869, ss. 6, 7, 8, 9.*

In an action on a bill of exchange an order was made staying all further proceedings on the defendant undertaking to pay the plaintiff 20*l.* and the costs of the action, and, if default were made in payment, the plaintiff was to be at liberty to sign judgment. The costs having been taxed at 9*l.*, the defendant tendered 29*l.* to the plaintiff, who refused to receive it unless the defendant would also pay 30*l.*, the amount of another overdue acceptance of his held by the plaintiff. The defendant refused to pay the 30*l.*, alleging that the acceptance for it had been obtained from him by fraud, and that the plaintiff had taken it with notice of the fraud the day before it became due. The plaintiff thereupon issued a debtor's summons against the defendant for 59*l.*, and, the defendant having failed to give security, presented a bankruptcy petition against him:

Held, that, the plaintiff not having signed judgment in the action, there was no sufficient debt to support the petition, and that it must therefore be dismissed.

This was an appeal from a decision of Mr. Registrar Pepps, sitting as Chief Judge in Bankruptcy.

The facts of the case were briefly as follows:—

On the 9th Sept. 1878 Messrs. Astrup and Harland commenced an action in the Lord Mayor's Court against Lefevre on a bill of exchange for 40*l.*, accepted by him and indorsed to them, and dishonoured.

The defendant obtained leave to defend on paying 20*l.* into court.

On the 17th Oct. an order was made staying all further proceedings in the action, on the defendant's undertaking to pay the plaintiffs 20*l.* 10*s.*, in addition to the 20*l.* paid into court, and the costs of the action. And it was ordered that, if default were made in payment of the 20*l.* 10*s.* and the costs, the plaintiffs should be at liberty to sign judgment and issue execution.

On the 24th Oct. the costs were taxed at 9*l.* 2*s.*, and the defendant tendered 29*l.* 14*s.* 6*d.* to the plaintiffs' solicitor. The latter refused to receive it, unless the defendant would also pay 30*l.*, the amount of another overdue acceptance of the defendant held by the plaintiffs.

The defendant refused to pay the 30*l.*, alleging that the acceptance for the 30*l.* had been obtained from him by fraud, and that the plaintiffs had taken it with notice of the fraud the day before it became due.

The plaintiffs thereupon issued a debtor's summons against the defendants for 59*l.* 14*s.* 6*d.*

(a) Reported by H. PRAT, Esq., Barrister-at-Law

The defendant applied to have the summons dismissed, but the usual order was made that he should give security, and the security not having been given within the time limited, the plaintiffs presented a bankruptcy petition against the defendant in respect of the 59*l.* 14*s.* 6*d.*

The registrar having dismissed the petition, the petitioners appealed.

*Maidlows* for the appellants.—Our whole demand against the defendant amounted to 59*l.*, and he only tendered 29*l.* *Dixon v. Clark* (5 C. B. 365) shows that a tender of part of an entire demand is inoperative. *Ex parte Andrews* (33 L. T. Rep. N. S. 556; L. Rep. 1 Ch. D. 358) shows that it is no answer to a debtor's summons for a sum exceeding 50*l.* to say that a tender of part of the sum was made and refused.

*Yate Lee* for the respondent.—There is not a sum exceeding 50*l.* presently payable, as the appellants have not signed judgment in the action, and there is, therefore, no sufficient debt to support the petition.

*Maidlows* in reply.

JAMES, L.J.—I am of opinion that the order of the registrar was quite right. The creditors resolved by an ingenious device to resort to the powers of the bankruptcy law. Having a debt of 29*l.* due to them, they took another acceptance of the debtor a day before it fell due, although they had received notice from the debtor that it had been obtained from him by fraud, and they did so evidently for the purpose of raising their debt above 50*l.* in order to enable them to make use of the provisions of the Bankruptcy Act. With that view they actually refused to accept the 29*l.* payable to them under an order made in an action on another bill. The original debt on that bill was converted into what they got on the judge's order, namely, a right to sign judgment if the payment was not made and to issue execution; but they preferred to attempt to get a technical advantage in what appears to me to be a very oppressive proceeding. Judgment has never been signed in the action, and there is nothing in respect of the sum dealt with by the judge's order to support the petition. Under these circumstances it seems to me that the creditors, who thought they were getting a technical advantage, have failed, and that the registrar was quite right in dismissing the petition.

BAGGALLAY, L.J.—I quite agree.

BRAMWELL, L.J.—I also agree. The creditors had a right to demand the 29*l.* odd under the judge's order, and on refusal to pay they could sign judgment, and would then have a judgment debt. They did not do so, and, as their original right on the bill was gone or suspended, they have not a sufficient debt to support their petition. They can now sign judgment, and issue another debtor's summons if so minded.

JAMES, L.J.—I do not think the summons was proper. I should have refused it.

*Appeal accordingly dismissed with costs.*

Solicitors for appellants, *Herbert and Kent*.

Solicitors for the respondents, *J. H. Shakespear*.

[CT. OF APP.]

*Ex parte KELLY AND CO.; Re SMITH AND CO.*

[CT. OF APP.]

March 27 and April 3.

(Before JAMES, BAGGALLAY, and BRAMWELL, L.JJ.)

*Ex parte KELLY AND CO.; Re SMITH AND CO. (a)**Bankruptcy—Fraudulent preference—Repayment of money sent for specific purpose—Bankruptcy Act 1869, s. 92.*

S. and Co. had accepted bills to the amount of 5300*l.*, drawn upon them by K. and Co., the arrangement between the two firms being that K. and Co. should provide funds to meet the bills at maturity. In accordance with this arrangement, K. and Co., shortly before the bills matured, sent to S. and Co. three cheques for 2500*l.*, 2000*l.*, and 800*l.* respectively, for the purpose of meeting the bills. Two of these cheques were duly paid into an account which S. and Co. kept at the Bank of England for the purpose of paying their acceptances, but the cheque for 2000*l.* was, by a clerk's mistake, paid into their general banking account at the London Joint Stock Bank. S. and Co. having stopped payment before the bills matured, drew a cheque on their account at the Bank of England for 5300*l.*, and afterwards paid 3800*l.* to K. and Co., who had paid the bills at maturity, and they placed the remaining 2000*l.* in *medio* until it was determined whether they could pay that sum to K. and Co. without committing a fraudulent preference:

Held, that, as S. and Co. never intended to misappropriate the 2000*l.*, the relation of debtor and creditor never arose between them and K. and Co. in respect thereof, and the repayment of it to them would not have been a voluntary preference, but a proper application of the money for the purpose for which it had been specifically sent, and that K. and Co. were consequently entitled to the 2000*l.*

THIS was an appeal from a decision of Mr. Registrar Brougham, sitting as Chief Judge in Bankruptcy.

The facts of the case were briefly as follows:—

Messrs. Smith, Fleming, and Co., of London, accepted bills to the amount of 5300*l.*, drawn upon them by Messrs. Kelly and Co., of Glasgow, which bills were to become due on the 5th Oct. 1878.

In accordance with an arrangement made between the two firms that Kelly and Co. should provide funds to meet the bills at maturity, towards the end of Sept. 1878 Kelly and Co. sent to Smith, Fleming, and Co. three cheques upon their London bankers for 2500*l.*, 2000*l.*, and 800*l.* respectively, making together 5300*l.*, for the purpose of meeting the bills.

Smith, Fleming, and Co. kept two banking accounts, one at the Bank of England for the purpose of paying their acceptances, and the other, which was their general banking account, at the London Joint Stock Bank.

It was intended by Smith, Fleming, and Co. that all the three cheques should be paid into their account at the Bank of England; but, through the mistake of one of their clerks, only two of the cheques were paid into that account, the cheque for 2000*l.* being paid into their account at the London Joint Stock Bank. This mistake was not discovered till the 3rd Oct.

On the 2nd Oct. Smith, Fleming, and Co. found that they were insolvent, and consulted their solicitors, and called in Mr. Harding, an accountant, to investigate their affairs. On the

following day they announced to their creditors that they had suspended payment. Before doing so, they drew a cheque upon the Bank of England for 5300*l.*, the amount of the cheques remitted by Kelly and Co., and proposed to pay it to Kelly and Co., but their solicitors advised them that, as the 2000*l.* had been paid into their general banking account, it was doubtful whether they could properly pay it back to Kelly and Co. The 5300*l.* was therefore placed in joint names at a bank to abide the determination of the question.

The London Joint Stock Bank claimed a lien on the balance of Smith, Fleming and Co.'s account with them, and refused to allow them to withdraw the 2000*l.*

Kelly and Co. paid the bills at maturity, and ultimately 3800*l.* part of the 5300*l.*, which had been placed in joint names, was paid to them, and the remaining 2000*l.* was placed in the hands of Harding to await the determination of the rights of the parties.

On the 1st Nov. Smith, Fleming, and Co. filed a petition for the liquidation of their affairs by arrangement, and Harding was appointed trustee in the liquidation.

Kelly and Co. applied to the court for an order that the 2000*l.* should be paid to them, but the registrar refused the application on the ground that the repayment of the amount to them would be a voluntary preference under the 92nd section of the Bankruptcy Act 1869.

From this decision Kelly and Co. appealed.

*Herschell, Q.C.* and *A. Morley* for the appellants.

—The money was sent by us for a specific purpose, and it was through a clerk's mistake that it was not forthwith applied for the purpose for which we sent it; it became trust money, and we say that it would be no fraudulent preference to apply the money for the specific purpose for which it was sent when the mistake was discovered: (*Sinclair v. Wilson*, 20 Beav. 324.) This case comes within the concluding words of the 92nd section of the Bankruptcy Act 1869, giving protection to certain payments:

*Butcher v. Stead*, 33 L. T. Rep. N. S. 541; L. Rep. 7 E. & I. 398.

*W. D. Gardiner* (with him *Benjamin, Q.C.*) for the respondent, the trustee.—By paying the money into their general account, Smith, Fleming, and Co. committed a breach of trust, and the relation of debtor and creditor was created between them and the appellants as soon as the breach of trust was committed. The appellants have no remedy but proof in the liquidation, unless they can show that the money was earmarked, and that they have failed to prove. The repayment of the 2000*l.* after the debtors found that they were insolvent would have been a voluntary preference of these particular creditors, and therefore void as against the trustee under the 92nd section of the Bankruptcy Act 1869. He cited

*Brown v. Adams*, 21 L. T. Rep. N. S. 71; L. Rep. 4 Ch. 764;

*Clayton's case*, 1 Mer. 572;

*Ex parte Sayers*, 5 Ves. 168.

[JAMES, L.J. referred to *Ex parte Cooke, Re Strachan*, 35 L. T. Rep. N. S. 649; L. Rep. 4 Ch. Div. 123.]

*Herschell, Q.C.* in reply.

JAMES, L.J.—I am of opinion that the appeal in this case ought to be allowed. There is no



ground for impeaching the transaction, as it seems to me, unless it could be brought up to this, that is was a payment made voluntarily with the intent to prefer a particular creditor, which is the thing expressly prohibited by the provisions of the bankrupt laws. No doubt, if a trustee commits a breach of trust by stealing or otherwise misappropriating the trust moneys, he becomes a debtor in respect of the money he has so improperly taken, and if he becomes a debtor in that way he remains only a debtor, and the *cestui que trust* only a creditor, unless you can do what is called "earmark" the money which he has so misappropriated; but I do not think it is for a court of law to hold that a man intended to be, or that he did become a thief, and therefore a debtor, in respect of the money retained by him, in the manner in which the money was retained by Smith Fleming and Co. in this case. I am satisfied that there never was a moment of time in which these gentlemen, who afterwards became bankrupt, did mean to commit any breach of trust, or to make any misappropriation whatever of the moneys which were sent to them for a specific purpose, and it is not for us, or for this court, as it seems to me, to put them in the position of having stolen moneys which they never intended to steal. There being bills of exchange outstanding, which had on them the names both of Smith, Fleming, and Co., and of Kelly and Co., of which Smith, Fleming, and Co. were the acceptors, and the acceptances being made payable at the Bank of England, Kelly and Co. being the persons who by arrangement between themselves and Smith, Fleming, and Co., were to keep the latter in cash advances, but still were only liable on the bills themselves secondarily as drawers, did make remittances specifically to Smith, Fleming, and Co. for the purpose of taking up the bills. When those remittances were made to Smith, Fleming, and Co., they did not create any relation whatever of debtor and creditor between Smith, Fleming, and Co. and Kelly and Co., and Kelly and Co. could not have called back the moneys, could have brought no action against Smith, Fleming, and Co. in respect of the moneys which they had so remitted, because they were given to Smith, Fleming and Co. to discharge the bills for which Smith, Fleming and Co. were primarily liable, and therefore the moneys were received by Smith, Fleming and Co. for purposes in which both Smith, Fleming and Co. and Kelly and Co. were equally interested as between them and the holders of the bills. Having received the moneys for that purpose, they pay part of such moneys into the Bank of England, and I suppose they intended to pay the whole amount into the Bank of England, where it would be ready, I believe, according to the custom of bankers, to meet all the bills which were made payable at that bank without any specific direction with regard to each bill; that is to say, if bills are made payable to be presented at the Bank of England or any other bank, and there is no countermand and there are assets at the bank, it would be the duty of the bankers to pay those bills just as much as it would be their duty to honour a cheque drawn on an account to the credit of which there were sufficient assets, and the bankers would be liable to serious damages if they refused to pay. These moneys were partly paid, and it was intended they should be wholly paid into the Bank of England, where the bills would have been

met in due course unless something had occurred to stop the payment. It seems to me, therefore, that there was no breach of trust. There were sums of money in the Bank of England ready and sufficient for the purpose of meeting the bills. Then this occurs: One of the remittances from Kelly and Co. was by a mere blunder of a clerk paid into another banking account of Smith, Fleming and Co., at the London Joint Stock Bank, which was their general banking account and upon which their bankers had a lien. In that state of things there came news of the failure of the City of Glasgow Bank, which was certain to bring down with it the house of Smith, Fleming, and Co. Smith, Fleming, and Co., not being then aware of the mistake which their clerk had made, and they being perfectly competent to do everything not prohibited by the bankruptcy law, and being masters and owners, as they were, of their own moneys, both at the Bank of England and at the other bank, wrote to Messrs Kelly and Co. thus: "We have paid into the Bank of England the 5300*l.* according to your directions." I apprehend that that was a payment which they were bound to make. If the clerk had not made the mistake of paying 2000*l.* of the money remitted into the other banking account, and if the whole 5300*l.* had been in the Bank of England, it appears to me that there would be no question about it. There seems to have been no question about the 3300*l.* that was paid into the Bank of England. In putting the remittances *in medio*, they did not say to the *cestuis que trust*, "You have got a better claim to the money, and can follow it, because it is earmarked as trust money." That is not, as I understand, the meaning of the letters that passed. What the debtors meant, as I understand, by those letters was this: "Unless there is some provision in the law (as to which our lawyer and accountants have some doubt) which makes it wrong for us to do what we are doing, or intended to do, you shall hold the moneys to do what we intended to have done, but for the advice of our lawyers." It appears to me that they were not forbidden by the provisions of the bankruptcy law to do what they intended from the first to do, and what it was intended by everybody they should do with the moneys they received, and which they would have done if those moneys had all been paid into the Bank of England. It seems to me that they made no fraudulent preference in correcting the mistake made by their clerk by taking money out of the one pocket for the purpose of meeting something for which the moneys in another pocket were specifically appropriated, the money having got into the former pocket by mistake. It seems to me that what they did was lawful and right. In applying the moneys for the specific purposes for which they were remitted, they committed no misappropriation, no breach of trust of any kind; therefore the relation of debtor and creditor never existed between them and Kelly and Co., and they cannot be said to have acted with the intent to give Kelly and Co. a fraudulent preference over the other creditors. They merely did that which they thought it was their duty to do, to comply with the specific direction given to them when the money was remitted to them.

BAGGALLAY, L.J.—I concur with the views expressed by the Lord Justice, and have very little to add. On the 5th Oct., bills to a considerable

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amount were becoming due, upon which bills both Kelly and Co. and Smith, Fleming, and Co. were liable. Those bills were made payable at the Bank of England. In the ordinary course of business between the two firms it was the duty of Kelly and Co. to supply Smith, Fleming, and Co. with funds to meet those bills. In pursuance of that usual course of trade and in ignorance of any pecuniary difficulty of Smith, Fleming, and Co., Kelly and Co. forwarded 5300*l.* to Smith, Fleming, and Co. Now if Smith, Fleming, and Co. had done nothing whatever until the 5th Oct., and had then drawn a cheque upon that account in the Bank of England and taken up the bills, no question could have been raised with regard to the propriety of their doing so; but it appears that two or three days before the 5th Oct., at the suggestion of their solicitors and accountants that there might be some doubt as to whether they could meet the bills by drawing upon the bank they placed 5300*l.* in another bank, the National Bank of Scotland, in the names of two of their partners, and immediately informed Kelly and Co. that they had done so for the express purpose of taking up the bills. Now I quite agree with Mr. Dundas Gardiner that the contrivance was a clumsy one, as it might have been done in a very simple way; but at the same time I see no objection to the course that has been adopted. I can see no distinction between the position of the 3300*l.* and that of the 2000*l.*

BRAMWELL, L.J.—I am of the same opinion. The first question, to my mind, is, does it make any difference that the 2000*l.* was inadvertently paid into the London Joint Stock Bank, instead of being paid into the Bank of England? Now, I cannot think that it was necessary that the specific 2000*l.* which had been paid into the London Joint Stock Bank should be drawn out again by Smith, Fleming, and Co., and paid into the Bank of England. It was enough for them to get the money. As it seems to me, it was the same thing if they had 5300*l.* unappropriated at the Bank of England. They might in that case intentionally have paid that 2000*l.* into the London Joint Stock Bank, instead of going through the form and ceremony—the idle form and ceremony—of paying it into the Bank of England, and drawing 2000*l.* out of their moneys at the Bank of England, for payment into the London Joint Stock Bank. They might have done that lawfully, and surely it could make no difference to do what they really did. It seems to me that the case ought to be considered just the same as if they had paid the 5300*l.* into the Bank of England. But Mr. Dundas Gardiner says that they committed a breach of trust. The money was remitted to them for the very purpose of paying it into the Bank of England, where the bills were made payable, and therefore, if they did that, they performed the trust, as it seems to me, and I cannot think that the law is that the money cannot be followed and traced where there was what we may call a technical or formal breach of trust, in not earmarking the fund. According to Mr. Dundas Gardiner's argument, he has as good a title to the 3300*l.* as to the 2000*l.* I think he has. I think he is entitled to neither, because it seems to me that Smith, Fleming, and Co. applied the money in the way in which it was intended they should apply it. If they had allowed it to remain in the Bank of England, and

the bills had been presented, they would have been paid, but knowing that the bankers might make some difficulty in paying, if they stopped before the bills were presented, they drew it out, and said, "We will perfect the conditions of the trust, and complete it as far as we can." I think, therefore, that the appellants are entitled to have this 2000*l.*, and that is our judgment.

*Appeal accordingly allowed with costs.*

Solicitors for the appellants, *Phelps, Sidgwick, and Biddle.*

Solicitors for the respondents, *Lynne and Holman.*

*Thursday, April 3.*

(Before JAMES, BAGGALLAY, and BRAMWELL, L.JJ.)

*Ex parte BANCO DI PORTUGAL; Re HOOPER. (a)*

*Bankruptcy—Double proof—Two firms composed of same individuals—One estate administered in different countries—Bankruptcy Act 1869, s. 37.*

*Two persons carried on business in partnership in two different places, viz., in London, as wine merchants, under the firm of H. and Sons, and in Oporto, as shippers of wine, under the firm of H. Brothers. The Oporto firm drew bills of exchange upon the London firm, which the latter accepted, and the bills were discounted for the Oporto firm by a Portuguese bank. The London firm filed a liquidation petition, and the affairs of the Oporto firm were liquidated according to the Portuguese law. The bank received a dividend out of the Portuguese assets in respect of the bills, and then claimed to prove on the bills in the English liquidation:*

*Held, that the 37th section of the Bankruptcy Act 1869 only applies to cases where the two firms have distinct estates, and that as the two firms here had but one estate, the bank could not be admitted to prove in the English liquidation without bringing in what they had received from the Portuguese assets.*

THIS was an appeal from a decision of Mr. Registrar Murray, sitting as Chief Judge in Bankruptcy.

The facts of the case were briefly as follows:—

J. K. Hooper and J. K. Hooper, jun., carried on business in partnership in London as wine merchants, under the firm of Richard Hooper and Sons, and in Oporto, as wine shippers, under the firm of Hooper Brothers.

They filed a liquidation petition in London, and immediately afterwards proceedings were taken in Oporto for the liquidation of their affairs there according to the laws of Portugal.

The Banco di Portugal, who had discounted for Hooper Brothers five bill of exchange drawn by Hooper Brothers upon and accepted by Richard Hooper and Sons, received a dividend of 8*s.* in the pound in respect of the bills in the Portuguese liquidation, and they afterwards tendered a proof upon the bills in the English liquidation.

The registrar held that the proof could be admitted only upon condition that the bank should not receive any dividend thereon until the other creditors had received a dividend equal to that which the bank had received in the Portuguese liquidation.

From this decision the Banco di Portugal appealed.

*Cookson, Q.C. and S. Wolff for the appellants.—*

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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The 37th section of the Bankruptcy Act 1869 entitles us to prove in the English liquidation without giving credit for what we have received from the Portuguese assets. The concluding words of the section, "shall not prevent proof in respect of such contracts against the properties respectively liable on such contracts" cannot mean properties separately chargeable, for the very notion of proof in bankruptcy excludes the notion of charge, because nobody can prove in bankruptcy except on giving up his security. The section clearly contemplates the circumstance, which occurs here, that the individuals composing the two firms shall be the same. Here we have a firm of R. Hooper and Sons, in London, and Hooper Brothers, in Oporto. Where the two firms are "in whole composed of the same individuals," they cannot have separate properties in the same sense as two firms which have only one common partner may be said for certain purposes to have separate properties. Therefore, there must be some limitation put upon the last words in the section. All that is necessary to establish our right to double proof is that there be distinct contracts, as Lindley, J. points out in his book on Partnership (4 edit. p. 1212), where after stating that the 37th section of the Bankruptcy Act 1869 had been inserted to remove certain doubts and difficulties, he says: "This section, it will be observed, extends to all liabilities on distinct contracts, which a bankrupt may have entered into, either as a member of two or more distinct firms, or as a sole contractor and also as a member of the firm. The section applies, although there may not be any distinct trades at all; and, so long as there are distinct contracts between such persons as are mentioned in the section, double proof is now admissible." We claim upon bills of exchange, of which the Oporto firm are the drawers, and the London firm the acceptors, and nothing can be more distinct than the contract of the acceptor and that of the drawer. Here, too, there are distinct trades, though that is not necessary, but for the purpose of working out the equity of the section it is not a matter to be lost sight of. By the Portuguese law the creditors whose debts were contracted in the name of the Portuguese firm had priority, as was the case in *Ex parte Wilson, Re Douglas* (26 L. T. Rep. N. S. 489; L. Rep. 7 Ch. 490). [BAGGALLAY, L.J.—It seems to me that that case is on all fours with the present case except that it arose under the Bankruptcy Act 1861.] Here there are distinct trades, while there it was the same trade carried on in two different places. In what possible case can the 37th section be applicable, if not to the present case, where we have two firms composed wholly of the same individuals, trading under different names? *Ex parte Wilson, Re Douglas*, was a decision on the Bankruptcy Act of 1861, the corresponding section (s. 152) of which was very different from the 37th section of the Act of 1869, for in it are the words "having distinct estates to be wound up in bankruptcy," which are omitted in the 37th section. All that is now requisite is that there should be distinct contracts. As for the expression "distinct firms," the only distinctness there can be between two firms composed of the same individuals, is an ostensible distinctness such as exists in the present case. They also referred to

*Ex parte Honey; Re Jeffery*, 25 L. T. Rep. N. S. 728; L. Rep. 7 Ch. 178;

*Goldmid v. Casanova*, 7 H. L. Cas. 785;  
*Ex parte Adamson; Re Collicie*, 38 L. T. Rep. N. S. 917; L. Rep. 8 Ch. D. 807;  
*Ex parte Stone; Re Welch*, L. Rep. 8 Ch. 914.

*De Gee, Q. C.* and *Finlay Knight*, for the respondent, were not called upon.

JAMES, L.J.—I cannot draw any distinction whatever between this case and that of *Ex parte Wilson, Re Douglas* (26 L. T. Rep. N. S. 489; L. Rep. 7 Ch. 490), which was decided by this court, and although I was one of the judges who decided that case, it is, of course, as binding upon us as any other judgment of the court. It was a case perfectly analogous to this, and the circumstances were very nearly the same. In that case the Brazilian law, and in this case the Portuguese law, was referred to. We there held that the 152nd section of the Bankruptcy Act 1861 could not apply unless where there are two estates to be wound-up; but it has been said that the words "having two estates to be wound-up" in the 152nd section of the Act of 1861 were left out of the corresponding section of the Act of 1869. So they were; but they were left out because they were mere surplusage; and the subsequent enactment (the 37th section of the Bankruptcy Act 1869) cannot be applied, as we think, except where there are two estates, and the words "having two estates to be wound-up" were unnecessary words, and might be left out. The only distinction intended to be made, as I gather, and the only distinction in fact made between the 152nd section of the former Act and the 37th section of the present Act was that the former was confined entirely to bills of exchange and promissory notes, and that limitation was left out of the subsequent enactment, which was meant to apply to any other contracts, that is to say, contracts which were bills of exchange or promissory notes, but the new law put them upon the same footing as bills of exchange or promissory notes were under the old law. That was the only change, except that the language was amended by being made shorter and terser. The word "property" in the 37th section of the Act of 1869 must be read "estate;" and, not being able to distinguish this case from that of *Ex parte Wilson, Re Douglas*, we must follow that decision and hold that the appellants are not entitled to prove against this estate until they have brought in what they have received from the same estate or from part of the estate by another administration.

BRAMBELL, L.J.—I am of the same opinion. I have a difficulty in seeing how this 37th section applies. It is a section for in certain cases permitting—or for the non-prevention, I suppose one ought to say, of double proofs. I am fully sensible of the difficulty there is in the construction. It appears to me that in an unsupposable case something is not to be prevented. It is, however, a section for the non-prevention of double proofs, and it contemplates double proofs, therefore; and, to my mind, it contemplates that there must be two estates. It is manifest, that the word "properties" here means that there must be two estates. Now, I agree with the opinion of Mellish, L.J.—at least I incline to it at the present moment—that there may be two estates, one in England and one abroad, as well as both in England; and I think it is possible that the Legislature might have contemplated a proof against

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an estate abroad, and also a proof against another estate in England; but to my mind it must be another estate. I cannot understand how there can be two proofs, unless there are two estates. The argument, if it comes to anything—if Mr. Cookson will forgive me for speaking of it in that way—must come to this, that in truth there are two estates, a Portuguese estate, and an English estate; and it is said that there is a Portuguese estate, because the Portuguese have done what they have done in the way they have done; but I think that argument cannot be sustained, because, supposing there had been a surplus of the Portuguese property, or the property in Portugal, it would have belonged to the trustee of the estate here. And another thing is also manifest, that the Portuguese would have done what they did if there had been only one contract, that is to say, if Hooper Brothers, in Portugal, had drawn upon Hooper and Sons in London, in which case there would have been only one contract, it is manifest that the Portuguese Courts would have taken the property in Portugal, and applied it in the same way as they have done; and yet in that case there can be no doubt that the Banco di Portugal, subject to allowing for everything they would have received under the Portuguese law, would have had a right to prove against the English estate, that is to say, they would have had a right to prove against the English estate in respect of the bill, although they had received money from the property administered in Portugal. What is proposed now? That they shall be admitted to prove against the same estate here. In respect of what? In respect of the indebtedness. I suppose it would be put upon that ground, treating it as though the bank had made a sort of proof, received a sort of dividend in respect of the drawee in Portugal; but that is not so. What the Portuguese courts do is not to make a separate estate, as it were, but to lay hold of what property they can get and distribute it among the creditors. Now it seems to me, therefore, that there are not two estates, one in Portugal and one here, and consequently there is not a possibility of a double proof; consequently the 37th section does not apply; and I further am of opinion that that case of *Ex parte Wilson, Re Douglas*, is in point, and I am satisfied with the reasons of it. I should like to say one word about hardship, because although it is often said that one ought to decide a case irrespective of hardship (which is undoubtedly true), yet I think I have had occasion to say more than once that when a particular construction of an Act of Parliament or a particular proposition of law leads to a hardship there is a presumption against that proposition being right, because I do not think that our law does, usually at least, in any sense lead to hardship. There is little hardship in this matter. When people take a bill of exchange, they take it on account of what they know of the parties; and it very rarely happens, I should suppose, that they say, "Here are half a dozen indorsements; that means half a dozen different firms, and some of them will pay if the others do not, and so altogether we shall get 20s. in the pound." That is very rarely said, you may depend upon it. They take it upon the credit of the names that are known to them, and I have very little doubt that in this case—of course I do not know, and think it

very immaterial—the Banco di Portugal either knew the partners in the drawing firm and in the accepting firm were the same. Mr. Cookson shakes his head—well, they did not care whether they were or not, and in either case no hardship is done.

BAGGALLAY, L.J.—I am of the same opinion for the same reasons.

*Appeal dismissed. Leave given to appeal to the House of Lords.*

Solicitors for the appellant, *M. Abraham and Roffey*.

Solicitors for the respondent, *Loxley and Morley*.

Feb. 17 and 18.

(Before JAMES, BRAMWELL, and BRETT, L.JJ.)

*Re HARKER; GOODBARNE v. FOTHERGILL. (a)*

*Appeal—Setting down—Rules of Court 1875, Order LVIII., r. 8.*

*In an administration action, an order had been made on further consideration, on the 3rd April 1878, on the 23rd April the defendant gave notice of appeal for the 30th. The appeal was not set down till the 28th June. The order under appeal was not drawn up till shortly before that day.*

*A preliminary objection to the hearing of the appeal having been taken by the plaintiff on the ground that it was not set down before the 30th April: Held, that the notice of appeal was given earlier than was necessary. The appeal could not be set down without producing an office copy of the order (under rule 8 of Order LVIII.), which could not be done till the order was drawn up, and the plaintiffs who had the carriage of the order ought not to be allowed to take advantage of their own delay.*

THIS was an appeal by the defendants in an administration suit from an order of Bacon, V.C., dated the 3rd April 1878, made on further consideration and on application by both parties, to vary the chief clerk's certificate. On the 23rd April the defendants gave notice of appeal for the 30th, asking that the order might be varied so far as it varied the certificate in certain particulars mentioned in the notice of appeal, and that the consequential directions might also be varied accordingly. The appeal was not set down till the 28th June. The order under appeal was not drawn up till shortly before the day on which the appeal was set down for hearing.

*Swanstone, Q.C. and Bisell* took the preliminary objection that the appeal, not having been set down before the 30th April, the day named in the notice, could not now be heard, and that a fresh appeal would be too late. They referred to

*Re National Funds Assurance Company*, 35 L. T.

Rep. N. S. 689; L. Rep. 4 Ch. Div. 305;

*White v. Witt*, 36 L. T. Rep. N. S. 123; L. Rep. 5 Ch. Div. 589; 46 L. J. 560, Ch.;

*Rhodes v. Jenkins*; *Re Mansell*, 38 L. T. Rep. N. S. 403; L. Rep. 7 Ch. Div. 711;

Rules of Court 1875, Order LVIII., r. 8.

*Hemming, Q.C. and Tremlett*, for the appellant, contended that it was the duty of the plaintiffs to draw up the order under appeal, which order had not been drawn up till June, and that the appeal could not be set down for hearing till after that order had been drawn up.

(a) Reported by E. S. ROCHE, Esq., Barrister-at-Law.

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JAMES, L.J.—I am of opinion that there is nothing in the objection. The notice of appeal was given earlier than was necessary, for it might have been given at any time within twenty-one days after the drawing up of the order. The order of which the respondents had the carriage was not drawn up till June, and the appeal was set down as soon as they enabled the appellants to comply with the requisitions of Order LVIII., r. 8. The case is one in which the respondents ought not to be allowed to take advantage of a delay occasioned by themselves.

BRAMWELL and BRETT, L.JJ. were of the same opinion.

Solicitors: *Collyer-Bristow; Withers and Russell; C. P. Deane.*

Wednesday, March 5.

(Before JESSEL, M.R., and JAMES and BRAMWELL, L.JJ.)

*Re HARDLEY'S TRUSTS.* (a)

*Practice—Trustee Relief Act—Payment into court—Address of party entitled unknown—Chancery Funds (Amended) Orders 1874, r. 5.*

Where, on payment into court under the Trustee Relief Act, the address of the person interested in the fund was not known, the court declined to give any direction as to how the notice required by the Chancery Funds (Amended) Orders 1874, r. 5, should be given, holding that the party paying in the fund ought to take that responsibility upon himself.

*Suggestions as to what would probably be considered sufficient notice of the payment in.*

THIS was an *ex parte* appeal from a decision of Fry, J. In 1862, John Hardley executed a mortgage in fee to Thomas Howe Clark with a power of sale, to secure 800*l.* and interest. On the 23rd Jan. 1872, John Hardley died intestate leaving two sons, Gillingham Hardley and Frederick Hardley. In May 1876, Captain Paley the mortgagee sold the mortgaged property under the power of sale and conveyed it to the purchaser, and after satisfying his debt, interest, and costs, there remained in his hands a surplus of 1217*l.* Paley paid the 1217*l.* into court under the Trustee Relief Act on the ground that he did not know and had been unable to ascertain the address of Gillingham Hardley who, as heir-at-law, was entitled to the fund. He deposed in his affidavit, made on payment of the money into court, that he had been informed by Frederick Hardley that his brother Gillingham Hardley left this country for Australia, in 1852, being a bachelor at that time; that his family received a letter from him shortly after his arrival there, but from that time until the year 1873 no tidings or communications were received of or from him by any member of his family, that in 1873 his family received intelligence of his being alive at Wincania, a place on the river Darling in Australia, and that on writing to him at that place they received a reply from a person styling himself Gillingham Hardley, which they believed to have been written by Gillingham Hardley, that they had since written several letters to him and received answers from the same person, who at one time wrote from a place called Wentworth, and another time from Port Adelaide, and lastly from Port Augusta; that his last reply to

their communications was dated in or about Dec. 1876 and was received in England in March 1877, that one of the letters written to him mentioned the fact of the property having been sold and that the surplus money was ready for him on his arrival in England, and that in letters received from him in reply he expressed his intention of returning shortly to England, but had never arrived, and since the receipt of his last letter no member of his family had heard of him, and that although inquiries had been made in Australia by his relatives, at the places from which he had written no such person could be heard of.

On the 27th Feb. 1879 an application having been made to Fry, J., sitting for Malins, V.C. on behalf of Capt. Paley, to dispense with the usual notice required by rule 4 of the Chancery Funds (Amended) Orders, 1874, or to direct how such notice should be given, his Lordship declined to give any directions, or to express any opinion as to what would be considered sufficient notice.

On the appeal,

D. Alexander, for Capt. Paley, contended that the directions of the court might be given, as that gentleman was unable literally to comply with rule 5 of the Chancery Funds (Amended) Orders, 1874. In *Re Hansford* (7 W. Rep. 199, 254), Wood, V.C., had, in a similar case, dispensed with the notice, and in *Re Palmer* (W. N. 1873, p. 101), Malins, V.C., had given directions as to the mode in which the notice should be given. He also referred to

*Re Goodman's Will*, W. N. 1870, p. 152.

JESSEL, M.R.—I am of opinion that the court has no power to dispense with the notice, or to give any directions. I believe that I have decided that it must be determined upon an application to distribute the fund, whether sufficient notices have been given, and that it was not a matter for *ex parte* application beforehand. What jurisdiction have we to direct substituted service?

D. Alexander submitted that the court having seisin of the fund, would have authority to tell the trustee what he ought to do.

JAMES, L.J.—If you write to the brother in England, and tell him of the payment into court, and advertise in any newspapers in Australia, I think the court will hereafter consider that you acted reasonably in incurring the expenses, and ought to be allowed them, and that you did all that it was incumbent on you to do. I can only say that is my opinion; we cannot, I think, give any directions which will free you from responsibility.

BRAMWELL, L.J.—I am of the same opinion.

Solicitors: *Cunliffe, Beaumont, and Davenport*, agents for E. F. Blake, Newport, Isle of Wight.

Feb. 12 and 18.

(Before JAMES, BRAMWELL, and BRETT, L.JJ.)

SMITH v. THE DYNEVOR, DYFFRYN, AND NEATH ABBEY UNITED COLLIERIES COMPANY. (a)

*Company—Winding-up—Agreement for a lease between creditor and a stranger—Sanction of company—Companies Act 1862, ss. 136, 159, 160—Joint-Stock Companies Arrangement Act 1870, ss. 2, 4.*

*An arrangement, which had been come to between a*

(a) Reported by E. S. ROCKE, Esq., Barrister-at-Law.

(a) Reported by E. S. ROCKE, Esq., Barrister-at-Law.

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*company and its creditors, had been approved by a large majority of the debenture holders at a meeting held under an order of the court, the majority exceeding that of three-fourths required by sect. 2 of the Joint-Stock Companies Arrangement Act 1870; and it was, after the order of the court had been made, approved by a general meeting of the shareholders of the company. The company was in voluntary liquidation. An order having been made by Malins, V.C. sanctioning the agreement, certain of the debenture holders appealed.*

*Held (affirming the decision of Malins, V.C.), that there had been a substantial compliance with the requirements of the Companies Act 1862 and the Joint-Stock Companies Arrangement Act 1870.*

*Where the approval of the shareholders of a company, by the requisite majority, has been given to an honest arrangement between the company and its creditors, such approval is not a condition precedent to giving the sanction of the court.*

THIS was an appeal by some of the holders of debentures of the Dynevor, Dyffryn and Neath Abbey United Collieries Company, from an order of Malins, V.C., sanctioning an arrangement which had been come to between the company and their creditors under the following circumstances:

In June 1874 the Dynevor, Dyffryn, and Neath Abbey Collieries Company was incorporated. A prospectus was issued shewing who were the directors, and amongst them was a Mr. John Newell Moore. By the prospectus it was stated that the capital of the company was to be 250,000*l.*, of which 200,000*l.* was subscribed, and 210,000*l.* was to be the first mortgage debenture stock which was to be raised by the public subscribing for those debentures. Advertisements were issued, and the debentures became ultimately partly subscribed for.

On the 29th Sept. 1874, a general deed of trust and mortgage was executed, by which the whole of the property belonging to the company became vested in Lord Claud Hamilton and Capt. Francis Pavey as trustees for the debenture holders. The result of the trading was disastrous, and after the business had been carried on for four years, it came to a complete collapse. In the meantime money was borrowed from the Glamorganshire Bank, and a large loan was made to the company. A certain number of the persons who held debentures had given priority to that loan over the debentures, and a certain number had not given such priority. In 1878, the company having come into such a straight that it could not pay its debts, a person named Cullum presented a petition for winding it up. About the same date Mr. Moore also presented a winding-up petition, and in April in that year a resolution was passed appointing a committee of debenture holders to investigate the affairs and position of the company.

On the 29th of June, 1878, the company came to a resolution to wind-up voluntarily, and appointed the two trustees of the mortgage deed liquidators. The two petitions were not disposed of by the Vice-Chancellor, but on their coming before him on the 29th July, he directed the trustees to convene a meeting of debenture holders to decide what had better be done. A meeting was accordingly held on the 21st Aug. 1878, when an arrangement which had been proposed between the company and the debenture holders,

with a view of granting a lease of the property of the company to Mr. Moore, was approved by a majority of the debenture holders, exceeding the majority of three-fourths required by section 2 of the Joint-Stock Companies Arrangement Act 1870; and it was afterwards approved by a general meeting of shareholders of the company. That arrangement was embodied in a provisional agreement, dated the 11th Sept. 1878, and made between the trustees on behalf of the debenture holders of the first part, the company of the second part, and John Newell Moore of the third part. It provided that a lease of the company's mines should be granted to Moore for twenty one years, at a dead or minimum rent of 5000*l.* a year and certain royalties. The lessee was to take all the liabilities of the leases under which the company held the property. The lease was to include the plant and machinery belonging to the company. The lessee agreed to have 10,000*l.* ready to be expended as capital on the date of the commencement of the lease, and that he would expend so much of that sum as should be required in developing and working the mines, and that he would, within twenty-eight days from the date of the sanctioning of the agreement, deposit 4000*l.* (part of the 10,000*l.*) in a bank specified in the names of the trustees. The lessee agreed to indemnify the company and the trustees and the secured creditors of the company against all debts, claims, and demands upon the company up to the date of the commencement of the lease other than the moneys secured by the deed of trust and mortgage for the benefit of the debenture holders and certain other specified moneys; and the liquidators of the company and the trustees were to assign to the lessee absolutely all the assets of the company, including all moneys owing in respect of calls already made on the shares.

This agreement was made expressly subject to the sanction of the court.

The case came before the Vice-Chancellor in Nov. 1878 upon an adjourned summons for the sanction of the court to carry out the proposed agreement, when the application was opposed by some of the debenture holders. The following sections of the Companies Act 1862, and the Joint-Stock Companies Arrangement Act 1870 were referred to in the course of argument.

Sect. 136 of the Act of 1862 provides that

Any arrangement entered into between a company about to be wound up voluntarily, or in the course of being wound up voluntarily and its creditors, shall be binding on the company if sanctioned by an extraordinary resolution, and on the creditors, if assented to by three-fourths in number and value of the creditors, subject to such right of appeal as is hereinafter mentioned.

Sect. 159 enacts that

The liquidators may, with the sanction of the court, where the company is being wound up by the court or subject to the supervision of the court, and with the sanction of an extraordinary resolution of the company where the company is being wound up voluntarily, pay any classes of creditors in full, or make such compromise or other arrangement as the liquidators may deem expedient.

By sect. 160 the liquidators may, with the sanction of the court, &c.,

Compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent . . . and all questions in any way relating to or affecting the assets of the company or the winding-up of the com-

pany, upon the receipt of such sums payable at such times, and generally upon such terms as may be agreed upon, with power for the liquidators to take any security for the discharge of such debts or liabilities, and to give complete discharges in respect of all or any such calls, debts, or liabilities.

**Sect. 2 of the Act of 1870 provides**

Where any compromise or arrangement shall be proposed between a company which is at the time of the passing of this Act or afterwards in the course of being wound up either voluntarily or by or under the supervision of the court under the Companies Acts 1862 and 1867 or either of them, and the creditors of such company or any class of such creditors, it shall be lawful for the court, in addition to any other of its powers, on the application in a summary way of any creditor, or the liquidator, to order that a meeting of such creditors or class of creditors, shall be summoned in such manner as the court shall direct, and if a majority in number representing three-fourths in value of such creditors, or class of creditors, present either in person or by proxy at such meeting, shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the court, be binding on all such creditors, or class of creditors, as the case may be, and also on the liquidator and contributories of the said company.

**Sect. 4 says:**

This Act shall be read and construed as part of the Companies Act 1862.

**In the court below,**

MALINS, V.C., after stating the facts, said:—Under the circumstances I feel myself bound to adopt the proposal that has been made. It has been urged that this case does not fall within the per-view of the Companies Act 1862 and the Joint-Stock Companies Arrangement Act 1870. What is the nature of the proposed arrangement? Here is a company which have collieries they are incapable of working, and there has consequently been a resolution come to to wind up voluntarily. The only question is, upon what terms the company should be wound up. The regular course to adopt would be to sell the collieries, but if that were done the parties would get nothing. Another mode is for somebody to find the necessary capital and to work the collieries. It is proposed that instead of selling them out and out they should be partly sold by granting a lease. That is an arrangement to retain the property during the currency of the lease, and it is agreed to by an enormous majority of the debenture holders. The question is whether I ought or ought not to approve this scheme. The court will be very slow, indeed, when it has directed a meeting to be held and when an overwhelming majority has adopted a particular course, to say that those who had an ample opportunity of objecting, but who remained silent, and who, remaining silent, must be taken to have consented to what was done, should have an opportunity afforded them of coming forward at this stage, to raise objections against being bound by what was done at that meeting. I consider that the meeting of the 21st Aug. 1878 was regularly and properly convened for the purpose of deciding the question whether the arrangement should be made or not. Now, the only doubt I have had has been, whether, considering Mr. Moore has bound himself up to the month of January next by this contract, it would be expedient to allow the matter again to stand over in order that the objectors might come forward with some better scheme. But there is no reasonable prospect of their coming forward with any better proposal, and therefore I entertain no doubt whatever that I ought to sanction the arrangement

with Mr. Moore, and I do so accordingly. With regard to the objection that the simple contract creditors and the general creditors have not been served, I understand that this order is only intended to bind the debenture holders, and therefore the rights of the former, whatever they may be, will be untouched, and it is not necessary that they should be parties to the proceedings. It is clear, however, that there is not enough to pay the debenture holders who stand first, and therefore it is immaterial to consider the interests of those who stand behind. Then lastly as to the point which has been urged, that there are some twenty or thirty actions pending against the promoters of this company for fraudulent misrepresentations and that I must attach importance to them, I cannot for a moment assume that that is well founded until it is proved. I can only add that whatever the rights of the parties in these actions may be, they will not, in the slightest degree be affected by my making the order confirming the arrangement sanctioned at the meeting of the 21st Aug., and therefore I do so accordingly.

The dissentient debenture holders appealed.

On the 5th Feb. 1879, pending the hearing of the appeal, an extraordinary general meeting of the company, duly convened by circular, was held, and a resolution was passed sanctioning the arrangement and agreement for a lease.

Bristowe, Q.C. and H. A. Giffard, for the appellants, contended that the order of the court below was invalid, because the approval of the shareholders had not been given until after it was made; also, that the arrangement or compromise was not one within the contemplation of the Joint-Stock Companies Arrangement Act of 1870, which contemplated, not an arrangement between the company and a third party, but something in the nature of a compromise between the company and their creditors, or a class of their creditors. An agreement entered into under the Act of 1870 must be treated as one made under a succession of clauses in the two Acts, namely, the 136th, 159th, and 160th sections of the Companies Act of 1862, and the 2nd and 4th sections of the Act of 1870. The governing principle throughout the Act of 1862 was that in a voluntary winding-up, before you could provide for any compromise or arrangement, there should be a previous extraordinary resolution passed by the company sanctioning such compromise or arrangement. No extraordinary resolution had been come to here prior to the agreement, and such omission was fatal.

Bowen, for a contributory, supported the appeal.

J. Pearson, Q.C. and Romer for the company; Higgins, Q.C., F. C. J. Millar, and C. M'Laren, for the debenture holders, were not called upon.

JAMES, L.J.—I am of opinion that the order of the Vice-Chancellor ought to be affirmed. It is not disputed that this is an arrangement which the great body of the debenture holders almost unanimously has sanctioned, and which the shareholders, with almost equal unanimity, have also sanctioned. As far as we can make out, the arrangement has been made most carefully and honestly between the parties. The debenture holders had a committee who looked after their interests, and the company had liquidators who looked after their interest. The Vice-Chancellor directed a meeting of debenture holders to be



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held, and after due notice that meeting was held, giving every person an opportunity of seeing the lease which was proposed to be made to Mr. Moore. Under those circumstances the substance of the thing seems to me to be entirely right. Now it is said that the arrangement is not a beneficial one for the debenture holders. One does not know what the exact state of these collieries was at the time, but one knows what colliery properties have been for some years, and are now. The debenture holders and the shareholders all thought that the best thing they could do was to make some arrangement with regard to the property. Of course the trustees of the debenture holders could not have been expected, and they would not of themselves have gone into possession, and taken the risk of working it themselves. They had no capital for the purpose. The company, as I understand, was subject to petitions for compulsory winding-up, which probably would have been granted if it had not been for the voluntary winding-up. Under these circumstances the committee of the debenture holders, and the liquidators, who were appointed by the shareholders, thought the best thing they could do would be to get a lease of the property taken by a person whom they supposed, and, therefore, I suppose to be a responsible person. The debenture holders and the shareholders are satisfied that this gentleman will be a lessee with available means to carry into effect the bargain he has made. Then it is said that this lease is not an arrangement within the Joint-Stock Companies Arrangement Act 1870. Of course the lease is not the arrangement. The arrangement was one between the debenture holders and the company that that lease should be granted. In other words, the arrangement between the debenture holders and the company was that the property of the company should be granted to Mr. Moore in such a way as to produce an income which would be more or less available for the debenture holders, the debenture holders being satisfied that that is the best thing they can get, and the most that they can get; and the lease is granted obviously, and I should say honestly, as being the very best thing that could be done for anyone. That seems to me to be the conclusion at which they have arrived. Then, part of the arrangement that is made is that the debenture holders shall sanction the arrears of calls to be paid to Mr. Moore. That is one thing they give up their claim to. Then they give up their claim to have the moveables and so on sold for the purpose of the proceeds being paid to them; and they arrange with the company that the company and their trustees shall make that arrangement with regard to the property of the company with Mr. Moore, which is to result in that which they think is the best thing for them under all the circumstances of the case. Notice was given of this arrangement, and it appears to me that the notice which was given was proper in form, and that the resolution was in proper form. Then it is said that there were certain important modifications of the terms, which ought to have been submitted to a further meeting of the debenture holders. I see no authority for that under the Act of Parliament or on any general principle of law or common sense. The modifications that were made seem to be modifications which were imposed upon the lessee and in favour of the lessors, who

were the trustees of the debenture holders, that is to say, the lessee was deprived of the privilege which the debenture holders thought would probably diminish the value of this property, and he was also made to pay an extra royalty for some part of the property. Those are the modifications which were imposed upon the lessee, and agreed to by him in favour of the persons who are now objecting to them as modifications which ought not to have been made. Then it is said that the arrangement was not carried out in due form, but all that is required, as it appears to me, by the Act of Parliament is that the arrangement shall be sanctioned by the company by an extraordinary resolution. The extraordinary resolution has been obtained, and the arrangement has been sanctioned. The debenture holders, some of whom are the persons who are complaining, sanctioned it by a very large majority, and the company on applying to the court, were, in fact, applying with the assent of everybody. The court having had its attention called to all the terms of the arrangement, sanctioned it; and then, if there was any difficulty from the want of a meeting of the shareholders to ratify what the company had done, that meeting has been held, and that ratification has been obtained. Therefore the whole thing seems to me to be quite right. But then it is said that the Vice-Chancellor ought not to have made his order until after that ratification. If necessary, the order might have been post-dated, but I do not think that is necessary. Every assent that is required has been given to the arrangement, and in what particular order or form that assent has been given seems to me to be wholly immaterial. I think that where there is an honest transaction, as this appears to be, from the outset, and everything is manifestly right, the court ought not to be astute to find out any little technical defect, if there be any, in the proceedings. I am therefore of opinion that the order of the Vice-Chancellor is right in substance, and right in form, and ought to be sustained.

BRAMWELL, L.J.—I am of the same opinion, and I shall add nothing to what has been said with respect to the technical difficulties which have been raised. I will only observe this, that there was a suggestion, although there was not a particle of evidence to show it, that a better bargain could have been made for the debenture holders.

BRETT, L.J.—It seems to me that the arrangement, and the only arrangement, in question is the one which has been made between the company and a certain class of its creditors, namely, the debenture holders; and the question is whether that arrangement has been come to in accordance with the statute in order to make it binding. That arrangement is, that the debenture holders, instead of being paid otherwise according to their rights, have agreed that the company or the trustees should make this arrangement with Mr. Moore, and that instead of being paid in any other way they should be paid out of the profits of this lease—that is to say, out of the rents and royalties to be paid under the lease. The only question is whether that arrangement has been come to with the proper sanction required by the statute. The creditors here—the debenture holders—are to be bound by the majority, and, therefore, under the Joint-Stock Arrangement Act of 1870, it is necessary that the proper

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requisites should have been gone through in order to enable the majority to bind the minority. What was required was that certain notices should be given; that a certain resolution should be passed; and that the sanction of the court should be obtained. All those requisites have been fulfilled. The first objection of Mr. Bristowe was that, supposing all these things to have been done, each in itself right, yet they were done in the wrong order, and that the sanction of the court ought not to have been given before the extraordinary resolution of the shareholders of the company. Now, I can see nothing in the statute which makes that order imperative. If all these requisites are actually procured, there is no objection because one is made before the other. But, then, it is said that the resolution of the majority of the creditors had been obtained wrongly, and not in accordance with the Act of 1870. The first objection was that the debenture holders had been summoned in one class, whereas they ought to have been summoned in three classes. I confess that it seems to me that, if they had been summoned in three classes, and made to vote separately, that would have been bad, and that the only right way of doing it was to summon them as one class, as they were the persons to be bound, and that, in that respect, the notice, and what was done, was more correct than the mode suggested by Mr. Bristowe. Then it was said that the resolution of the debenture holders was bad on account of its giving power to make modifications. To my mind the resolution does not enable the trustees to make any essential modification in the substance of this lease, and if there had been any essential modification in the substance of the lease, I should have thought that the lease would be bad, and ought not to have been sanctioned by the court. But it seems to me that those two matters which were done, namely, the striking out of the wayleaves of a penny per ton, and the adding on of fourpence royalty for certain of the coal, are not, as was said, gross or large alterations. The fact is they are minor alterations, and they are both in favour of the debenture holders. Therefore, they are just the modifications that were authorised by the resolution, and the matter cannot be said to be bad upon that ground. It seems to me that the objections taken on behalf of the appellants are all hypercritical, and do not do away with the power of the court which made the order, and that the order was right.

*Appeal dismissed, with costs*

Solicitors: *Ashurst, Morris, and Co.; Norton, Rose, Norton, and Brewer; A. H. Miller.*

#### SITTINGS AT WESTMINSTER.

June 27 and 28, 1878.

(Before BRAMWELL, COTTON, and THESIGER, L.JJ.)

WRIGHT v. THE NEW ZEALAND SHIPPING COMPANY. (a)

*Ship—Charter-party—Action for delay in discharging—Duty of charterer—Reasonable time—Circumstances at port of discharge.*

*Where the time to be allowed for unloading is not named in a charter-party, the charterer is bound to provide at the port of discharge sufficient appliances of the kind ordinarily in use at the*

*port for the purpose of unloading, and it is no answer to a claim for damages for delay in unloading to show that the delay was caused by the crowded state of the port.*

APPEAL from the Queen's Bench Division.

The action was brought by the plaintiff, owner of the ship *China*, against the defendants, charterers, for not unloading the ship at the port of discharge within a reasonable time, the charter-party being silent as to the time to be allowed for unloading. The defendants relied upon the fact that, at the time when the ship arrived at the port of discharge, Port Lyttleton, in New Zealand, the port was crowded with vessels, and there were only a limited number of lighters in the port, the consequence of which was that it became impossible to unload the ship as soon as she could have been unloaded if there had been a sufficient number of lighters in the port to meet the requirements of all the vessels which were there at the time, or if the port had not been so crowded with shipping. The time when the ship arrived was the time of year when the port was generally most crowded. There were a considerable number of other vessels in the port besides the *China*, either belonging to or chartered by the defendants, and it was alleged on behalf of the defendants that they distributed all the lighters which they could obtain between the ships which they were discharging, including the *China*.

A verdict was found for the defendants, and the Divisional Court (Cockburn, C.J. and Mellor, J.) set the verdict aside, and directed a new trial.

The defendants appealed.

*Cave, Q. C. and Hugh Shield*, for the defendants, contended that the crowded state of the port, being usual at the time of year at which the ship arrived, must be taken to be an ordinary circumstance of the port, that the impossibility of obtaining sufficient lighters discharged the defendants from their liability to unload within what would otherwise have been a reasonable time, and that the verdict was justified by the evidence given at the trial.

*Herschell, Q. C. and J. P. Aspinall*, for the plaintiff, contended that the difficulties which the defendants relied upon as having relieved them from their obligation under the charter-party were such as they were themselves bound to provide against, and they could not throw the consequences upon the plaintiff; and further that, in any case, the verdict was against the weight of evidence:

*Adams v. The Royal Mail Steam Packet Company*, 5 C. B. N. S. 492; 28 L. J. 53, C. P.; and *Ford v. Cotterworth*, 19 L. T. Rep. N. S. 634; L. Rep. 4 Q. B. 127; 38 L. J. 52, Q. B., affirmed in Exchequer Chamber, 23 L. T. Rep. N. S. 165; L. Rep. 5 Q. B. 282; 39 L. J. 198, Q. B., were cited.

*Our. adv. vult.*

June 28.—BRAMWELL, L.J.—I am of opinion that this appeal should be dismissed. I think the order of the court below was right. I think the verdict was against the evidence, so that it ought to be set aside. In order to show that I think so, it is necessary for me to consider what I hold to be the law upon this matter. Now, the charter-party contains no statement as to the number of days in which the charterers should be entitled to discharge the vessel; they were therefore bound to do it within a reasonable

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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time. Now, in my judgment, a reasonable time for doing a thing is the time within which it can be done, working reasonably. What I mean to say is this: you are to look at the time necessary for doing the act without taking into account the time that may have been, or might under the particular circumstances be, necessary for the man who has to do it to make his preparations. Applying that rule to this particular case, it seems to me that the defendants, upon the arrival of the ship, were bound to have—I do not mean, as I said before, lighters on the shore ready manned to start off, but were bound to have lighters presently, or immediately, or forthwith, or within a reasonable time, ready to discharge the ship, and were not entitled to say, "We had not got them, not through any fault of ours, but because there were only a certain number of lighters there, and there were other ships which required those lighters, belonging to other people, and we could not get them, and we behaved reasonably and fairly to you in getting lighters for you as soon as we could." To my mind, that is no answer; they must do the thing, and they must be ready to do it, and being ready, they must do it within a reasonable time. Now, if that is the law, it is manifest that this verdict is against the evidence, because the case of the defendants is, not that they did it within a reasonable time in such a way as I have mentioned, but that they did it in a reasonable time, taking into account the embarrassment they were under on account of there being only a certain number of lighters, and a large collection of ships. Of course, in considering a case of this sort, you would have to take into account what one may call the physical conditions of the port. If the vessel cannot get within two miles the charterer must have a longer time for unloading her than if she came within a few yards. Things of that sort may be taken into account, but not such as are relied upon by the defendants in this case. A difficulty was suggested as to a ship being bound to go to a certain place, and that place not being accessible. It seems to me that if the condition or the obligation of the defendant was to have that place ready, why then it was his place, or, if he was in any way bound to have it ready, he is responsible, although it may be occupied by anything else; but if he is not bound to have it ready, as in the case of a dock which I put, where the dock is not his dock, where both parties have agreed that the ship shall be discharged there, and the ship cannot get into the dock on account of some defect at the entrance of the dock, which is not the fault of the shipowner or the charterer, then the charterer is not liable, nor is the shipowner; neither of them has made any default in doing the thing within a reasonable time, and it would be as unreasonable to say in such a case that the charterer had not discharged the ship within a reasonable time as it would be to say the shipowner had not got his ship into dock within a reasonable time; neither statement would be well founded. I cannot help thinking the illustration I gave was a good one. I order a coat of a tailor, and he must make it in a reasonable time. What is that? Why it is the reasonable time required by a man who has got workmen and needles and cloth, and other things for making a coat. In considering what is a reasonable time, he must not say that he ought to have some time for buying the cloth and to go and get

workmen and the materials necessary. Lord Justice Cotton has been good enough to read to me what he is going to say upon this. He has put down his view of what the law is on the matter, with which I entirely agree.

COTTON, L.J.—I agree in thinking there must be a new trial; that is to say, that even according to the ruling of the learned judge at the trial, the court from which the appeal comes was right in saying the case must go back, and that really disposes of the appeal; but I think it would not be right, as it is to go back for a new trial, not to say what, after argument, in our opinion is the law applicable to the case, in order that there may be no necessity for the case coming again to this court, after a further trial, on a question of law. Now the contract is one imposing an obligation on the charterer to unload within a reasonable time, nothing being said about the time to be taken; that is, in law, that he must do it within a reasonable time. When that is the contract there always arises a difficulty as to what is meant by "reasonable time," and I think the difficulty always arises in this way, from not considering what the obligations of the parties are, and not considering what facts are to be taken into account as between the parties to the contract in estimating what is reasonable. Therefore, I propose to state what I consider is the obligation of the charterer under those circumstances, what he is entitled to take into account in his favour in fixing what is a reasonable time, and what he is not—not of course exhaustively, but as applicable to this particular case, and to some extent to all cases. Now, I apprehend, in saying anything determining whether an obligation of this sort has been performed within a reasonable time, we must take it that this is an obligation of the charterer, namely, that he must provide at the port of discharge sufficient appliances of the kind ordinarily in use at the port, and that he must have them ready either when the ship arrives or within a short time (one might say a reasonable time, but that would be ambiguous) within, we may say, a day, or a couple of days, after the arrival of the ship. Possibly cases may arise where a ship arriving unexpectedly, much more shortly than could reasonably have been expected, a longer delay might be claimed and allowed than in ordinary cases where the ship arrives at the time when she is expected, and when there was no difficulty in knowing when she would come. I say appliances of the kind ordinarily used in the port for which the ship is destined, because of course it is not reasonable that the charterer should be supposed to provide at the port appliances which are in use in some ports, such as the port of London, which would never be expected to be provided, and never be deemed to be in the contemplation of the parties as being provided, at such a port as that we are dealing with—a port in New Zealand; then, I take it, he must provide a sufficient number of them, and have them ready in order to make use of the appliances provided for unloading the ship, and although he is not bound to work during the whole of the twenty-four hours, he must work during the ordinary time of working at that port where the ship is to unload. That being so, for what is allowance to be made? I apprehend the first allowance applicable to the present case is this, that allowance must be made if any difficulty

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or delay arises from the natural or physical peculiarities of the port; such, for instance, as this, that the ship is obliged to lie at some considerable distance from the land, or that in particular winds, or those which in ordinary ports would not be of such strength as to prevent a ship being unloaded into lighters, yet, in that particular port, owing to its exposure to a particular quarter, or the particular character of the port in other respects, it is not safe, speaking reasonably, to unload during that time; and then if a ship could be more conveniently unloaded by bringing it, after a portion of its cargo is taken out, nearer to the shore, then for any interruption of the work really caused by bringing it there, allowance is also to be made. Whether or no the work of unloading can be going on during the removing or changing of the berth, would be a question upon which the jury must give their opinion. Of course, allowance must be made for that, and I should say allowance must also be made for any holidays usually observed at the port, during which working men will not work, such as in the present case, Easter Monday. Now, I do not mean to say that there may not be other allowances, but those allowances affecting the present case appear to me to be allowances to which the charterer is entitled. But is he entitled to that on which his counsel relied in the present case? As I understood his argument, it was this: "I had a number of ships in this port, and besides my own ships there were a number of others, the number of lighters at the port being limited, and what I did was this, without favour to anybody I used such lighters as I had got, and the number of other ships belonging to other persons allowed me, and distributed them fairly between the ships." Now upon that point I think the verdict was unsatisfactory, having regard to the evidence. But is that law? Now, in my opinion, it is not. In my opinion, for the purpose of determining what was a reasonable time on the contract between the plaintiff and the defendant, the defendant is not entitled to excuse delay that would otherwise be inexcusable by saying, "I sent so many ships to that port that the lighters which I engaged did not enable me to unload your ship within what would otherwise (and if I had not taken those other ships to that port) have been a reasonable time." In my opinion he cannot excuse his delay by claiming an allowance for the time during which he used his lighters, which could have been used for that ship, for the purpose of unloading other ships sent by him to the port. In my opinion it was his duty as between himself and the owner of the ship to provide sufficient appliances for unloading the ship. In like manner, in my opinion, he cannot excuse his delay by saying, "there were at the port other vessels not belonging to me, so many in number as to prevent me from applying the appliances which otherwise might be applied to the purpose of unloading the ship." That, in my opinion, must be the principle on which to decide what, upon the contract between these parties, is or is not a reasonable time for unloading according to the charter.

THORNTON, L.J.—I am of the same opinion. The contract between the parties to this action was that which the law implies, namely, that the ship should be unloaded at the port of her discharge within a reasonable time. A reasonable time

means a reasonable time under ordinary circumstances, and in the absence of some stipulation altering the implied contract between the parties the charterers would not be relieved from the fortuitous and unforeseen impediments affecting only the due performance by them of their part of the contract. This seems to be the result of the case of *Adams v. The Royal Mail Steampacket Company*, and the case of *Ford v. Cotesworth*. In the present case it is proved that at Port Lyttleton about thirty-five working days would in general be occupied in discharging a vessel of the burden of the *Ohina*, loaded as she was loaded under the charter-party in question; but it is said on the part of the defendants that at the particular time of the year at which she arrived at the port the concourse of vessels was, as a yearly occurrence, such that lighters could not be obtained regularly enough to discharge the vessel within the time mentioned. Now, although that circumstance might be one which did as a matter of fact occur at the same time in each year, that was not, in my opinion, an ordinary circumstance of the port the consequence of which the shipowner was called upon to bear. He has a right to assume, when he contracts to discharge the cargo into lighters, that the charterers will provide a proper supply of lighters to unload the cargo within such time as would be reasonable, having regard to the character of the vessel and the quantity and description of the cargo; and the effect of there not being sufficient lighters for the purpose is one of those fortuitous and unforeseen (unforeseen at least as regards the shipowner) impediments affecting only the due performance by the charterers of their part of the contract, and from the consequences of which they are not relieved. And, as a matter of common fairness, they ought not to be relieved from them unless some express stipulation on the point is made in the contract of charter, and for this reason, namely, that the shipowner cannot in any way control the arrangements as to lighters, and cannot be supposed to know the times at which, owing to the circumstances of the particular port, there may be a difficulty in obtaining them. He therefore makes his arrangements for the employment of his vessel with reference to the time within which, under ordinary circumstances, and amongst them the circumstance of a due supply of lighters, his vessel will be discharged. On the other hand, the charterers have a control as well as knowledge in the matter, and can, if they choose, make special arrangements to meet special emergencies, and if they do not choose to make those special arrangements in order that the charterer's vessel may be unloaded within a time which would be a reasonable time, under what the shipowner would naturally and properly assume to be the ordinary circumstances of the port, it is but reasonable that they should indemnify the shipowner for the loss thereby sustained. If this be the law it is clear—and indeed it was admitted by counsel for the defendants—that the jury had not the law presented to them as it should have been, and for that reason, therefore, there should be a new trial; but even assuming that the difficulties in obtaining lighters, caused by the rush of vessels to the port of discharge at the particular time in question, were to be taken into account in favour of the defendants, I am further of opinion, upon the grounds which have already been stated, that the

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verdict was against the evidence, and should be set aside.

BRAMWELL, L.J.—I quite agree with every word spoken by Lord Justice Thesiger. The judgment will be affirmed. Appeal dismissed.

*Judgment affirmed.*

Solicitor for plaintiff, Coote, for Adamson, North Shields.

Solicitors for defendants, Hollams, Son, and Coward.

Feb. 24 and 25.

(Before BRETT, COTTON, and THESIGER, L.JJ.)

SHARPE v. THE METROPOLITAN DISTRICT RAILWAY COMPANY. (a)

*Arbitration—Costs—Incorporation of general with special Act—Ascertainment of costs—Condition precedent—Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), s. 34; and 1869 (32 & 33 Vict. c. 18) s. 1.*

*A special Act empowered defendants, a railway company, to lower two streets, and provided that the company should pay to persons injured thereby compensation to be ascertained by arbitration before a special tribunal. The special Act incorporated the Lands Clauses Consolidation Acts 1845 and 1869, "except where expressly varied by this Act." The Lands Clauses Consolidation Act 1845 constitutes different kinds of arbitration with respect to questions of disputed compensation, and by sect. 34 provides that "the costs of any such arbitration shall," in certain events, "be borne by the promoters of the undertaking."*

*Sect. 1 of the Lands Clauses Consolidation Act 1869 enacts, that the costs of arbitrations under the Act of 1845, or any Act incorporating the same, shall, if either party requires it, be taxed and settled by any one of the taxing masters of the Superior Courts of law.*

*Held (affirming the decision of Manisty, J.), (1) That sect. 34 applied to an arbitration before the special tribunal provided by the private Act; (2) Where a plaintiff was entitled to some costs under sect. 34, that the settlement of the amount by the master was not a condition precedent to plaintiff's right to bring an action in respect of them.*

APPEAL from a judgment of Manisty, J.

The action, which was to recover 134l. 11s. 1d., the costs, incurred by the plaintiff, of an arbitration between herself and the defendants, was tried before Manisty, J. without a jury, on the 6th Dec. 1878.

The facts were practically admitted, and were shortly as follows:—

The plaintiff was lessee of a house and premises in Mansion House-street, Hammersmith, for twenty-one years from Lady-day 1874, with the option of purchasing the ground lease.

In Aug. 1877 the defendants served a notice on the plaintiff that an arbitrator had been appointed by the Board of Trade, pursuant to the provisions of sect. 14 of the Metropolitan District Railway Act 1875,

To determine the compensation to be given to the owners and lessees of any houses not purchased by the company, abutting on such portions of Mansion House-street and Cambridge-road, in the parish of Hammersmith, as shall be lowered under the powers of the said Act, in respect of the deterioration (if any) which may be caused to such

houses by reason of such lowering, and also to determine all questions of compensation arising out of the interference by the company with the said street or road.

The plaintiff appeared by counsel at the arbitration, and the arbitrator awarded her 30l. in respect of her interest in the premises as rack rent lessee, but did not award anything to her in respect of her claim for compensation as to an agreement she was alleged to have entered into to purchase the ground lease.

The plaintiff's bill of costs was delivered to the defendants' solicitors on the 13th Dec. 1877, and notice of taxation before a master on the 15th Dec. was indorsed upon it.

The parties attended before the master, but the taxation was subsequently adjourned, and has not been proceeded with.

Manisty, J. gave judgment for the plaintiff, who appealed.

By sects. 23, 25, 26, 27, 28, 29, 30, 31, 32, and 33 of the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18) provision is made for settling by arbitration the compensation claimed with respect to lands purchased and taken by companies otherwise than by agreement, if the compensation claimed or offered in any case exceed 50l.

By sect. 34:

All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions.

The Lands Clauses Consolidation Act 1869 (32 & 33 Vict. c. 18), s. 1, enacts that the costs of arbitrations relating to disputed compensation under the Lands Clauses Consolidation Act 1845, or any Act incorporating the same, shall, if either party so requires, be taxed and settled as between the parties by any one of the taxing masters of the Superior Courts of law.

By the Metropolitan District Railway Extension Act 1875 (38 & 39 Vict. c. 206), the Metropolitan District Railway Company were empowered to connect their railway with the railway of the London and South-Western Railway Company at Hammersmith.

By sect. 2 the Land Clauses Consolidation Acts 1845, 1860, and 1869 are, "except where expressly varied by this Act," incorporated with and made part of the special Act.

By sect. 14 it is enacted that

The company shall compensate the owners and lessees of any houses not purchased by the company, abutting upon such portion of Mansion House-street and Cambridge-road aforesaid, as shall be lowered under the powers of this Act, in respect of the deterioration in value (if any) which may be caused to such houses by reason of such lowering, and the amount of such compensation (if any), shall be determined in the event of a dispute by a single arbitrator, to be appointed by the Board of Trade, on the application of the parties or the company, and all questions of compensation arising out of the interference by the company with the said street and road shall be referred to the same arbitrator. Provided that, if the company shall think fit to purchase and take any houses in respect of which such claims for compensation shall be made, they shall be at liberty to do so, and the amount of the purchase-money or other compensation shall be determined by such arbitrator as aforesaid.

The Solicitor-General (Sir H. Giffard) and Pollard for the defendants.—Two questions arise

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in this case: first, whether the plaintiff is entitled to recover her costs against the defendants; and secondly, whether or not, if she is so entitled, the ascertainment of costs by the master is a condition precedent to her right to sue. As regards the first point, sect. 14 of the special Act expressly varies the provisions of the Lands Clauses Consolidation Act. An entirely new tribunal is provided with respect to Mansion House-street and Cambridge-road. A different arbitration is therefore applied to those two streets, and sect. 34 of the Lands Clauses Consolidation Act 1845 cannot apply, because it is enacted with respect to "such arbitration" as is provided for by the previous sections of the Lands Clauses Consolidation Act 1845. It does not follow of necessity that because the plaintiff is entitled to compensation she is also entitled to costs:

*Re Laws and The Principal Officers of Her Majesty's Ordnance*, 1 Ex. Rep. 441.

There need be no variation in express terms in order to satisfy the words "expressly varied." Provisions which, though they do not affirmatively exclude any portion of the general Act, are yet inconsistent with some portion of it, will expressly vary the general Act:

*Weld v. The South-Western Railway Company*, 32 Beav. 340; 33 L. J. 142, Ch.;

*Reg. The Lord Mayor of London*, 16 L. T. Rep. N. S. 280; L. Rep. 2 Q. B. 292.

The Legislature may have intended that the costs of the new tribunal constituted by the special Act should be regulated in a totally different manner from the manner in which the Lands Clauses Consolidation Acts provide:

*Ex parte Reynal*, 16 L. J. 304, Q. B.;

*Corydon v. The Blackwall Railway Company*, 2 Dowl. N. S. 876.

As to the second point, the whole award has not been made until costs are ascertained. The Act of 1860 substitutes a master for the arbitrator if either party so requires. The master ascertains the costs, not as an officer of the court, but to perform a part of the arbitration, and until he has performed that part the arbitration remains unfinished:

*Holdsworth v. Wilson*, 8 L. T. Rep. N. S. 434; 4 B. & S. 1; 32 L. J. 289, Q. B.

If the arbitrator had had to ascertain the costs, it would be clear that his so ascertaining them would be a condition precedent to the right of action.

*W. G. Harrison, Q.C., E. G. Man, and T. O. Jarvis* for the plaintiff.—The whole of the Lands Clauses Consolidation Act 1845 must be read in with the special Act, except where there is an express intention to exclude any part of it. There is nothing in sect. 14 of the special Act to exclude the provisions as to costs of the general Act. Reading the two Acts as one, "any such arbitration" means any such arbitration as the two Acts incorporated into one provide for:

*Holdsworth v. Wilson*, 8 L. T. Rep. N. S. 434; 4 B. & S. 1; 32 L. J. 289, Q. B.;

*Lewis v. Rossiter*, 33 L. T. Rep. N. S. 260; 44 L. J. 136, Ex.

The ascertainment of costs is a mere ministerial act, and not a part of the award. Whether the arbitrator finds them, or a master, can make no difference. The question of liability having been determined, the plaintiff's right to sue for costs

arises. The judgment in this action can be for all the costs which the master finds.

Sir *Hardinge Giffard* (S.G.) replied.

BRETT, L.J.—I am of opinion that this judgment, with some slight variations, must be affirmed. The first question we have to decide is, whether the plaintiff is entitled, upon the construction of these two statutes, to any costs at all, and that must depend upon whether or not the 34th section of the Lands Clauses Consolidation Act 1845 can be applied to an arbitration held under sect. 14 of the special Act. The Lands Clauses Consolidation Act is, by the 2nd section of the special Act, to be incorporated with the private Act, unless "expressly varied;" and the Legislature therefore intended that every part, not "expressly varied," of the Lands Clauses Consolidation Act should be read in with the private Act. Now I agree that by the words "expressly varied" more than an exclusion or variation in absolute terms is meant. These words would be satisfied if any part of the private Act was inconsistent with provisions relating to the same subject-matter of the general Act; and so those provisions would be excluded from applying to the special Act. I therefore proceed to consider this case as if all the clauses of the general Act had been incorporated into the private Act, except any of them which may be inconsistent. The question, therefore is, whether there is anything in sect. 14 of the special Act inconsistent with the provisions of sect. 34 of the Lands Clauses Consolidation Act. Now, if all the clauses of the Lands Clauses Consolidation Act had been enacted in this private Act, there would have been several arbitrations which might have been applicable under different states of circumstances. There would have been the arbitrations as to lands purchased or taken, or lands injuriously affected under sect. 68, elsewhere than in those two streets; and sect. 34 would apply to both kinds of arbitration. But sect. 14 of the private Act makes express provision for the case of these two streets. If there had not been that 14th section, there are two kinds of arbitration which would have been applicable under the Lands Clauses Consolidation Act—an arbitration in respect to lands purchased and taken, or one in respect to lands injuriously affected under sect. 68. And with respect to those arbitrations there would have been two arbitrators appointed, in the usual way, to assess compensation or value, or there would have been an assessment before justices under sect. 22. But by sect. 14 of the private Act an alteration is made with respect to the arbitration as to the lowering of these two streets by the railway company. It is an alteration as to who is to be the arbitrator, and, so far as respects the tribunal provided, it is inconsistent with the arbitration clauses in the general Act. It must be taken, therefore, that sect. 14 expressly varies the Lands Clauses Consolidation Act, but only with regard to the kind of arbitration to be had recourse to. But this is still an arbitration—it is not a proceeding before justices, but before an arbitrator; and, in my opinion, the provisions of the general Act with respect to arbitration apply. Then we come to sect. 34 of the Lands Clauses Consolidation Act 1845. If sect. 14 had not been passed, and you had recourse to the incorporated clauses of the general Act, you would have an arbitration

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proper for taking houses, and also in respect to injuries done to persons under sect. 68, and this special kind of arbitration for injuries done to these two streets is of two kinds. Looking at sect. 34, if you may read the provisions of the Lands Clauses Consolidation Act into any part of the private Act, you may, I think, put it in either before or after sect. 14. But I do not like to decide upon the mere location of the sections. I think sect. 34 applies to any arbitration under a statute which provides for an arbitration, and to which the provisions of the general Act are to apply unless inconsistent. If so, it would apply to this private Act and the arbitration held under it. There is nothing inconsistent, in my view, in saying that sect. 34 of the general Act is applicable to arbitrations under sect. 14 of the private Act. There is no express exception in the private Act of sect. 34; no negative exception, and nothing in sect. 14 inconsistent with the provisions of sect. 34; and I am of opinion (admitting the authority of *Reg. v. The Lord Mayor of London*) that the plaintiff is entitled to her costs. But then the question arises, whether this action has not been brought too soon. That depends upon whether it is a condition precedent to the right to bring the action that the costs should be settled and ascertained. It is necessary, in order to solve this question, to proceed by steps. Now I take the doctrine laid down in *Houldsworth v. Wilson* to be contained in the judgment of Erle, C.J. A contrast is drawn between a judicial decision and a mere ministerial function to be exercised after that judicial decision. The ministerial function is not exercised by the master as an officer of the court, but as an officer appointed by the arbitrator to ascertain costs. The foundation of the judgment is, that where the award decides the question in dispute between the parties, and the arbitrator awards costs, the award is a judicial decision so far as respects the question between the parties, but the ascertainment of the amount of costs is a mere ministerial act which follows. On this view the court, in *Houldsworth v. Wilson*, held that a successful party might bring his action for costs before they were actually ascertained, because there had been a judicial declaration that he was entitled to them. His right having been determined, and all that remained to be done being a merely ministerial act, he could bring his action at once. Apply this principle to sect. 34 of the Lands Clauses Consolidation Act. There were two duties laid upon the arbitrator: he had to determine judicially the plaintiff's right to compensation, and under sect. 14 of the private Act he could, in my opinion, award compensation and nothing beyond. And then the Lands Clauses Consolidation Act steps in and declares as a matter of law that, upon the arbitrator having made his award in favour of the claimant, the latter should be entitled to costs. This, therefore, is not a judicial but a statutory declaration of the right to costs; but, as long as the statute put upon the arbitrator the duty of ascertaining what amount of costs were due, he had two functions to perform under the Lands Clauses Consolidation Act—the one duty judicial, the other ministerial. Under the Act of 1869 one part of the duty given to be exercised ministerially was transferred to or shared with the master if the parties so chose, and that Act seems strong to show that the court's view in *Houldsworth v. Nelson* is the one the Legislature

intended. If the Legislature meant the arbitration to be in respect of two matters, the question in dispute between the parties and the amount of costs, I doubt if they would have made two arbitrators instead of one. It is quite likely, however, that they would transfer the question of costs to an officer more accustomed to deal with them. In the present case there was a decision of the arbitrator, and upon his decision a statutory right to costs. Then by the Act of 1869 there is a ministerial duty to ascertain the amount. Applying the doctrine of *Houldsworth v. Wilson*, it is an authority for saying that a right of action then accrues in respect of costs, because all that remains to be done is the ministerial discovery of the amount. That being so, the action may be brought in the same way as in *Houldsworth v. Wilson*. The judgment, therefore, of the court below is in substance affirmed; but I think it is impossible to say that the declaration of the amount of costs is strictly correct, because I cannot think, when there are two distinct heads of claim, and the claimant wholly fails in respect of one but succeeds as to the other, he is entitled to recover costs in a matter as to which he has been entirely unsuccessful. I therefore think that the order of Manisty, J. must be somewhat modified so as to show that the costs the claimant is entitled to are costs in respect of which she has succeeded; but I am of opinion that, on the substantial part of the case, the judgment must be affirmed with costs.

COTTON, L.J.—I am of the same opinion. The first question is, whether the Lands Clauses Consolidation Act applies so as to give the plaintiff a right to costs. The claim is in respect of a sum stated to be due for the costs of an arbitration under sect. 14 of the private Act. That section does not mention costs, and it is clear that, costs not having been given under the ordinary jurisdiction of the court, the person who claims them must show some statutory enactment entitling him to recover them. Although there is no special provision relating to costs in the private Act, it incorporates the provisions of the Lands Clauses Consolidation Act, and there are enactments in that statute which will entitle the claimant to costs if they apply in the present case. Let us consider, therefore, whether or not the provisions of the Lands Clauses Consolidation Act do apply to an arbitration such as this. The incorporation is under sect. 2 of the private Act, and by that section the Lands Clauses Consolidated Act 1845 is incorporated with the private Act except where it is expressly varied by the private Act. The Legislature, in providing for the incorporation of the general Act with special Acts, intended to make one body and one statute of the general Act and the special ones to which it is applied—the view being to save unnecessary expense and inconvenience by inserting into the special Act certain necessary clauses which ought to be found there. But in the present case the general Act is to be incorporated unless expressly varied by the special one, and we have to consider what is the effect of that limitation. I take it to mean this—that where you find provisions in the special Act relating to the same subject-matter as is dealt with in the sections of the general Act, then no incorporation takes place if the provisions in the one Act are inconsistent with those in the other. Now here no doubt sect. 14 is to some



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extent inconsistent with the clauses relating to the same subject-matter of the general Act. It is so in this way: a special kind of arbitrator is appointed, and so a tribunal being provided for by sect. 14 different to the tribunal the general Act provides, the general Act is so far expressly varied, and cannot be incorporated. But is the 34th section of the general Act relating to costs expressly varied? In my opinion it is not. All that can be said is; that, as regards the new tribunal, sect. 14 makes no provision as to the costs of any person going before an arbitrator under that section. But that does not make an inconsistency with respect to sect. 34, which as regards certain tribunals does give costs. It may be fairly argued that sect. 14 does not provide for costs, because sect. 34 does deal with that question. But the question is not settled by that argument. We must see whether sect. 34 will, on the fair construction of it, apply to give the claimant costs in arbitrations under sect. 14. The words are [His Lordship read the section]. What is the meaning of these words "any such arbitration?" It is perfectly clear to my mind that it must mean any one of the arbitrations mentioned in the Act, because several arbitrations have been already mentioned. If "any such arbitration" means "any such arbitration" as herein mentioned, then, if the provisions of the Lands Clauses Consolidation Act, including sect. 34, were to be put into one body, including sect. 14 of the special Act, "any such arbitration" would mean "such arbitration" as is mentioned in sect. 14. And that, in my opinion, is the proper construction of the statute. Through inadvertence, probably, these words "any such arbitration" have been inserted with no relative after them. Dealing reasonably and fairly with the special Act, it is not one relating to these two streets only; it gives power to the railway company to make their line, and to acquire certain property, and it gives them power also to lower these streets, and to buy the houses in them, in consequence of any claim being made for compensation for damage to their houses. Now the Lands Clauses Consolidation Act 1845 contains various blocks of provisions to be applied when powers like these are given under special Acts, and when the two Acts are incorporated we should have to read in with each of the provisions of the special Act that block of provisions in the general Act after the same subject-matter in the special Act to which that block is to be applied. Thus we should read in the block of provisions from sects. 6 to 8 of the general Act after the provision in the special Act that the company may purchase houses in these two streets if they think fit, and we should also have to read in the special provision in respect of how the amount of purchase money is to be ascertained. Then, also, sect. 68 applies to consequential injuries, and a right is given generally to claim compensation; we should read in with that the proviso in the special Act as to how compensation is to be ascertained. That being so, there being nothing inconsistent with sect. 34 in the private Act with regard to the claim to be made in respect of these two streets, I think the proper construction of sect. 34 is that it does give the plaintiff, if successful, a right to her costs under an arbitration before the special tribunal constituted by sect. 14 of the special Act. Then the further question arises, whether the

plaintiff has brought this action too early. On this part of the case I start with the fact that there has been a statutory declaration that the claimant is entitled to the costs of and relating to the arbitration. The arbitrator under the Lands Clauses Consolidation Act 1845 had not to determine in the particular case whether the plaintiff should or should not have his costs, but only to say what amount of costs he was entitled to; and now under the Act of 1869 the settlement is to be made by the master if required. I do not propose to go into the question of whether or not the cases have been decided rightly or wrongly. They have at any rate been law for a long time, and they show that the master, in taxing the costs of the arbitration, is not acting as an officer of the court, and his taxation is therefore not subject to the court's revision. But he only decides the question of costs; he has no discretion to refuse costs altogether. He cannot decide that the successful party has no right to his costs properly incurred, though he might disallow all the costs if improperly incurred. Therefore any technical difficulty which might exist before the Judicature Acts as to the form of decree is now removed. There is a statutory liability on the defendant's part to pay costs, and judgment may be given for the plaintiff subject to a reference to the arbitrator to ascertain the amount. I therefore think the judgment was right. Probably through inadvertence the award as to costs has gone too far. I agree that the costs should be cut down in respect to the separate arbitration as to which the claimant failed.

THESETER, L.J.—The question we have first to decide is, whether the plaintiff, who has obtained compensation under sect. 14, is entitled to her costs at all. Before considering that section it may be not unimportant to consider generally the position of the parties to this arbitration. The railway company's Act deals with two matters; it enables them to take lands for the purpose of their undertaking, and also to affect other lands by this operation, and in respect of both these cases the parties whose lands are taken or affected are clearly generally entitled to compensation, because sect. 3 of the company's Act incorporates the Lands Clauses Consolidation Act 1845, and ample machinery is provided by that Act for assessing compensation in respect of similar injuries of both kinds. Now, the Lands Clauses Consolidation Act enables compensation to be claimed by different modes of procedure. In cases of injuriously affecting lands under sect. 68, and lands taken and purchased, and consequential damage caused to persons whose lands are purchased, the machinery provided is threefold. If the claim is under 50*l.* it must be enforced before justices. If over 50*l.* there are two methods of enforcing it: the claimant may have his case submitted to a jury, or he may go to arbitration; and that again divides itself into two courses, arbitration before a single arbitrator, or before two arbitrators and an umpire to be appointed in case of difference. That being the position of the parties under the general Act, there arises an *a priori* presumption in favour of persons injured by railway operations being entitled generally to compensation, and one would therefore expect very clear words in the private Act if it was intended to take away the right to compensation, or the costs which would follow. Let us

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see, in the first place, what is the character of the special provisions expressed in sect. 14. The parties mentioned in that section are the persons in two separate streets who have suffered through the railway company having lowered the streets. Stopping there for a moment, it is clear to my mind that, although the Legislature has specially mentioned this particular class of injury in sect. 14, it is also included in sect. 68 of the Lands Clauses Consolidation Act 1845. The very point has been decided in principle by *Macarthy v. Metropolitan Board of Works* (28 L. T. Rep. N. S. 417; L. Rep. 8 C. P. 191; 42 L. J. 81, C. P.), because that case decided that, where there was an interference with the plaintiffs' right of way which affected a particular house so as to lessen its value, the full value of the house was properly claimed for compensation. That being admitted on the part of the defendants, they base an argument on the fact that the injury claimed for here is within the class of injuries dealt with by sect. 68, and yet is specially dealt with by sect. 14, showing, they say, that the Legislature intended to make a difference in respect to the particular property dealt with by sect. 14. That is true, but true only so far as that sect. 14 indicates one matter in which a difference is to exist, and there is no reason for supposing that the difference is to extend beyond that matter. By sect. 14 the plaintiff, instead of being able to choose an arbitrator, or go before a jury, is confined to the special tribunal appointed by sect. 14, that is to say, as regards that particular class of injury the Legislature has constituted a special tribunal consisting of an arbitrator appointed by the Board of Trade, who is to deal with all cases of injury in respect to the two main streets. But it cannot therefore be reasoned, *a priori* or otherwise, that the Legislature intended to take away costs from the claimants who went before that special tribunal. It is said that this was a small and unimportant class of property, and a difference was therefore intended to be made in respect of it. It may be so, but that only shows that a tribunal was fixed which might possibly deal with claims in an expeditious and inexpensive manner, and it by no means follows that the claimants were not to be entitled to costs. One view shows the great injustice which would result if the defendants' contention is right, because under the latter part of sect. 14 another power is given to the company of taking property altogether, and it would follow that while parties generally, whether their property taken was either large or small, would be entitled to costs, the persons in these two particular streets would not. Then it is said that the right to costs is excluded by something in sect. 14 inconsistent with the provisions as to costs of the general Act. I can find nothing. The defendants contend that the effect of making this special fixed tribunal in sect. 14 is to do away with the whole of the provisions relating to arbitrations between sects. 25 and 27 in the Lands Clauses Consolidation Act 1845. The answer is manifest, that without many of these sections the arbitration could not be carried on at all. It could not without sect. 29, which provides for the appointment of a new arbitrator in the case of the death of the one first appointed; or without sect. 32, which enables the arbitrator to order production of documents;

and finally, how could the award be enforced unless sects. 35 and 36 are incorporated in the special Act? If that be so, what possible ground is there for contending that there is any greater inconsistency in excluding sect. 34 than in excluding the other sections? Sect. 34 commences with relative terms which are stated, and proceeds with terms the relatives to which are to be found in the Lands Clauses Consolidation Act. If all these sections in the Lands Clauses Consolidation Act relating to arbitration are to be read in with sect. 14, there is no difficulty either in form or substance in holding that sect. 34 may be read in after sect. 14 of the special Act. The substance of the whole matter is, that the Legislature thought fit to deal with a particular kind of claim in respect of these two streets in a particular way, using plain and particular language, which is not to be found in sect. 68, and so far a change is made by making a final tribunal, namely, the arbitrator nominated in the Act. Apply sect. 25 and the matter is plain. I therefore think there is a clear right on the plaintiff's part to recover costs. If so, has the plaintiff been premature in bringing her action? I have had more doubt on this point. If the matter had arisen before the Judicature Acts, I do not see how an action could have been brought for costs when no costs had been ascertained. Apart from the authority of *Houldsworth v. Wilson* I certainly do not see how it could be done, because the plaintiff had a remedy—a *mandamus* could be got to compel the master to tax the costs. But on the other hand it seems manifestly a most reasonable thing that, where a defendant may not be liable to costs at all, there should be a method of determining the question of right before the mere form of ascertaining the amount is gone through. Unless I can see very clearly that this course cannot be taken, I think it ought to be taken. *Houldsworth v. Wilson* lays down a principle which governs this case, and I am prepared to hold that there was a right on the plaintiff's part to have her costs, and to bring an action for them, subject to the ministerial act of having them taxed. That being so, subject to the modification which has been suggested by the Lords Justices, I think this judgment was right, and should be affirmed.

*Judgment affirmed.*

Solicitor for the plaintiff, *Thomas Noton*.  
Solicitors for the defendants, *Baxter and Co.*

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

*Saturday, March 29.*

(Before FRY, J.)

WYMER v. DODDS. (a)

*Practice—General liberty to amend—Cesser of a defendant's interest—Name of defendant not specified struck out—Revivor—Costs—Rules of Court 1875, Order XVI., rr. 13, 14.*

*Where an order is made, giving leave to strike out the name of one defendant, and also general liberty to amend, the plaintiff is not entitled to strike out the name of another defendant, though that defendant's interest in the action has ceased. A defendant whose interest in the subject-matter of*

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

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*the action has ceased, but whose costs have not been previously taxed, cannot obtain payment of his costs.*

THIS action was commenced in April 1876, to administer a trust estate. The statement of claim asked that two of the defendants, Thomas Vaughan and Joseph Dodds, who were the trustees, might be ordered to pay into court forthwith the sum of 10,000*l.* (being the fourth part of a certain legacy of 40,000*l.*), and that the same might be duly invested and secured for the benefit of the plaintiffs and all the other persons interested therein, and that the trusts of the one fourth part might be administered under the direction of the court. It also asked that other trustees might be appointed in place of Vaughan and Dodds. Another of the defendants, T. L. Elwon, had an interest in the income of the 40,000*l.* until he should assign, charge, or otherwise dispose of the income, or any part thereof, by way of anticipation, or should do or suffer some act or thing whereby the same would, but for this provision, become invested in some other person or persons.

In Sept. 1876 Elwon filed a liquidation petition, and a trustee of his property was appointed. On the 11th July 1876 the plaintiffs took out a summons, upon which an order was made on the 20th Nov. 1876 giving them leave, upon the payment of the costs of the application, to amend the writ and statement of claim by substituting one of the defendants, Mary L. Weyman, as a plaintiff, in the place of the original plaintiffs, and by striking out her name as a defendant, and "otherwise as the plaintiffs might be advised." Elwon was served with notice of this application, and his costs were afterwards taxed and paid, and nothing was said about striking his name out as a defendant. After this order was made, Elwon's solicitor received no further notice of any proceedings in the action, but in Jan. 1877 he discovered that on the 2nd Dec. 1876, the writ and statement of claim had been amended as mentioned in the order, and also that Elwon's name had been struck out as a defendant. No notice of this had been given to Elwon, and no provision had been made for his costs of the action.

Elwon's solicitor then claimed his costs of the action, and afterwards, on the 4th July 1878, took out a summons in the chambers of Malins, V.C. asking that Elwon's costs in the action might be paid out of the fund in court, or by the next friend of the plaintiff.

The hearing of this summons was adjourned into court, and in consequence of the illness of the Vice-Chancellor the action was transferred to Fry, J., and the summons now came on for hearing.

*Higgins, Q.C.* and *Oreed* in support of the summons.—The order of the 20th Nov. 1876 gave the plaintiffs leave specially to strike out the name of Mary Weyman as a defendant, and put it in as a plaintiff. The words, "or otherwise, as they may be advised," do not justify them striking out Elwon's name. The name of a defendant cannot be struck out without a special order for the purpose: (Order XVI., rr. 13 and 14.) Elwon is entitled to his costs:

*Blackmore v. Smith*, 1 M. & G. 80; 1 Daniell's Chancery Practice (5th edit.) 711.

*Glaess, Q.C.* and *Romer* for the plaintiff.—In consequence of Elwon having filed a liquidation

petition, his interest in the action ceased. [Fry, J.—But, if his interest did determine, had you a right to strike his name out without paying his costs?] The general liberty to amend did not authorise Elwon's name being struck out, but still he is not entitled to his costs. Under the old practice if any interest had survived to the trustee in the liquidation, the suit must have been revived against him, or the bill would have been dismissed with costs:

*Blackmore v. Smith*, 1 M. & G. 80; 1 Daniell's Chancery Practice, 5th edit., 145.

But if the suit was revived against the trustee the practice was to treat the bankrupt as dead. If Elwon's name had been retained he would have been treated as no longer a party to the action as he had no interest in it:

*Robertson v. Southgate*, 5 Ha. 223.

Neither Elwon or the trustee would have obtained any costs of the action unless an order for revivor had been made, and as Elwon had no further interest in the property it would simply have been a revivor for costs. It is contrary to the settled practice to revive merely for costs when no order has been made for their payment.

*Higgins, Q.C.*, in reply.—The plaintiff have done what they were not authorised to do by the order and the defendant is therefore entitled to his costs.

Fry, J., stated the nature of the summons of the 11th July 1876, and the effect of the order of the 20th Nov. 1876, and continued:—The plaintiffs amended the writ and statement of claim not only by making the alteration which was specifically indicated in that order, but also by striking out the name of the defendant Elwon. It appears to me that the order did not justify this proceeding. I think it is clear that when an application is made for leave to alter a writ and statement of claim by striking out the names of some of the parties, the order giving that leave cannot justify the striking out of the name of some other party without providing for his costs of the action. So to hold would be to construe the order with a laxity of which its terms do not admit. If the matter stood there, I should think the present applicant was right in saying that the plaintiff has proceeded in a wrong way. But it does not follow that in the present case I can order the plaintiff to pay all the defendant Elwon's costs of the action. The filing of his liquidation petition operated as a voluntary alienation and put an end to his estate in the trust fund. If the action had been brought for the adjustment of the income of the fund during his estate, he would have had a continuing interest notwithstanding the liquidation petition. But the action was brought only to secure the capital of the fund, and does not deal with the income at all, and therefore the defendant Elwon's interest entirely ceased in Sept. 1876. It is not necessary that I should determine what was the proper course for the plaintiff to take. They would have been right in taking one or other of those two courses; in obtaining an order to strike out Elwon's name as a defendant, or in retaining him and not serving him with any further proceedings in the action. But his interest having ceased, no one could be entitled to recover his costs unless some order of revivor was made, and no such order could be made, as his right to costs was only an inchoate and contingent

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right. If the plaintiffs had followed the proper course, Elwon would not have obtained any costs of the action, and I cannot make the plaintiffs pay costs merely because a wrong course has been taken. I must therefore refuse the summons, but without costs.

Solicitor for Elwon, *Oliver Richards*.

Solicitors for the plaintiffs, *Walker, Martineau, and Co.*

Thursday, April 3.

(Before FRY, J.)

Re THAMES STEAM FERRY COMPANY. (a)

*Practice—Company—Winding-up—Action against liquidator—Transfer—Order LI., r. 2a.*

*An action was commenced in the Exchequer Division against the liquidator of a company which was being wound-up in the Chancery Division, claiming damages for injuries sustained through the negligence of the company. A motion by the liquidator to transfer the action from the Exchequer Division to the Chancery Division was refused on the plaintiff undertaking to amend his writ by suing the liquidator personally; the plaintiff's right to prove against the company in the winding-up not to be prejudiced thereby.*

In July 1878 Mr. Waddell was appointed liquidator of the Thames Steam Ferry Company which was being wound-up in this branch of the court, and as such continued to carry on the business of the company.

In March 1879 he was served with a writ in an action of *Raine v. Waddell* brought in the Exchequer Division. The writ claimed "damages for injuries sustained by the plaintiff through the negligence of the Thames Steam Ferry Company."

*Romer* for the liquidator.—I now move, under Order LI., r. 2 a, that the action may be transferred from the Exchequer Division to this division. The plaintiff ought to prove for the damages in the winding-up of the company. After the transfer I shall be able to apply to this court to stay proceedings in the action, and though I could now apply to the Exchequer Division to do so, this motion is according to the ordinary practice.

*J. L. Walton* for the plaintiff in the action.—A question arises in the action as to whether Mr. Waddell is not personally liable, therefore the action ought not to be transferred. [FRY, J.—The claim is for damages from the negligence of the company. Will the plaintiff amend by striking out the company, and substituting Mr. Waddell?] I would prefer to amend by claiming against both Mr. Waddell and the company, but I will amend in the manner suggested by the court, provided my rights in the winding-up are not prejudiced.

FRY, J. said that, on the plaintiff undertaking to apply for leave to amend the writ by suing Mr. Waddell personally, and not as liquidator, he would not make the order for transfer, and the plaintiff would still be at liberty to prove against the company in the winding-up.

Solicitors for the liquidator, *Linklater and Co.*

Solicitor for the plaintiff, *W. B. Preston*.

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

Saturday, May 3.

(Before FRY, J.)

Re PILCHER (deceased); PILCHER v. HINDS. (a)  
*Practice—Action for the recovery of land—Joinder with other causes of action—Service of writ—Rules of Court 1875—Order XVII., r. 2.*

*The necessary leave to join a cause of action with an action for the recovery of land under Order XVII., r. 2, must be obtained before the writ is served.*

ADJOURNED SUMMONS.

This was an application for leave to join an action for the administration of the trusts of a will with an action for the recovery of land.

The indorsement on the writ claimed the administration of the trusts of the will of the late Thomas Pilcher, deceased; an account from the defendants William Severn Smith, William Blotcher, and Robert Thomson, of the rents and profits of certain messuages and tenements devised by the testator's will, and of which they had been and still continued in possession, and also possession and sale of these messuages and tenements.

This writ was served on these defendants, and the plaintiffs then took out this summons for leave to "continue the action in the present form."

*Oswald* for the plaintiff.—I apply for leave under Order XVII., r. 2, to join an action for the recovery of land with an administration action. In order that the trusts of the will may be carried out it is necessary for the plaintiffs to have possession of the houses which are devised on certain trusts by the will.

*Stallard*, for the defendants, objected that the writ had already been served in that form before the leave of the court had been obtained.

*Oswald*.—The court has given leave in like cases:

*Whetstone v. Davis*, 33 L. T. Rep. N. S. 501; L. Rep. 1 Ch. Div. 99:

*Cook v. Enchmarch*, L. Rep. 2 Ch. Div. 111.

[FRY, J.—In those cases the writ had not been served.] If the leave is given now the defendant cannot be prejudiced, as the statement of claim has not been delivered, and unless it is given the action will be useless, as the two causes of action are so intimately connected. If this application is too late, the court has power to enlarge the time under Order LVII., r. 6.

FRY, J.—In this case the plaintiffs have, by the indorsement on the writ, asked for the administration of the trusts of a will, and for the possession and sale of certain land, and they now apply under Order XVII., r. 2, for leave to do what they have already done. The objection has been raised on the part of the defendants, that the time to apply for the leave of the court has expired, and that the leave ought to have been obtained before the writ was served. The rule provides that "No cause of action shall, unless by leave of the court or a judge, be joined with an action for the recovery of land," except in certain cases. In this case the plaintiffs have already joined the two causes of action, and now ask the leave of the court to do so. I am informed by the registrar that it is the practice in the Record and Writ Clerks' Office to require evidence that the leave of the court has been obtained before the writ is allowed to issue. The present application

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

is therefore quite irregular. It is said that under Order LVII., r. 6, I now have power to enlarge the time and to give the necessary leave; but this does not appear to me to be a simple question of enlarging time, and I do not think that rule applies to this case. If I thought it did apply, I should not give the leave asked, as it is important that there should be uniformity in the practice of the court.

I therefore dismiss the summons with costs.

Solicitors for the plaintiffs, *E. Kimber*.

Solicitors for the defendants, *Duncan, Warren, and Gardner*.

# QUEEN'S BENCH DIVISION.

Monday, March 8.

(Before COCKBURN, C.J. and MANISTY, J.)

DESILLA v. FELS AND Co. (a)

*Foreign action—Examination of witness—Admissibility of evidence—Examiner's discretion—19 & 20 Vict. c. 113.*

*By 19 & 20 Vict. c. 113, an examination upon oath of a witness in a foreign action may be ordered, and a judge may give all such directions as to matters connected therewith as may appear reasonable and just; and the order may be enforced in like manner as an order of the same kind in an English action.*

*Held, that the person directed to take such examination ought not to limit the questions by the rules as to admissibility of evidence in this country; but he may exercise his discretion in allowing cross-examination of friendly witnesses, or questions which are totally irrelevant or useful only for illegitimate purposes.*

THIS was an action brought in the Greek Civil Courts at Patras, in which the plaintiff, who was a merchant at Patras, sought to recover from the defendants, who were also merchants at Patras, an indemnity to the amount of upwards of 17,000*l.* for the injury which he alleged was done to the reputation and commercial credit of the plaintiff by the defendants' designedly and wickedly spreading verbally and by letter false reports and representations concerning the plaintiff.

The Court of Appeal at Patras had directed the plaintiff to prove in the action certain particular issues relating to the false reports and representations, alleged in the statement of the plaintiff's case. There was also pending in the Common Pleas Division of the High Court of Justice an action brought by the plaintiff claiming 50,000*l.* damages against a firm at Manchester trading under the style of Schunck Souchay and Co., for alleged slanders spoken of the mode in which the plaintiff carried on his business in Greece. The plaintiff had sought to make the defendants in the action in Greece also defendants in the said action in the Common Pleas Division.

An order for the examination of witnesses in England in the said action had been obtained by the plaintiff under the provisions of 19 & 20 Vict. c. 113, and on the 13th and 14th Feb. inst. an examination of two of the witnesses produced by the plaintiff was had before Master Francis, one of the masters of the Queen's Bench Division, when one witness was examined and another

partly examined. There had been transmitted by the Greek Civil Courts, together with a resolution of the civil court to have the examination of the witnesses taken here, an official copy of the theme or statement which was directed to be proved by the plaintiff, and on which evidence was to be produced in the suit on his behalf. Such official statement or theme was at the commencement of the examination of the witnesses in the possession of the master, and the defendant complained that the plaintiff's counsel in the examination did not confine the same to the points in issue and so directed to be proved, but put questions to the witnesses on various points, which were apparently intended to obtain information for the purposes of the action brought against Schunck Souchay and Co., and of obtaining information which might enable the plaintiff to bring actions against other parties, and for the purpose of obtaining answers which were not properly evidence in the action in the courts of Greece, but were merely hearsay, and might seriously prejudice the defendants therein; and that the plaintiff's counsel severely cross-examined the witness named Henry Prentice, who was examined during the greater portion of the two days, notwithstanding that he gave his evidence with apparent fairness and desire to state what he knew in the matter in dispute.

The counsel for the defendants applied to the master to exercise a discretion as to the admissibility of the questions so put to the witnesses by the plaintiff's counsel, and he declined to do so, stating that in his view he filled a merely ministerial office, and was bound to take down all that passed, and he directed the witness that he was bound to, and must, answer every question put to him.

The plaintiff's solicitor, by affidavit, denied the defendant's complaint that the examination was for the purpose of the English action; and stated that the evidence adduced was admissible in the Greek action before the Greek courts, although not within the English rules of evidence. He also stated that the plaintiff had been directed to obtain the evidence of these witnesses, that they had refused to appear on commission before the Greek Consul, that the plaintiff therefore was bound to proceed under this statute, that the witnesses were hostile to the plaintiff, and that it was only by cross-examination that the plaintiff's counsel could get the evidence required.

Field, J., upon a summons by way of appeal, refused at chambers to interfere with the master's determination.

By sect. 1 of 19 & 20 Vict. c. 113:

Where, upon an application for this purpose, it is made to appear to any court or judge having authority under this Act that any court or tribunal of competent jurisdiction, in a foreign country, before which any civil or commercial matter is pending, is desirous of obtaining the testimony, in relation to such matter, of any witness or witnesses within the jurisdiction of such first-mentioned court, or of the court to which such judge belongs, or of such judge, it shall be lawful for such court or judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly; and it shall be lawful for the said court or judge by the same order, or for such court or judge, or any other judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order, for the purpose of being examined, or the production of any writings or other documents to

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just, and any such order may be enforced in like manner as an order made by such court or judge in a cause depending in such court or before such judge.

By sect. 3:

Such persons giving false evidence are to be guilty of perjury.

By sect. 5:

Provided also that every person examined under any order made under this Act shall have the like right to refuse to answer questions tending to criminate himself, and other questions which a witness, in any cause pending in the court by which, or by a judge whereof, or before the judge by whom the order for examination was made, would be entitled to; and that no person shall be compelled to produce under any such order as aforesaid any writing or other document that he would not be compellable to produce at a trial of such a cause.

*Gully, Q.C. and Henn Collins*, for the defendants, moved to set aside or vary the order of Field, J.—The evidence which the plaintiff's counsel persisted in adducing would not be admissible in a similar action in an English court of justice; and it could not have been intended by this Act to compel answers to irrelevant questions. [COCKBURN, C.J.—It is stated that these questions would be admissible in the Greek courts.] If so, the evidence should be obtained on commission. Here the witnesses are bound to answer, and are liable for perjury; the questions therefore ought only to be such as are within the English rules of evidence. [COCKBURN, C.J.—The master is bound to give each witness all the protection the Act authorises; but no injury can happen even if a witness answer a question which would be inadmissible by the English law. The Greek courts can intervene before the evidence is read.] The order for examination is to be enforced in like manner as an order in an English court; therefore leading questions to and the cross-examination of friendly witnesses ought to be prevented. [COCKBURN, C.J.—The master must exercise some discretion on those points, but it cannot be for him to decide judicially what evidence is admissible.]

*O. Russell, Q.C. and Mugliston* for the plaintiff.—According to the plaintiff's statement by affidavit, this is an attempt to stop evidence which is admissible in the Greek action, merely because it may tell against the defendants in an English action. The witness in this case declined to be examined on commission; and the plaintiff's only means of getting his evidence was under this Act, the object of which must have been to afford a remedy in these very circumstances; there is nothing to limit the evidence to that which is admissible in an English court; and if answers cannot otherwise be obtained, cross-examination is justifiable. [Stopped by the Court.]

COCKBURN, C.J.—I have no hesitation in saying that this motion must be dismissed. I agree with the defendants' counsel that under this Act evidence can only be taken by the English mode; but I am not prepared to say that it must be limited to that which is admissible in English courts. We ought to afford foreign courts the fullest benefit we can, and if we know their rules of evidence we should give them effect in examinations of this kind; and even where we have no means of knowing the peculiar rules of the par-

ticular court, I think we may fairly admit whatever questions may reasonably be expected to throw light upon the matters in issue, without strictly binding ourselves to our own rules of admissibility. Generally, we cannot interfere with a master's discretionary power; he must do the best he can under the statute, and if he were satisfied in this case that either party were adducing evidence material only to another action, I think he ought to exercise a discretion in admitting it. If such evidence were totally irrelevant, or could be useful only for illegitimate purposes, he would have a right to interfere. It does not, however, appear here that the master considered that he had any such grounds for disallowing the questions put.

MANISTY, J.—I am of the same opinion. We seem to have power under the 1st section of this Act to give directions as to all matters connected with these examinations which may appear reasonable and just. I think a master ought not to shut out anything subject to a doubt as to its admissibility. The complaint here is that he has been taking evidence which he need not have admitted; and that in my opinion is no ground for our interference.

*Gully, Q.C.* asked the court for a direction as to the cross-examination by the plaintiff of his own witnesses.

COCKBURN, C.J.—No doubt the master should protect the witnesses from unreasonable treatment, but the hostility of a witness need not be absolutely proved to justify cross-examination; he must exercise his discretion on that subject; we only say that the person taking evidence under this Act is not necessarily bound by the rules of admissibility of evidence in this country.

*Motion refused.*

Solicitor for plaintiff, *Benn Davis*.

Solicitors for defendants, *Stibbard, Gibson, and Co.*

Wednesday, April 2.

(Before COCKBURN, C.J. and MELLOR, J.)

HINTON (app.) v. SWINDON NEW TOWN LOCAL BOARD (resps.). (a)

*Sanitary authority—Expenses of sewerage and levelling street—Owner at time of completion of work—11 & 12 Vict. c. 63, s. 69—21 & 22 Vict. c. 98, s. 2—38 & 39 Vict. c. 55, ss. 150 and 257.*

*The appellant, in the early part of 1875, was owner of certain premises abutting upon a street which the respondents then gave him, and the other adjoining owners, notice to sewer and level, under sect. 69 of the Public Health Act 1848; this notice not being complied with, the respondents had the works required executed by contract.*

*In May 1876 the appellant disposed by sale of the whole of his interest in the premises.*

*In July 1876 the expenses of this work were duly apportioned upon the adjoining owners, and notice of his apportionment was served upon the appellant.*

*In Dec. 1876 the final balance for the work was paid to the contractor by the respondents.*

*Held, upon a case stated, that the appellant was not, in these circumstances, the owner in default under sect. 69 of the Public Health Act 1848, or*

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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*sect. 150 of the Public Health Act 1875, and that the respondents' remedy under these sections, and sect. 62 of the Local Government Act 1858, or sect. 257 of the Public Health Act 1875, was only against the owner of the premises at the time when the work was completed.*

THIS was a case stated by the Court of General Quarter Sessions of the peace for the county of Wilts, holden at Warminster on Tuesday, 3rd July 1877, for the purpose of obtaining the determination of the High Court of Justice.

The respondents on the 22nd March 1875, in pursuance of sect. 69 of the Public Health Act 1848, gave notice to the appellant, who was then the owner of certain premises at Swindon, within the district of which the respondents are now the urban sanitary authority, to metal, level, channel, curb, sewer, and light the street adjoining or abutting on the appellant's said premises.

This notice not being complied with, the respondents contracted with a builder to carry out the works required; these works were completed, and the final balance was paid to the contractor on the 8th Dec. 1876.

The respondent's surveyor, under this sect. 69, duly apportioned the estimated expenses, and on the 3rd July 1876 the respondents served upon the appellant and other owners notice of apportionment, the amount apportioned to the appellant being 27l. 19s. 4d.

The appellant gave no notice to dispute this apportionment under sect. 63 of the Local Government Act 1858 (21 & 22 Vict. c. 98).

On the 15th Dec. 1876 the respondents served upon the appellant notice demanding payment of the sum of money so assessed upon him within fourteen days.

On the 29th May 1877 the respondents made complaint by way of summary proceedings for the recovery of this sum of 27l. 19s. 4d., and on the 7th June 1877 the justices of Wilts made an order for payment of this amount upon the appellant, the order containing the words, "he being such owner of the said premises before and at the time when the said works were completed."

The appellant did not address any memorial to the Local Government Board in respect of these summary proceedings in pursuance of the 268th section of the Public Health Act 1875; but he duly appealed to the quarter sessions of the county against the said order.

At the said quarter sessions it was proved that the appellant ceased to be owner of these premises by the sale of his interest therein, to one Deacon, before the month of May 1876, and therefore about seven months before the completion of the works and the payment to the contractor of the final balance. The quarter sessions accordingly directed the order of the justices to be quashed with costs, on the ground that the appellant was not the owner, under the facts proved, within the terms of the order appealed against.

Judgment was given by the quarter sessions for the appellant, subject to this special case.

By the Public Health Act 1848 (11 & 12 Vict. c. 63), s. 69, it is enacted

That in case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts

thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or in case of dispute as shall be settled by arbitration (having regard to all the circumstances of the case), in the manner provided by this Act; and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided.

By the Local Government Act 1858 (21 & 22 Vict. c. 98), s. 62:

Where the local board have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable, either by application of or agreement with the owner, or by the Public Health Act 1848, or any Act incorporated therewith, or this Act, the same may be recovered from the person who is owner of such premises when the works are completed for which such expenses have been incurred, in the manner provided by the Public Health Act 1848, and such expenses shall be a charge on the premises in respect of which they were incurred, and shall bear interest at the rate of five pounds per centum per annum till payment thereof. In all summary proceedings by a local board for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand.

*Mellor, Q.C. and P. Goldney* for the appellant.—Sect. 69 of the Public Health Act 1848 is in effect repeated in sect. 150 of the Public Health Act 1875, the summary remedy to recover the amount expended being given in both Acts against "the owners in default." There is no liability until the works are completed and the apportionment demanded; the owner in default must therefore be the owner at the time of the demand. [Stopped by the Court.]

*Charles, Q.C. and Ravenhill* for the respondents.—The owner in default, under sect. 69 of the Public Health Act 1848, is the owner at the time of notice by the board requiring the premises to be sewered and levelled; this appears not only from the words of the section, which necessarily imply that the default mentioned is the omission to do the work required, but also from the 62nd section of the Local Government Act 1858, which expressly empowers the board to recover from "the owner of such premises, when the works are completed for which such expenses have been incurred." This provision of the Act of 1858 would be entirely superfluous if the appellant's contention were correct. This section is in effect repeated in sect. 257 of the Public Health Act 1875, which came into effect on the 11th Aug. 1875, and therefore applies to this case; and it seems from this recent Act, which consolidates the previously existing law on the subject, that boards or sanitary authorities have three remedies for the recovery of these expenses—one against the owner of the premises at the time when notice requiring the work to be done is delivered; one against the owner when the works are completed; and the third against the owner or occupier by instalments over any period not more than thirty years, when the board declare the amount to be private improvement expenses. The respondents in this case claim to enforce the first of these



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remedies, which by the findings of fact is clearly applicable to the appellant. Although there seems to be no authority on the point, a similar cumulative remedy was recognised under the Metropolitan Acts in

*Vestry of Bermondsey v. Ramsey*, L. Rep. 6 C. P. 247.

*Mellor*, Q.C. was called upon to continue his argument for the appellant.—There cannot be a default until a payment is due; the owner is not required to comply with the notice to do the work himself; it is a mere condition preliminary to the board's undertaking it.

COCKBURN, C. J.—I think we can reconcile these somewhat conflicting sections with common sense and justice. An owner, after he has given up all interest in the premises, cannot be an owner in default; but the further remedy against the owner in possession on the completion of the works may well apply to those premises which had a different owner at the time of the notice requiring the work to be done, and was no doubt intended to supplement the first remedy. I cannot think it was the intention of the Legislature that when a person ceases to be owner he should be liable for work not then done to the premises. The person liable should be the owner after the completion of the work; and I do not think that two owners of different periods can be both liable in respect of the same premises. What seems to be meant by the provisions of the Acts of 1848 and 1858, which are repeated in sects. 150 and 257 of the Act of 1875, is that the usual case of an owner who does not himself do the work required shall be within sect. 150; but, if that owner gives up possession during the time the work is being done by the board, the new owner comes within sect. 257. The two sections can thus, I think, be brought into harmony.

MELLOR, J.—I am of the same opinion.

#### *Judgment for appellant.*

Solicitors for appellant, *Clarke, Woodcock, and Ryland*, for *Kenner and Tombs*, Swindon.  
Solicitor for respondents, *W. Moon*.

### COMMON PLEAS DIVISION.

June 29 and Dec. 1, 1878.

(Before LOPES, J.)

THE HOUSEHOLD, FIRE, AND CARRIAGE ACCIDENT INSURANCE COMPANY (LIMITED) v. GRANT. (a)

*Contract—Complete on posting acceptance—Letter lost in transmission—Allotment of shares in company.*

*A contract is binding upon the proposer as soon as a letter of acceptance, properly directed to him, has been posted by any person to whom the proposal has been made, notwithstanding such letter never reaches him, provided that there is no unreasonable delay in accepting the proposal, and that the ordinary and natural mode of transmitting the acceptance is through the post.*

*A., who resided at Swansea, handed a written application for 100 shares in the B. company to the manager of the company, on the 30th Sept. On the 20th Oct. the B. company, whose office was in London, posted a letter of allotment of 100 shares to A., directed to the address at Swansea that A.*

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

*had given in his form of application. This letter of allotment never reached A.*

*Held, in an action by the B. company against A. for the amount of a call due in respect of the 100 shares allotted to him, that A. was liable to pay the call.*

THIS was an action for 94l. 15s. claimed as due in respect of a call on 100 shares alleged to be held by the defendant in the plaintiffs' company. The defendant denied that he was a shareholder. At the trial before Lopes, J., it appeared that the defendant, who resided at Swansea, and who was afterwards appointed agent for the plaintiffs' company at Swansea, applied in Sept. 1874 for 100 shares in such company, with a view of his being appointed such local agent. The application was sent through the manager of the company, and was in the usual form, of which the following is a copy:

#### Application for shares.

Liability limited to 2l. per share, interest at the rate of 5l. per cent. per annum from the date of allotment.

The Household Fire Insurance Company (Limited).

Offices: 4, St. Paul's Churchyard, London, E.C., and 56, George-street, Edinburgh.

To the Directors.—Gentlemen,—Having paid to your bankers the sum of 5l., being a deposit of 1s. per share on 100 shares in the above company, I hereby request that you will allot me that number, and I agree to accept such shares or any less number you may allot me, and I agree to pay the further sum of 19s. per share within twelve months from the date of the allotment, and I authorise you to insert my name on the register of members for the number of shares allotted to me.—I am your obedient servant,

Name in full, Alexander Grant.

Address, 16, Herbert-place, Swansea, Glamorgan.

Occupation, Commission and Insurance Agent.

Date, Sept. 30 1874.

Usual signature, A. Grant.

The shares so applied for were allotted to the defendant, and a letter of allotment in the usual form, directed to the defendant according to the address he had so given, was posted on the 20th Oct. 1875. The following is a copy of such letter:

#### Allotment Letter.

Household Fire Insurance Company (Limited), 4, St. Paul's Churchyard, London, E.C.

20th Oct. 1874.

Sir,—In reply to your application for 100 shares in this company the directors have allotted you 100 shares, the payments on which are as follows:—

Deposit of 1s. per share on 100 shares allotted £5 0 0

Deposit received from you on application

Balance due by you now (on allotment)

A further sum of 19s. per share, namely, 95l., will be due from you on the 23rd day of October 1875.

Certificates of shares when ready (of which due notice will be given) will be delivered in exchange for the banker's receipt for the deposit money, and the receipt for the further payment.—I am, Sir, your obedient servant,

HENRY HARR, Secretary.

To Alexander Grant, Esq., 16, Herbert-place, Swansea.

The defendant swore that he had never received this letter, and that he had had no letter about the shares until March, when he received the following:

19th March 1877.

Sir,—The following amounts being due from you in respect of 100 shares held by you in this company:

5l. due 23rd Oct. 1874;

95l. due 23rd Oct. 1875;

I am instructed by the directors to require you to pay these amounts at this office on or before the 19th day of

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April next, and to inform you that in the event of your not doing so the said shares will be forfeited.—I am, Sir, yours truly,

(Signed) J. E. REDMOND, Secretary.

Mr. A. Grant, 7, Herbert-place, Swansea.

Credit, however, was given in this action for 5l. 5s., that sum being found entered in the books of the company as having been paid by the defendant on the 100 shares. The jury found that the letter of the 20th Oct. 1874 had been posted, but that it had never been received by the defendant. On these findings the learned judge reserved judgment, and the case now came before him on further consideration.

W. G. Harrison, Q.C. and Wilberforce for the plaintiffs.

Finlay and Dillwyn for the defendant.—They cited

*Taylor v. Jones*, L. Rep. 1 Ch. Div. 87; 34 L. T. Rep. N. S. 131;

*The Imperial Land Company of Marseilles, Wall's case*, L. Rep. 15 Eq. 18;

*Bedpath's case*, L. Rep. 11 Eq. 86; 23 L. T. Rep. N. S. 834;

*Finucane's case*, 20 L. T. Rep. N. S. 729;

*Adams v. Lindell*, 1 B. & Ald. 681;

*Higgins v. Wilson and Co.*, 9 Scotch Sess. Cas. 2nd ser. 1407;

*Taylor v. The Merchants' Fire Insurance Company*, 9 How. Rep. (American) 390;

*Dunmore v. Alexander*, 9 Shaw & Dunlop, 190,

in addition to the authorities referred to in the judgment. *Our. adv. vult.*

Dec. 11.—LORES, J.—This action is brought to recover 94l. 15s. for balance due on 100 shares in plaintiffs' company applied for by the defendant. The defendant denies his liability. On the 30th Sept. 1874 the defendant, who acted for the plaintiffs at Swansea, applied through the manager for 100 shares, and handed him a written application for shares in the usual form. The manager laid the application before the plaintiffs, and an allotment letter was prepared in the usual form. The defendant swore he never received this letter, or any notice of calls or dividends. His name was duly entered on the list of shareholders. Evidence was given on behalf of the plaintiffs to prove the postage of the allotment letter of the 20th Oct. The defendant swore he had not received any letter about the shares until the 19th March 1877. I asked the jury if they thought the letter of allotment of the 20th Oct. was in fact posted; they replied in the affirmative. I also asked them if they thought the letter of allotment was in fact received by the defendant; to this they replied in the negative. It was urged by Mr. Finlay, for the defendant, that the letter of application was sent by hand, and there was no request to be answered by post. The letter of application, it will be observed, is in the usual form, and contains the usual particulars of name and address, and having regard to the position of the plaintiffs' office, and the defendant's residence, the ordinary and natural mode of transmission of the allotment letter would be through the post. The question raised in this case is, whether the contract between the plaintiffs and the defendant was complete when the letter accepting the defendant's offer was put into the post by the plaintiffs, or not until it was actually received by the defendant. The question is difficult, and the decisions are conflicting. It appears to me, however, that regard being had to the general inclination of the authorities and to

mercantile convenience, the plaintiffs are entitled to succeed. I will refer only to a few of the leading cases. In *Dunlop v. Higgins* (1 H. L. Cas. 351) the proposal did not prescribe any time, but the nature of it implied the answer must be speedy. The acceptance was not posted by the earliest post. The court decided that the contract was binding on the proposer. Lord Cottenham appears to have thought that the contract was absolutely concluded by the posting the acceptance (within the prescribed, namely, a reasonable time), and that it mattered not what became of it afterwards. In *Duncan v. Topham* (8 Com. B. Rep. 225) not long afterwards, Wilde, C.J., Maule, J., and Cresswell, J., seem to have so understood it, so that the contract would be binding, though the letter did not arrive at all. In the case of *The British and American Telegraph Company v. Colson* (L. Rep. 6 Exch. 108; 23 L. T. Rep. N. S. 868), it was found as a fact that the letter of allotment was never received. The court held the defendant was not bound, and endeavoured to restrict the effect of *Dunlop v. Higgins*. In *The Imperial Land Company of Marseilles, Harris's case* (L. Rep. 7 Ch. 587; 26 L. T. Rep. N. S. 781), the letter of allotment was duly received, but in the meantime the applicant had written a letter withdrawing his application on the ground of the delay in answering. The Lords Justices held the applicant was bound on the authority of *Dunlop v. Higgins*, with which they thought it difficult to reconcile *The British and American Telegraph Company v. Colson*. In the case of *Brogden v. The Metropolitan Railway Company* (L. Rep. 2 H. of L. 691), Lord Blackburn says: "So again when in *Harris's case* a person writes a letter and says, 'I offer you an allotment of shares,' and he expressly or impliedly says, 'if you agree with me, send an answer by post,' then as soon as he has sent that answer by the post, and put it out of his control, and done an extraneous act which clenches the matter, and shows beyond all doubt that each side is bound, I agree that the contract is perfectly plain and clear." And again, at page 692: "I take it that that which was said 300 years ago and more is the law to this day, and is quite what Mellish, L.J. in *Harris's case* accurately states, that when it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post this letter the offer is accepted." Acting upon these cases, I come to the conclusion that the contract here was complete on the posting of the allotment letter, and that it is immaterial whether the defendant actually received that acceptance of his offer. There is doubtless hardship caused to the proposer if the acceptance does not come to hand, but against this he may guard himself by making the proposal expressly conditioned on the arrival of the answer within a definite time. It would be difficult to exaggerate the mischievous consequences to the commercial world which would follow if it were held that a contract was not complete until the letter accepting the offer had reached the proposer, and that it might be revoked at any time until the letter accepting it had been actually received.

*Judgment for plaintiffs.*

Solicitors for plaintiffs, Evans and Cook.

Solicitors for defendant, Tucker, New, and Co., agents for R. T. Leyson, Swansea.

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PELLAS AND COMPANY v. NEPTUNE MARINE INSURANCE COMPANY.

[C.P. Div.]

Dec. 4, 1878, and March 18, 1879.

(Before DENMAN and LOPES, JJ.)

PELLAS AND COMPANY v. NEPTUNE MARINE  
INSURANCE COMPANY. (a)*Marine insurance—Money owing to underwriters by insured—Defence in action by assignee of the policy—31 & 32 Vict. c. 86.**The 31 & 32 Vict. c. 86, which enables assignees of marine policies to sue thereon in their own names, provides that "the defendant in any action shall be entitled to make any defence, which he would have been entitled to make if the said action had been brought in the name of the person by whom, or on whose account, the policy had been effected."**Held, in an action by the assignees of a policy, that the underwriters were entitled, under this provision, to set up a counter-claim for money owing to them, at the time of the assignment, by the person by whom the policy had been effected.*

THIS was an action upon a policy of marine insurance, tried before Lord Coleridge, C.J., at the Guildhall. It was not disputed that there was a total loss, in respect of which the plaintiffs, who were the assignees of the policy, were entitled to recover 300*l.*; and the only question in dispute was whether the defendants were entitled to deduct from that amount a sum of 40*l.*, which was owing to them by the persons for whose benefit the policy was originally effected. Lord Coleridge decided against the plaintiffs on this question, and a rule for a new trial was subsequently obtained by them on the ground of misdirection of the learned judge in holding that the set-off could be maintained against the present plaintiffs.

*Herschell, Q.C.* and *A. L. Smith* now showed cause. —The substantial question in the case is whether the defendants can set up their claim against Harris, who is the person for whose benefit the policy was effected, in this action by the plaintiffs. That depends on the construction to be put upon 31 & 32 Vict. c. 86, s. 1. Supposing a man has insured his ship, and it is damaged, and the assurer lends 200*l.* to the assured, and then the assured assigns the policy to A. B., and A. B. sues the assurer; is the assurer entitled to deduct 200*l.* from the amount of the insurance? It is said on the other side that policies of insurance are, like bills of exchange, transferable from hand to hand, and that it would be very inconvenient if their negotiability was in any way interfered with. But there is no real hardship in requiring the assignee to give notice of assignment to the underwriter, or take the policy at his own risk; while, on the other hand, there would be a great hardship to the underwriter, if he were liable to lose the security for his debt, through the assignee not choosing to give notice of assignment to him. The balance of convenience, therefore, is in favour of the defendants; but they rely on the plain words of the statute.

*Murphy, Q.C.*—It is submitted, in the first place, that the intention of the Legislature was to enable assignees of marine policies to sue thereon as if they had been the original grantees. It cannot be thought that it was the intention of the Legislature to preserve a state of things that

(a) Reported by A. H. BIRTLESTON, Esq., Barrister-at-Law.

enabled the assignor to commit a fraud. Before the statute, it is admitted that the assignee of this or any other *choses in action* could only have sued in the name of the assignor, subject to all equities against the assignor. But the Act intended to give a complete relief. Surely the Act cannot have been passed only with the object of enabling "assignees of marine policies to sue thereon in their own names," taking those words literally. Is it an uncommon thing to find in an Act that greater relief is given than is mentioned in a short preamble? It is submitted that, to give a reasonable construction to the Act, the words "any defence" must be limited to mean a defence upon the policy itself. Then, secondly, a set-off could never have been pleaded in an action for unliquidated damages. The claim is here for a total loss, or, in the alternative, general average; that is an action for unliquidated damages: *Luckie v. Bushby* (13 C. B. 884), *King v. Walker* (2 H. & C. 884), which cases are referred to in *Arnold's Marine Insurance*, 5th edit., p. 219, where it is said: "In considering the law of set-off, it is as well to remember that the contract of marine insurance is still a contract sounding in unliquidated damages, even after an adjustment of a loss under the policy, and notwithstanding it be a valued policy." If it is said that the Judicature Acts have altered this. The Marine Policies Act can only refer to defences that could have been set up at the time that it was passed; the Judicature Acts, therefore, do not apply. Moreover, the Judicature Acts, dealing only with procedure, cannot be held to have effected a change in the law of marine insurance.

*Herschell, Q.C.* in reply.—In this case the damages are liquidated. Before action brought, it was agreed that there was a total loss, and that the amount of damages was 300*l.* The cases cited go upon the particular facts, and do not establish any general proposition. By the Judicature Act 1873, sect. 25, sub-sect. 6, "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other *choses in action*, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or *choses in action*, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or *choses in action* from the date of such notice, and all legal or other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always," &c. The debt to the defendants here is an equity which would have been entitled to priority over the right of the assignee if the Marine Policies Act had not passed. That Act says that the defendant shall be entitled to make any defence which he would have been entitled to make if the action had been brought in the name of the person by whom the policy had been effected; and by the Judicature Act 1873, Order XIX., r. 3, "A defendant in an action may set off, or set up by way of counter-claim, against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such," &c. It follows that

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the defendants here may set off this debt even if the claim be one for unliquidated damages.

*Our adv. vult.*

March 18.—The judgment of the court was delivered by LORRE, J.—The plaintiffs are merchants; the defendants, underwriters. The action is brought on a policy of insurance for the sum of 300*l.*, effected in Jan. 1876, by Harris and Co., a firm at Newcastle, on a cargo of coals, and cash advances, shipped on board the *Toivatar* for a voyage from the Tyne to Genoa. The defendants, in consideration of the premium, underwrote the said policy, and became insurers to Harris and Co. On the 22nd May 1876 the policy was assigned by Harris and Co. to one Questa, of Genoa, and on the 30th May 1876 the said policy was further assigned by Questa to Castorina and Co., of Genoa, who, on the 10th May 1877, assigned to the plaintiffs. The *Toivatar*, with the said coals and cash advances, was, by the perils insured against, lost. The defendants admitted that the plaintiffs were entitled to recover, and paid the 300*l.* into court, except the sum of 40*l.*, which the defendants contended they were entitled to set off (the said 40*l.* being a debt due to the defendants from Harris and Co., incurred in Jan. 1876). The case was tried before the Chief Justice of the Common Pleas in London, who directed a verdict for the defendants. A rule was subsequently obtained for a new trial for misdirection, the ground being that the learned judge ought to have told the jury that the defendants could not set off this 40*l.* against the present plaintiffs. The question we have to consider on the argument of this rule is whether, having regard to the provisions of the Act 31 & 32 Vict. c. 86, this set-off can be pleaded as a defence against the plaintiffs, who are assignees of the policy. The Act is entitled, "An Act to enable assignees of marine policies to sue thereon in their own names." Sect. 1 is as follows: "Whenever a policy of insurance on any ship or on any goods in a ship, or on any freight, has been assigned so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name, and the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom, or on whose account, the policy had been effected." It is contended on the part of the plaintiffs that "any defence" is confined to a defence arising on the policy itself, and cannot cover or include a defence like a set-off, or in fact any defence which does not arise upon the policy. We are unable to place this limited meaning on the word defence, used as it is in this Act of Parliament. It would be doing violence to the plain language used. Previously to the passing of the Act, an assignee of a marine policy could not sue in his own name, he must have sued in the name of his assignor. The Act was passed to remedy this evil, and according to our view the Legislature intended to leave the law in all other respects as it was. It was intended to enable the assignee to sue in his own name, but the defendant was to be entitled to make any defence to the action of the assignee, which he might have made to the action of the assignor. Before the Act, if the action had been brought, as it must have been, in the name of Harris and Co., the defendants could

have set off this 40*l.* If the debt set off had accrued since the assignment, and the defendants had notice of the assignment, it might have been replied as an equitable replication; but the 40*l.* beyond all question could have been set off. We think the defendants here are entitled to set off the 40*l.* A point was taken by the plaintiffs in the argument, which was not raised at the trial. It was, that the plaintiffs' claim was for unliquidated damages, and that the 40*l.* could not be set off against such a claim. We do not think it necessary to consider this point. The point ought to have been taken at the trial. If it had been, the learned judge would probably have amended the statement of defence, by permitting the defendants to add a counter-claim for this 40*l.* If it had been pleaded as a counter-claim, we think it would have come within the words "any defence" in the Act. Had the Act not been passed, plaintiffs could only have sued in Harris and Co.'s name. If Harris and Co. had been plaintiffs, defendants could, under the Judicature Acts, have made this 40*l.* the subject of a counter-claim and defence, and we think would have been within the meaning of the Act of Parliament.

*Rule discharged.*

Solicitors for the plaintiffs, *Lowless and Co.*

Solicitors for the defendants, *Shum, Crossman, and Co. for Turnbull and Tilly, West Hartlepool.*

[NOTE BY REPORTER.—*Cf. Brice v. Bannister*, 38 L. T. Rep. N. S. 739; 47 L. J. 722, Q. B., and the remarks by Cockburn, L.C.J., on that case, in *Buck v. Robson*, 48 L. J. 250, Q. B.]

Thursday, March 6.

(Before Lord COLERIDGE, C.J. and DENMAN, J.)

HARRIS v. WARRE. (a)

*Pleading—Libel—Malicious prosecution—Statement of claim—Demurrer—Judicature Act 1875, Order XIX., rr. 4, 24.*

*There is nothing in the Judicature Acts to alter the old rule of pleading, that in actions for libel the very words of the libel must be set out in the statement of claim, and in actions for malicious prosecution the statement of claim must show a prosecution instituted and determined.*

THIS was a demurrer to a statement of claim.

The statement of claim alleged that the plaintiff was a farmer, and the defendant a rector in Somersetshire. In June 1878 Frederick Merry, a packer in the employ of the Great Western Railway Company, was found dead on the railway between Taunton and Watchet, and at the inquest held on the body of Merry, a verdict of accidental death was returned. The defendant subsequently wrote and sent to the chief constable of the county letters in which he charged the plaintiff with having been concerned in, or guilty of, the murder of the said Frederick Merry, and required the chief constable to cause the plaintiff to be arrested on such charge. The defendant also sent to the superintendent of police for the district wherein the plaintiff resided, and charged the plaintiff with having been guilty of the murder, and required the superintendent to arrest the plaintiff upon the said charge. The superintendent of police, in consequence thereof, endeavoured himself to arrest the plaintiff, and directed a police constable to proceed to the plaintiff's resi-

(a) Reported by A. H. BIRLSTON, Esq., Barrister-at-Law.

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dence and to arrest and detain the plaintiff upon the said charge of murder so made against him by the defendant. The police constable accordingly, on several occasions, went to the plaintiff's residence and endeavoured to arrest him, and would have done so, but that he was unable to meet with the plaintiff. The defendant had no reasonable or probable cause for making the said charge, and the same was false, and was made by the defendant maliciously, and with intent to injure the plaintiff. By reason of the said wrongful and malicious acts of the defendant the plaintiff's credit and reputation had been greatly injured, and the plaintiff had suffered great loss and injury.

The plaintiff claimed 1000*l.* damages.

Demurrer, on the ground that no prosecution of any kind was shown, and that if the plaintiff meant to complain of libel or slander the words ought to have been set out, and on other grounds sufficient in law to sustain the demurrer.

*Bray*, for the defendant, in support of the demurrer, cited

*Bradlaugh v. The Queen*, L. Rep. 3 Q. B. Div. 607; 38 L. T. Rep. N. S. 118; and the cases cited in the judgments in that case;

*Austin v. Dowling*, L. Rep. 5 C. P. 534; 22 L. T. Rep. N. S. 721.

*Petheram*, for the plaintiff, in support of the claim.—First, as to the libel. If the law requires that the exact words of a libel must be set out and proved by the plaintiff, then in every case in which the words of the libel are forgotten and the libel itself destroyed there must be a nonsuit. By the Judicature Act 1875, Order XIX., r. 4, "Every pleading shall contain, as concisely as may be, a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved, such statement," &c. And by rule 24 of the same Order, "Wherever the contents of any document are material it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material." Secondly, as to the malicious prosecution. The defendant here writes to the police, charges the plaintiff with murder, and requires them to act—and they do act—upon that statement.

Lord COLERIDGE, C.J.—I am of opinion that this demurrer must be allowed. I am willing to assume with Mr. Petheram that an improper thing has been done by the defendant. This is an endeavour to recover damages for it in two forms, as a libel and as a malicious prosecution. As to the latter, Mr. Petheram admits that no prosecution was ever instituted and determined, and he is therefore out of court on that ground. As to the libel, Mr. Petheram admits that this is an entirely new form of pleading, and that it has always hitherto been necessary in actions for slander and libel to set out the defamatory words. And this is not a merely formal matter. The defendant has a right to know what he is charged with saying or writing. Everything may turn in actions for slander and libel on the exact words used; and a slight, but important, variation in the exact words may make the whole difference. I find it laid down in a book of the highest possible authority: "It has long been settled that the declaration or indictment must profess to set out

the very words published, and that it is not sufficient to describe them by their usual substance and effect." (a.) That was laid down by a great authority many years ago; but it has been affirmed by the Court of Appeal within the last few weeks. That being so, it is admitted that, before the Judicature Act this claim could not have been sustained; but Mr. Petheram relies on Order XIX., r. 4, which declares that "every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved," as enabling him to plead as he has done. But the answer is that the words here are the material facts in the case. Moreover, the conclusion of the rule is: "Forms similar to those in Appendix C. hereto may be used." In Appendix C. there is no form of claim in libel or slander. Therefore, I think the law with respect to setting out the defamatory words in these actions is unaltered by the Judicature Act, and this demurrer must be allowed.

DENMAN, J.—I am entirely of the same opinion. I will only add that rule 24 of Order XIX. does not appear to me to help Mr. Petheram at all. That says, "Whenever the contents of a document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material." The latter part of that rule seems to me to entirely prevent a construction of it, such as Mr. Petheram contends for. The precise words of a libel are material.

*Demurrer allowed with costs. Leave to amend within a fortnight.*

Solicitors for plaintiffs, *Whitaker and Woolbert*.  
Solicitors for defendant, *Torr, Janeways, Torr, and Gribble*.

## EXCHEQUER DIVISION.

May 10 and Dec. 4, 1878.

(Before KELLY, C.B. and HUDDLESTON, B.)

*Re DUTTON; Ex parte* PRAKE AND ANOTHER. (b)

APPEAL FROM INFERIOR COURT.

*Will*—Gift of money to trustees of a mechanical institution—To be applied towards the building fund connected therewith—Charity—Mortmain Act (9 Geo. 2, c. 36)—Perpetuity—Literary and Scientific Institutions Act 1854 (17 & 18 Vict. c. 112), ss. 30, 33—Void bequest—Construction.

*The Tunstall Athenaeum and Mechanics Institution* was established and maintained by the donations and subscriptions of its members for the purpose of providing a lending and reference library and reading room and lectures, for the use and mutual improvement of the members. By some of the rules of the institution all the property of the institution was vested in the trustees thereof for the time being, and the institution was not to be dissolved except by the resolution of nine-tenths in number of the members present at a specially called general meeting, to be confirmed by a like resolution at a subsequent meeting of the same character. There was no building fund in connection with the institution, but there was a

(a) *Starkie's Law of Slander and Libel*, 2nd ed. vol. I., 362.

(b) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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"sinking fund" established to pay off a mortgage on the premises occupied by, and which was the property of, the institution. A testator having bequeathed a sum of money "unto the trustees for the time being of the institution, to be applied by them towards the building fund in connection therewith," it was

Held, by the Exchequer Division (Kelly, C.B. and Huddleston, B.), that the institution was not a charitable institution so as to bring the case within the terms of the Mortmain Act (9 Geo. 2, c. 36), but that the bequest was void as tending to create a perpetuity.

The cases of *Carne v. Long* (2 L. T. Rep. N. S. 552; 2 De G. F. & J. 75; 29 L. J. 503) and *Thomson v. Shakespeare* (1 L. T. Rep. N. S. 398; 2 De G. F. & J. 399; 29 L. J. 276, Ch.) in point and followed.

THIS was an appeal from the decision of the judge of the County Court of Staffordshire, holden at Hanley, Burslem, and Tunstall, on the petition of John Wade Peake and J. Beech, the trustees of the Tunstall Athenæum Mechanics Institution, and the facts of the case were as follows:—The testator, one Thomas Dalton, by his will bearing date the 10th Aug. 1874, after the bequests of divers pecuniary legacies, gave, devised, and bequeathed the residue and remainder of his personal estate, and all his real estate, to his wife and one Allen Beckett Lowndes, their heirs, executors, administrators, and assigns, upon trust to get in, sell, and convert the same into money, and to invest the proceeds and pay the annual income thereof to his said wife, for her separate use during her life, and from and immediately after her decease, the said testator gave and bequeathed the capital as well as the income of the said proceeds of his said trust estate, after the payment of the legacies hereinbefore bequeathed, "unto the trustees for the time being of the Tunstall Athenæum Mechanics Institution, to be applied by them towards the building fund in connection therewith," and it was declared that the receipts of the trustees of the institution should be sufficient discharges to the trustees of the said will.

The testator died on the 13th Aug. 1874, not leaving any real estate, but his residuary personal estate amounted to the sum of 431l. 2s. 2d. His wife survived him, and on her death, on the 26th March 1877, disputes and questions arose touching the validity of the above bequest to the trustees of the Tunstall Athenæum, and thereupon the surviving executor and trustee of the testator's will, the said Allen Beckett Lowndes, paid the 431l. 2s. 2d. into the Post Office Savings Bank under the provisions of the Trustee Relief Acts and the County Court Act 1867. Thereupon the trustees of the Tunstall Athenæum and Mechanics Institution, presented their petition praying that the money should be paid to them as such trustees, to be applied by them in accordance with the directions of the testator's will. The surviving executor and the next of kin of the testator were made respondents to and opposed the said petition, which came on for hearing before the County Court judge, when it appeared from the evidence that the institution was founded for the purpose of providing the members of the institution with a library consisting of a library of reference, and a circulating library, and a reading room, and for holding public lectures and

classes for mutual improvement. The institution was managed by a committee appointed under rules in accordance with the Literary and Scientific Institutions Act 1854, and occupied a house which was purchased, ready built, by the committee. There was no "building fund," but there was a "sinking fund" formed by a resolution of the committee for the purpose of paying off a mortgage debt on the premises.

The following were the rules relating to the constitution of the society, so far as material to this report:

1. The members of this institution shall consist of (a) Donors of 10l. or upwards in money or books at one time, who shall be invested with all the privileges of class b for life. (b) Honorary subscribers of 1l. and upwards annually, who shall be eligible to any office, and entitled to all the privileges of the institution. (c) Subscribers of 10s. per annum, with 1s. entrance fee, who shall be entitled to all privileges as above. (d) Subscribers of 5s. per annum and 6d. entrance fee, entitling them to the use of the reading room or library separately, as may be determined upon at the time of entering. . . .

4. The institution shall not be dissolved without the consent of nine-tenths in number of the members present at a general meeting to be specially called for that purpose, such consent to be confirmed by the like majority at a special general meeting, to be called within not less than one or more than three calendar months from the passing of such first resolution. . . .

5. The property and effects of the institution shall from time to time be vested in the trustees for the time being in trust for the general benefit of the members. . . .

45. No member, on withdrawing from this institution by forfeiture, expulsion, or otherwise, shall be entitled to claim any share or interest in the property of the institution.

The learned judge of the County Court held that the testator's gift to the trustees of the institution was void under the 9 Geo. 2, c. 36, as being a bequest of money to be laid out in land for a charitable purpose, and dismissed the petition of the Athenæum trustees, and directed that the property should go to the testator's next of kin.

From that decision the trustees of the Tunstall Athenæum appealed, and a rule nisi was obtained, calling on the surviving executor and next of kin of the testator to show cause why the judgment or order of the judge of the County Court should not be set aside, and an order made in the terms of the petition on the ground that the institution was not a charity, and that the gift was not void for perpetuity, or on the ground that, if the institution was a charity, the gifts was not void under the 9 Geo. 2, c. 36, and accordingly

May 10.—*Arthur Charles, Q.C.* appeared for some of the next of kin and showed cause against the rule. —The question for the court's determination here is, whether or not this is a good and valid trust, or whether the gift to the trustees of the Tunstall Athenæum is or is not a void bequest. There are two grounds on which it is contended on the part of the next of kin that the bequest is void: first, as being a bequest to a charity of money to be laid out in the purchase of land; and, secondly, as tending by the terms of the bequest to create a perpetuity. With regard to the first point, the will contains no direction that land is not to be purchased with this money, nor is there anything in the will to prevent such an application of it, and therefore it is void within the meaning of the statute 9 Geo. 2, c. 36. With regard to the second point, it can hardly be contended on the part of the trustees of the institution that the terms of the bequest do not contemplate the per-

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petual continuance of the institution, though it is true that by the 4th rule of the institution there is a power to dissolve it if a majority, consisting of not less than nine-tenths of the majority of the members present at a specially called general meeting, resolve that that shall be done. The present case clearly tends to create a perpetuity, and it cannot be distinguished from the decision of Lord Campbell, L.C. in *Carne v. Long* (2 L. T. Rep. N. S. 552; 2 De G. F. & J. 75; 29 L. J. 503, Ch.) [He was then stopped.]

*English Harrison* on the same side, for others of the next of kin, added nothing.

*Julian Robins*, for the surviving executor and trustee of the testator's will, submitted to abide by the decision of the court.

*A. D. Tyssen and Sidney Woolf*, for the trustees of the Tunstall Institution, supported their rule.—A gift such as that in this case to an association of this kind in such a way as to make the subject-matter of the gift become part of the property of the association so as to come under their free disposition, as is the case here, is a perfectly good and valid gift. The present case differs from that of *Carne v. Long*, which was the case of a corporation where there was no right to divide the property. The present association is a voluntary unincorporated body, and may divide the property amongst themselves as co-owners on dissolving the society. They are a mere club. There is nothing in the nature of the association that infringes the rule against perpetuities, the members having a power to dissolve at any moment, as in the case of *Brown v. Dale*, before the Master of the Rolls (L. Rep. 9 Ch. Div. 78). The present case is within the decision of Wickens, V.C., in *Cocks v. Manners* (24 L. T. Rep. N. S. 869; L. Rep. 12 Eq. Cas. 574; 40 L. J. 640, Ch.), in which the distinction between that case and *Carne v. Long* was pointed out by the learned Vice-Chancellor, the gift in *Carne v. Long* being to the trustees and their heirs for ever, and the members there having no power to sell the land the profits of which were given in trust for the benefit of the institution. [KELLY, C.B. refers to *The Mayor, &c., of Gloucester v. Wood*, 3 Hare, 131; s.c. nom. *The Corporation of Gloucester v. Osborn and another*, in the H. of L., affirming the decision below, 1 Ul. & Fin. 272.] They cited also

*Stewart v. Green*, 5 Ir., Eq. Rep. 470, at p. 485; and *Wigram on Wills*, 3rd edit. p. 51, proposition 5, 4th edit. p. 65,

and contended that this bequest was not void within the rule against perpetuities, and that the decision of the County Court judge was wrong.

*A. Charles*, Q.C. in reply.—Nothing that has been urged on the other side has upset the authority of the decision in *Carne v. Long*, or its applicability to the present case. This money surely could never become the property of the trustees or members of the institution under any circumstances, for the institution comes within and is subject to the provisions of the Literary and Scientific Institutions Act 1854 (17 & 18 Vict. c. 112), by the express terms of sect. 33 of the Act, by sect. 30 of which the property on dissolution would go to some other institution, and could not be divided among the members.

*Our. adv. vult.*

KELLY, C.B.—This case came before us on appeal from a decision of the judge of the County Court of Staffordshire, and the question we have to decide is, whether a bequest under the will of one Thos. Dalton to the trustees for the time being of the Tunstall Athenæum and Mechanics Institution can or not be supported as valid. Two questions upon which the bequest might be held to be invalid were presented to us in the course of the argument, viz.: first, that it was void under the Mortmain Act as a bequest to a charitable institution; and secondly, that it was void as tending to create a perpetuity. If the bequest should be held to come within either of these two grounds of objection, it would be a void bequest, and the next of kin of the testator would be entitled to the money or fund which was the subject of it. The trusts of the bequest are "to the trustees for the time being of the Tunstall Athenæum and Mechanics Institution, to be applied by them towards the building fund in connection therewith." The first question, therefore, that arises is, what is the nature and character of this Athenæum, and is it a charitable institution? Upon that point, having regard to the terms of the bequest, I think that, if the institution were a charity, this bequest would probably be held to be void under the Mortmain Act. But when we look to the rules of this society, which set out at great length the objects and purposes of the institution, we find that it is in reality a species of club in which a number of people meet together, and agree to occupy and use a certain house and premises for the purposes of mutual literary instruction, amusement, and improvement. Under these circumstances I am of opinion that this institution is not a charitable institution, and that it comes clearly within the decision of Hall, V.C., in the case of *Re Clark's Trusts*, (45 L. J. 194, Ch.; L. Rep. 1 Ch. Div. 497), in which the learned Vice-Chancellor deals with the question which arises in the present case, and decides that an institution for mutual benefit is not a charity. But even if this institution were to be held to be a charitable institution, I am by no means sure that this particular bequest would be void. The other and principal question, however, that was argued before us was, whether the bequest was valid, or whether it was void, on the ground that, having regard to its express terms, it tended to the creation of a perpetuity. Now, with regard to that question, I am clearly of opinion that this bequest is certainly void on that ground. The case of *Carne v. Long* is strongly in point. In that case there was a devise of freeholds to the "trustees for the time being of the Penzance Public Library to hold to them and their successors for ever for the use, benefit, maintenance, and support of the said library," and the Lord Chancellor (Lord Campbell) in his judgment in that case said: "I look upon this as a devise for the benefit of a society of individuals in Penzance. My objection to it is that it leads to a perpetuity, an objection with which the Vice-Chancellor does not appear to have dealt, but which appears to me wholly fatal to the devise. The clear intention of the testator, as expressed by the will, is that there should be a gift in perpetuity to this institution at Penzance. The gift is to the trustees for the time being of the society and their successors for ever, they holding it for the use, benefit, maintenance, and support of



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the library." Now, without doubt, these are stronger words than those which appear in the bequest in the present case; but nevertheless, looking to the rules and constitution of the society with which we are dealing, it appears to me that there is nothing here to prevent this society lasting for ever, or that should necessarily cause it to cease to exist, and I think, therefore, that, though the bequest in this case does not contain the strong words of the one in *Carne v. Long*, the principle of that case does and must apply. Lord Campbell then went on to say: "If the devise had been in favour of the existing members of the society, and had they been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition, and not tending to a perpetuity. But looking to the language of the rules of this society, it is clear that the library was intended to be a perpetual institution, and the testator must be presumed to have known what the regulations were. By one of these it is provided that the society is not to be broken up so long as the members remain. The devise is for the benefit of a subsisting society, and one which is intended to subsist so long as the members remain, and the property comprised in the devise is therefore to be taken out of commerce, and to become inalienable, not for a life or lives in being and twenty-one years afterwards, but for so long as ten of the members of the society shall remain." On that ground the decision of the Vice-Chancellor in *Carne v. Long* was reversed accordingly. There are many other cases also, and amongst them that of *Thomson v. Shakespeare* (1 L. T. Rep. N. S. 398; 1 De G. F. & J. 399; 29 L. J. 276, Ch.) which are in point even more directly upon the present case, and go to show that where by the constitution of a club, society, or other institution, not a charity, there is nothing necessarily to put an end to its existence, so that it may last an indefinite time, and the gift is made in such terms as to make the subject of it an accession to the capital or permanent property of the club, or other institution, and not a sum to be brought into the annual accounts of the institution as part of its yearly income to be disposed of by the then existing members, then there is in such a case a tendency to a perpetuity, and the bequest is void. For these reasons, therefore, I am of opinion that the judgment of the County Court judge was right, that the next of kin are entitled to our judgment, and that this appeal must be dismissed.

HUDDESTON, B.—I am of the same opinion. Upon the argument it was almost conceded that this institution was not in any sense a charitable institution, its object being solely social and literary, and that the case therefore did not fall within the Mortmain Act (9 Geo. 2, c. 36). It was, however, urged upon us that the County Court judge was right in holding the bequest to be void as tending to a perpetuity, and I agree entirely with my Lord in holding that that is so. It was contended on the part of the appellants, the trustees of the Athenæum, that there were no words in the present case showing that the testator contemplated anything in the nature of a perpetuity, and that in that respect the case resembled the case of *Cocks v. Manners*, where there was a bequest to a voluntary association of ladies for pious and charitable purposes, and that there was, as in that case, nothing in the rules of

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the present institution to prevent the dissolution of the society and the division of the property, and in that respect establishing a great distinction between the present case and that of *Carne v. Long*. That argument, however, if it were well founded, was met and answered by Mr. Charles on the part of the respondents, the next of kin, who referred to the Literary and Scientific Institutions Act 1854 (17 & 18 Vict. c. 112), and pointed out that that Act, which by sect. 33 is made applicable to all such institutions as the present one, expressly provides by sect. 30 that upon dissolution the property of an institution under the Act shall not be paid to or distributed among the members of the institution, or any of them, but shall be given to some other institution to be determined by the members at the time of dissolution, or in default thereof by the judge of the County Court. I agree with Mr. Charles that it is not necessary that a bequest should contain the express words "for ever" in order to bring it within the rule against perpetuities. The real object of the present testator clearly was to do something which should be a benefit to the institution or society for ever, and so to create a perpetuity; and I am therefore of opinion that the County Court judge's decision was right, and this appeal therefore should be dismissed.

*Judgment below affirmed. Leave to appeal refused.*

Solicitors for the petitioners (appellants), *Llewellyn, Aclerill, and Hammack*, agents for *Llewellyn and Aclerill, Tunstall*.

Solicitors for the testator's next of kin (respondents), *H. Tyrrell*, agent for *E. Tennant and Co.*, *Hawley*; and *J. Burton*, agent for *Tomkinson and Furnival, Burslem*.

Solicitors for the executor and trustee of the will, *Norris, Allen, and Carter*, agents for *G. Smith, Tunstall*.

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT LINCOLN'S INN.

Nov. 6, 1878, and March 22, 1879.

(Before BAGGALLAY, BRETT, and COTTON, L.JJ.)

CHAPMAN v. ROYAL NETHERLANDS STEAM NAVIGATION COMPANY. (a)

*Steamship—Collision—Limitation of liability—Both vessels to blame—Merchant Shipping Act 1854, s. 514—Merchant Shipping Amendment Act 1862, s. 54.*

*Plaintiff was owner of the steamship S., the defendants were owners of the steamship V. and of her cargo. A collision had occurred between the two vessels, whereby the V. had been lost with her cargo. The S. was also damaged. In an action in the Admiralty Division, both vessels had been found to blame, and the ordinary Admiralty rule where both vessels were to blame was ordered to apply, namely, that each was to pay half the damage to the other. The owner of the S. then took proceedings in the Chancery Division to obtain the benefit of the provision of the Merchant*

(a) Reported by E. S. ROUSE, Esq., Barrister-at-Law.

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*Shipping Act, which enables shipowners to limit their liability to a sum equal to 8l. per ton of the tonnage of their ship. The loss on the V. and her cargo was about 28,000l., and the limit of liability at 8l. per ton of the S. would be only 5200l. The loss on the S. was about 490l. The owner of the S., while claiming to limit his own liability to 8l. per ton, claimed nevertheless to recover half the damage sustained by his own vessel against the owners of the V., which would make him liable for a balance of about 3200l. The owners of the V. on the other hand claimed to have the two sets of damages first assessed, and the S.'s half damage deducted from the V.'s half damage, and then contended that the owners of the V. should prove against the S. for the balance to the extent of 8l. per ton, which would make the plaintiff liable to the full limit of his liability, namely 5200l.*

*Held, by Baggallay and Cotton, L.JJ. (reversing the decision of Jessel, M.R.), Brett, L.J. dissenting, that on the true construction of the 54th section of the Merchant Shipping (Amendment) Act 1862, there could be no set-off under the circumstances, that the principle advocated by the plaintiff was the correct one, and that the proof must be for the whole moiety of the damage ascertained to have been sustained by each ship.*

THIS was an appeal by the plaintiff from a decision of the Master of the Rolls in a suit for the limitation of the liability of shipowners in a case of collision, the crews of both vessels having been to blame.

The plaintiff was the owner of the steamship *Savernake*; the defendants, the Royal Netherlands Steam Navigation Company, were the owners of the steamship *Vesuvius*, and the owners of her cargo.

On the 7th April 1876 a collision had occurred between the two vessels, whereby the *Vesuvius* had been sunk, and was lost, with her cargo. The *Savernake* was also damaged.

On the 22nd April an action for damages was commenced in the Admiralty Division by the owners of the *Vesuvius* against the owners of the *Savernake*, who defended the action, and put in a counter-claim against the *Vesuvius*.

The action was tried on the 24th July 1876, before the judge of the Admiralty Division, who held both vessels to blame, and the ordinary Admiralty rule where both vessels were to blame was ordered to apply, namely, that each was to pay half the damage to the other.

The owner of the *Savernake* thereupon commenced the present action in the Chancery Division to obtain the benefit of the provision of the Merchant Shipping Act which enables shipowners to limit their liability to a sum equal to 8l. per ton of the tonnage of their ship. He claimed a declaration that he was only answerable in damages in respect of loss and damage to the owners of the *Vesuvius* and her freight, the goods, effects, and merchandise, and other things, on board the said ship, to an aggregate amount not exceeding 5064l., being the amount of 8l. per ton on the gross registered tonnage of the *Savernake*, and for relief consequent on such declaration. The loss on the *Vesuvius* and her cargo was about 28,000l. and the limit of liability at 8l. per ton of the *Savernake* would be only 5200l. The loss on the *Savernake* was about 4000l. The present

plaintiff, the owner of the *Savernake*, while claiming to limit his own liability to 8l. per ton, claimed, nevertheless, to recover half the damage sustained by his own ship against the owners of the *Vesuvius*, which would make him liable for a balance of about 3200l.

The owners of the *Vesuvius*, on the other hand, claimed to have the two sets of damages first assessed, and the *Savernake's* half damage deducted from the *Vesuvius's* half damage, and then contended that the owners of the *Vesuvius* should prove against the *Savernake* for the balance to the extent of 8l. per ton, which would make the plaintiff liable to the full limit of his liability, namely, 5200l.

On the 7th Aug. 1878 the case came before the Master of the Rolls, when he gave the following judgment, deciding in favour of the defendants, the owners of the *Vesuvius*.

JESSEL, M.R.—I will first of all give my view of what the meaning of the thing is, and then I will see how far that view is consistent with the well-known forms of precedents. When two ships come into collision and both are in fault, one or the other can recover damages, and only one of the two, because the result of the action is that either the plaintiff or the defendant is to win something. That is the meaning of it. The consequence of the collision is, that damage being done to one or both vessels, the owner of one vessel can recover something from the other. The Admiralty rule in such a case is to take the amount of the damage done to each vessel, to add the amounts together, and to halve them, so that each owner is *inter se* to bear half, and then to ascertain who is to pay to the other, and the monition finally issues for the balance. That is all that is ever recovered in the action. Now let us look at what the statute provides: "Where any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or both, they are not answerable in damages, beyond a certain amount. What were they then answerable for before the Judicature Act passed? They were answerable for the balance. The other side could not have got from the Admiralty judge a monition for more than the balance. Since the passing of the Judicature Act is there any distinction? If there is, it is entirely in favour of the same view, because since then these things are no longer raised by cross-claims but by counter-claims. It is a mere question of procedure. What is to be done on that judgment? What is the duty of the judge? I think it is plain that that which was formerly called "set-off" is now a matter of right and duty, a right in the first party to pay and a duty in the judge to grant. That is perfectly clear when you look at the Act of Parliament, which is for the purpose of enabling the court to do complete justice. Is it complete justice to make one side pay and leave the other side without paying? The 24th section of the Judicature Act 1873, sub-sect. 3, says: "The said courts respectively and every judge thereof shall also have power to grant to any defendant in respect of any equitable estate or right or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the

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said courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner." Nothing can be wider. "All such relief" shows it may be in diminution of the plaintiff's claim, or it may be in excess of the plaintiff's claim, but although it is no longer to be a cross-action, the judge is to do complete justice between the parties. The 3rd rule of Order XIX. says: "A defendant in an action may set off or set up, by way of counter-claim against the claim of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not; and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim." And Order XXII., r. 10, says: "Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case." Now, I am asked to make that word "relief" mean "where he wins altogether," but I decline to accept such interpretation. It may be in diminution of the plaintiff's claim, as it is in the 3rd sub-section of the 24th section of the Act of 1873. The result therefore is this, that where it says, "the court may adjudge," it means "the court shall," and consequently where the question in the action is, who is to pay damages on account of the collision, the court is bound to see who is to pay on the balance, and to order for it. Therefore the result under the Judicature Act is the same as the practical result was before the Judicature Act, by reason of the judge only issuing the monition for the balance. The total result therefore, is this, that the mode of calculating the damages is what I have stated, but the damages are calculated as the damages arising from the collision, payable by one party to the other, which is the balance in case both vessels are damaged. Of course, in the case of only one vessel being damaged, there is only one payment in respect of that one vessel. That, I think, is the fair view of the Act of Parliament—not two losses, not two independent actions, and two separate independent rights, but the loss arising from the collision; and if you look at the Act you will find that there is nothing said about the person entitled to recover. It is only a limitation of the amount that the owner of the vessel is liable to pay. It appears to me a fallacy to say that the owner of that vessel is entitled to recover from the owner of the other; on the contrary, he is liable to pay the balance and not entitled to recover. Although, by reason of some defective procedure, you may have a difficulty in making your demand effectual, it appears to me that is the substance of the matter, and all the rest is mere form. That being so, it seems to me, as between the owners of the two vessels, the amount payable as damages to the owners of the *Savernake* is the difference or balance of the two moieties ascertained in the way I have indicated. So far as they are concerned they have a right to prove, and, as I have already said, it does not make the owner of the *Savernake* liable to pay beyond the 8*l.* per ton, nor was it intended that he should pay more.

Now, as regards the intention of the Legislature, I think it is plain. Originally it was the value of the vessel, but there was inconvenience about that, and instead, this tonnage value was substituted; the theory being that, when the owner of the vessel gave up all he was entitled to, he should not pay more. That was the theory of the Legislature, and when you look at it in that light, it is quite clear he is not to be in a position to receive compensation for damage to his vessel, and at the same time not to pay compensation for damage done to the vessel of the other people. Clearly he is to get no profit, and he is to give up his vessel and freight, and that will be the result, according to the decision at which I have arrived.

The plaintiff appealed, on the ground that, according to the true construction of sect. 54 of the Merchant Shipping Amendment Act 1862, the defendants should prove for a moiety, when ascertained, of the amount of damage sustained by the *Vesuvius*, without deducting a moiety of the amount of damage sustained by the *Savernake*.

The material facts and the nature and effect of the arguments are fully set out in the written judgments of their Lordships.

Davey, Q.C., Webster, Q.C., and Clarkson, for the appellant, cited

*The North American*, 1 Lush. 79; 5 Jur. N. S. 659.  
*The Singapore*, L. Rep. 1 P. C. 378;  
*The Milan*, 5 L. T. Rep. N. S. 590; 1 Lush. 389;  
*The Saracen*, 6 Moore P. 75, C. C.;  
*Wahlberg v. Young*, 45 L. J. 783, P. C.;  
*The West Frisland*, Swab. 456;  
*The Aurora*, 1 Lush. 327;  
*Pritchard's Digest*, 591, 594 (2nd);  
*Merchant Shipping Act 1854*, s. 514;  
*Merchant Shipping Amendment Act 1862*, s. 54.

Holl, Q.C. and W. Phillimore, for the owners of the *Vesuvius*, referred to

*The Seringapatam*, 2 W. Rob. 39;  
*Devaux v. Salvador*, 4 Ad. & Ell. 431;  
*General Steam Navigation Company v. London and Edinburgh Shipping Company*, 36 L. T. Rep. N. S. 743; L. Rep. 3 Ex. Div. 467.

BAGGALLAY, L.J.—The question involved in this appeal has arisen under the following circumstances:—On the 7th April 1876, a collision took place between the steamship *Savernake* belonging to the plaintiffs, and the steamship *Vesuvius* belonging to the defendants. On the 22nd of the same month an action for damages was commenced in the Admiralty Division by the owners of the *Vesuvius* against the *Savernake* and her owners; the owners of the *Savernake* defended the action, and put in a counter-claim against the owners of the *Vesuvius*. The action was tried on the 24th July 1876, before the judge of the Admiralty Division, who held both vessels to blame, and condemned the owners of each in a moiety of the losses and damages sustained by the other; and it was referred to the registrar of the Admiralty Division, assisted by merchants, to assess the amount of such damages respectively. The owners of the *Savernake* thereupon availed themselves of the provisions of the Merchant Shipping Acts, and commenced the present action in the Chancery Division, claiming a declaration that they were not answerable in damages in respect of loss and damage to the *Vesuvius* and her freight, the goods, effects, and merchandise, and other things on board the said ship, to an aggregate amount exceeding the sum of 5064*l.*, being the amount of 8*l.* per ton on the gross registered tonnage of the

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*Savernake*, and for relief consequent on such declaration. The defendants to the limitation action were the Steam Navigation Company and the owners of a portion of the cargo which was on board the *Vesuvius* at the time of the collision. By an order of the Master of the Rolls leave was given to the plaintiffs to pay into court to the credit of the action the sum of 5212*l.* 3*s.* 5*d.*, being the amount of the aforesaid sum of 5064*l.* together with interest thereon at 4 per cent. per annum from the time of the collision; and on 29th Dec. 1876, 5212*l.* 3*s.* 5*d.* was paid into court pursuant to such order. By the same order the defendants, the owners of the *Vesuvius*, and the defendants, owners of the cargo, were restrained from further prosecuting the proceedings commenced by them in the Admiralty Division against the owners of the *Savernake*, in respect of the collision, until judgment in the present action or further order, without prejudice to the continuance of the proceedings in the said division in respect of the counter-claim of the *Savernake*. On the 25th June 1877 judgment was given by the Master of the Rolls in the limitation action, and a declaration of limitation of the liability of the owners of the *Savernake* as claimed by them was made, and inquiries were directed for the purpose of ascertaining who were the persons entitled to the fund so paid into court and its accumulations, and in what proportions it ought to be distributed among the persons who should be found entitled; and the injunction awarded by the order of the 9th Dec. 1876 was continued until further order against the defendants, the Steam Navigation Company. It appears that the effect of the proceedings in the present action is to leave the damages in which the owners of the two ships have been respectively condemned to be assessed by the registrar and merchants under the order of the Admiralty Division of the 24th July 1876. In the course of the prosecution of the inquiries so directed by the Master of the Rolls, the defendants, the Steam Navigation Company, as owners of the *Vesuvius*, claimed to prove for the full amount of the losses and damage sustained by them by reason of the collision, or, in the alternative, to prove for one moiety of such losses and damage, less the moiety of such damage as should be found to be payable by them to the plaintiff in respect of the losses and damage sustained by the plaintiff, and to be paid *pro rata* with the other claimants out of the fund in court in respect of the amount for which they should be held entitled to prove. On the 7th Aug. 1878, the claims so asserted by the defendants, together with certain other questions which had arisen in the course of the proceedings, were brought under the consideration of the Master of the Rolls, upon an agreed statement of facts: the first of the alternative claims of the company does not appear to have been pressed, at any rate it has not been supported in argument before us, and it is clearly untenable; the second was opposed by the plaintiff, who insisted that the company ought to prove for a moiety, when ascertained, of the amount of damage sustained by the *Vesuvius*, without deducting a moiety of the amount of damage sustained by the *Savernake*. If this contention of the plaintiff were to prevail it would leave him in a position to assert his claim against the owners of the *Vesuvius* for the amount, when ascertained, in which such

owners have been condemned in respect of the damage occasioned to the *Savernake* by the improper navigation of the *Vesuvius*. The Master of the Rolls decided in favour of the second of the alternative claims of the company, and from that decision the present appeal is brought. The owners of the *Vesuvius* have not asserted any claim to a limitation of their liability. The question involved in the appeal is one of considerable importance, not only to the parties interested in the present action, but also as affecting the principle upon which the liabilities of shipowners are to be measured in cases where both ships are held to blame in respect of a collision, and the owners of one or both claim a limitation of liability under the provisions of the Merchant Shipping Acts. If the contention of the respondents is well founded, the plaintiff, as owner of the *Savernake*, instead of having his liability limited to 8*l.* per ton upon the registered tonnage of his ship, will also lose the amount in which the owners of the *Vesuvius* have been condemned, and will be in exactly the same position, as regards the amount of loss he will have to bear, as he would have been in had he been held alone to blame, that is to say, he will have to pay the 8*l.* per ton, and bear the loss of all the damage done to his own ship. The owners of the *Vesuvius*, on the other hand, by reason of their escaping the payment of the amount in which they have been condemned by deducting it from the amount in which the owner of the *Savernake* has been condemned, and proving for the balance only, will obtain payment in full of so much of the amount in which the owner of the *Savernake* has been condemned as is equal to the amount in which they have themselves been condemned. The claimants in respect of cargo, &c., are also benefited by the decision of the Master of the Rolls, inasmuch as the proportionate parts of the fund paid into court, to which they are entitled, will be increased in amount by the reduction of the proof of the owners of the *Vesuvius*, and we consequently find them siding with the company in opposing the appeal. Now it certainly strikes one as improbable that such an apparently inequitable result should be in accordance with the true construction of the Merchant Shipping Acts; but, if such be their true construction, we are bound to adopt and act upon it, however inequitable, in our opinion, the result may be. The question therefore for present consideration is, whether the true construction of the Acts is that which the Master of the Rolls has adopted. With all respect for that learned judge, and for Lord Justice Brett, who is of opinion that the appeal should be dismissed, I think that the view contended for by the plaintiff is more in accordance with the true construction of the Merchant Shipping Act 1862, upon which, as it seems to me, the whole question turns. The 54th section of that Act, so far as it is applicable to the case we are now considering, may be stated in the following terms: "Where by reason of the improper navigation of any ship, but without the actual fault or privity of its owners, loss or damage is caused to any other ship, or to any goods on board such other ship, the owners of such first-mentioned ship shall not be answerable in damages, in respect of such loss or damage, to an aggregate amount exceeding 8*l.* per ton of their own ship tonnage." The aggregate, which is

limited to 8*l.* per ton, is made up of (1) damages in respect of the loss or damage to the other ship, and (2) damages in respect of the loss or damage to the goods on board such other ship; but, as regards both classes of damages, they are to be in respect of loss or damage occasioned by the improper navigation of the ship, whose owners claim the benefit of limited liability. What then are the damages to which the owners of the *Vesuvius* would be entitled in respect of the loss or damage occasioned to that ship by the improper navigation of the *Savernake*, if no claim to limited liability had been made by the owner of the *Savernake*? It appears to me that the damages to which, upon this hypothesis, the owners of the *Vesuvius* would be entitled would be a moiety of their claim in the Admiralty action, as assessed under the order of the 24th July 1876, or under any substituted jurisdiction. It may be, and probably is, quite true, that after the assessment of the amounts in which the owners of the two ships were respectively condemned, the Admiralty Division would order the owner of the *Savernake*, which had admittedly sustained less damage than the *Vesuvius*, to pay to the owners of the *Vesuvius* the difference between the amounts of the two assessments, but that would be mere procedure, adopted for convenience only, and to avoid the circuitous course of reciprocal payments; the amount of damage occasioned to each ship by the improper navigation of the other could not be altered by the order for payment of the balance by the one condemned in the larger amount. And it is in respect of the damage occasioned to one ship by the improper navigation of the other, as such damage could be ascertained independently of the provisions of the Merchant Shipping Acts, that limited liability is given by those Acts, and not in respect of the ultimate balance which, under the procedure of any court having jurisdiction, may be payable in the final winding-up of all matters of account arising out of the collision. But our attention has been directed, in the course of the argument, to the practice of the Court of Admiralty as constituted previously to the passing of the Judicature Acts, of setting off, as it were, in cases of collision in which both ships were held to blame, the amounts in which owners of the ships were respectively condemned, and of issuing a monition for payment of the balance by the owners of the ship condemned in the larger amount; and it has been contended on behalf of the respondents that such balance, being the amount which would have been so ultimately recovered by the owners of the ship that had sustained the greater amount of damage, should be treated as the amount of damages provable by them in a limitation suit. It is immaterial, in my opinion, to consider the various steps in the proceedings in the Admiralty Court which would have preceded the issuing of a monition for the payment of a balance under such circumstances as have been referred to in argument, though cases have been cited on the subject by the one side and the other. I will assume, for the purpose of the few remaining observations which I have to make, that the practice was as it has been represented by the counsel for the respondents. But in what respect did the practice of the Admiralty Court, of issuing a monition for the payment of the balance after the sums which each party was liable to pay to

the other had been ascertained, differ in principle from that which might, and probably would, be adopted by the Admiralty Division under similar circumstances, and to which attention has been directed? Then, as now, convenience dictated the form in which the ultimate order should be made, but such ultimate order was for the purpose of giving effect to rights previously declared after the pecuniary results of such declaration had been assessed. It appears to me that, under the provisions of the Admiralty Court Act 1861 and the recent Judicature Acts, the Court of Admiralty, previously to the last-mentioned Acts coming into operation, and the Admiralty Division from that time, acquired the power of doing directly what the Court of Admiralty, previously to the Act of 1861, had done or endeavoured to do indirectly, that is to say, the power, after the amounts in which the owners of each ship were liable to the owners of the other had been ascertained, of securing that the owners of one ship should not receive the amount coming to them without ample provision being made that they should in return pay or account for the amount of their own liability, and in no better way can such provision be made than by setting off the one amount against the other, and ordering payment of the balance, and for that purpose, and for no other, as it appears to me, have monitions or orders for payment of the balance been from time to time made. I am of opinion that the order of the Master of the Rolls should be reversed, and that an order should be made declaring that the owners of the *Vesuvius* ought to prove for the amount of one moiety of the loss or damage sustained by their ship by reason of the improper navigation of the *Savernake*, when such amount shall have been assessed in manner directed by the order made in the Admiralty Division on the 24th July 1876, and that the costs should follow the result.

BRETT, L.J., after referring to the facts, said:—The Master of the Rolls decided in favour of the view presented by the owners of the *Vesuvius*, and his order carries out that view. The appeal is against that order. Our decision must depend upon what is the true application to such a case of sect. 54 of the statute of 25 & 26 Vict. c. 63 (the Merchant Shipping Amendment Act 1862), by which, omitting inapplicable matter, it is enacted that the owners of any ship shall not, where any loss or damage is, by reason of the improper navigation of such ship, caused to any other ship, be answerable in damages in respect of loss or damage to ships, goods, or merchandise, &c., to an aggregate amount exceeding 8*l.* for each ton, &c." The case to which we have to apply this enactment is that of a collision between two ships, a claim and a counter-claim in the Admiralty Division, a judgment thereon that both vessels were to blame, a limitation action in the Chancery Division by the owners of the vessel which was the less injured of the two. The same question might have been raised by a petition in the Admiralty Division for a declaration of limitation. No difficulty in the application of the statute in question can arise except where both vessels are pronounced to be in fault. At the time of the passing of the Act of 1862 the difficulty therefore could only have arisen in respect of a decision given, or to be given, in a suit in the Admiralty Court. Since the passing of the Judicature Act

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of 1873 (sect. 25, sub-sect. 9), it may arise in respect of a decision in the other divisions of the High Court. But the Merchant Shipping Amendment Act 1862 must be interpreted, I think, as it would have been on the day after it came into operation. I, therefore, with deference, think it better not to discuss the effect of the procedure under the Judicature Acts. Whatever was the effect of the Limitation Act upon the rights of the parties before the Judicature Act must, in my opinion, be its effect now. The Judicature Acts did not alter rights but only procedure. In order to interpret the Limitation Act, or to apply it, it seems to me necessary to consider what, at the time of the passing of the Act, was the course of procedure in the Admiralty Court in a cause of damage. In case of a collision a cause was instituted by the owners of one of the ships, a warrant was issued, either the ship proceeded against was seized, or her owners, without waiting for such seizure, entered an appearance upon giving bail to, or paying into court, the amount in which the cause was instituted; if the ship was seized bail might be given to the ascertained value of the ship, if that was less than the sum for which the cause was instituted, or to the amount in which the cause was instituted, if the value of the ship was greater than that sum—the cause then proceeded. The owners of the ship proceeded against might or might not institute a cross action. If they did not the single cause proceeded to a hearing. If the question of joint blame was raised by proper pleading in that cause the court would in that suit give judgment, either that the defendants' ship was solely to blame, or that both ships were to blame, and the court, in and by such judgment, unless the amount was admitted, would refer to the registrar and merchants the amount of damage done to the plaintiff's ship. In the former case the plaintiff would eventually be entitled to recover the whole amount of damage done to his ship; in the latter case the half of such amount. After the report of the registrar to the court, the plaintiff applied to the court for an order for the payment of the money due to him. If the defendant had paid money into court, the order was to pay to the plaintiff the amount due out of the fund in court, and upon such "order for payment" the plaintiff obtained a cheque from the registrar. If the defendant and sureties had given bail, the "order for payment" was an order on the defendant and his bail to pay the amount on a particular day. If the amount was not paid on that day, the "order for payment" was enforced by "monition" to pay it on a particular day, and on neglect by "attachment." But in general, before the Judicature Acts, the defendants in a suit instituted in respect of a collision did at some time, sooner or later, institute a cross-cause. To the cross-cause thus instituted the original plaintiffs sometimes appeared, and sometimes did not appear. If they appeared, they in their turn gave bail. If they did not appear, and their ship could not be seized, the cross-cause could not for the time proceed. Yet the court, before 1862, had no power to stay proceedings in the first cause. This was decided in several cases, as in *The Seringapatam*, *The Heart of Oak*, *The Carlyle*, and *The North American*. The first case proceeded to judgment, that is to say, to the judgment which declared the liability, and it further

proceeded to the inquiry thereupon by the registrar and merchants. And the court could not direct an inquiry as to the amount of damage done to the defendant's ship, so as to allow the defendant to deduct the half of such amount from the amount due to the plaintiff. That was decided in *The Seringapatam*. The court therefore allowed the inquiry to proceed as to the amount of damage suffered by the plaintiff's ship and issued "an order for payment" against the defendants and their bail. But the court by anticipation refused to issue a "monition" to the defendants and their bail to pay the plaintiffs the loss or damage suffered by the plaintiffs' ship; for instead of making the "order for payment" an order to pay the plaintiffs, it ordered "the amount to be paid into court under the decree, not to be paid out till the plaintiffs should consent to a deduction in respect of the damage done to the defendants' ship." Thus in *The North American* and *The Ruta Carmen* (1 Lush. 79), where there was no appearance to the cross-action, the court refused to stop the proceedings in the first action, or to refer the damage done to both vessels; but after the report of the registrar on the amount of damage done to the plaintiffs' vessel, refused to make an "order for payment" to the plaintiffs until decree should be given in the cross-action, and ordered the amount reported due by the registrar to be paid into the registry. It is obvious that the Court of Admiralty was struggling to effect, in these cases, as the result of the litigation, that only one payment should, in fact, be made, and that such payment should be a payment of the balance between the amounts of the two damages. But the court could not interfere until the moment when it was asked to enforce the decree it had been obliged to make; that is to say, until it was called upon to issue a "monition to pay." That it refused to do. The difficulty in proceeding in a manner which the court so evidently considered to be just, namely, so as to make the suit end in one payment only, and that a payment of the balance was met by the enactments contained in sect. 34 of the Admiralty Court Act 1861: "The High Court of Admiralty may, on the application of the defendant in any cause of damage, and on his instituting a cross-cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross-cause be heard at the same time and upon the same evidence; and if in the principal cause the ship of the defendant has been arrested, or security given by him to answer judgment, and in the cross-cause the ship of the plaintiff cannot be arrested, and the security has not been given to answer judgment therein, the court may, if it think fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross-cause." The court, after that statute, could, if the defendant instituted a cross-cause, force the plaintiff to appear to it, and insist that both causes should be heard together. This could be for no other purpose than to arrive directly at the result which had been sought, and which was probably arrived at indirectly in the case of *The Seringapatam* and *The North American*. The same result was now procured whether there was at the commencement of the litigation only one cause or a cause and



a cross-cause. Before the litigation was ended there was a cause and a cross-cause. But, in such circumstances the two causes, though tried together, and upon the same evidence, were distinct and separate causes just as they had been before: (*The Calypso*, Swab. 28.) Each therefore proceeded by separate pleadings and resulted in for n separate judgments as to liability. In each there was, if the proceedings were formally drawn out, a judgment or decree which declared that both ships were to blame and ordered a reference to the registrar and merchants to ascertain the amount of damage suffered in each cause by the plaintiff's ship. Whether the registrar would thereupon in form hold two separate references I know not. I doubt much whether he ever did. He would, in strictness, I presume make a report in each case though I should think he never did. It may even be that an order for payment would be made in each suit though I much doubt it. But it seems to me impossible to suppose that more than one monition ever issued. It cannot be that the Court of Admiralty ever issued two monitions so as uselessly and ridiculously to force both the parties to pay money, one of them thereby both paying and receiving an identical sum. There must have been one monition and that must have been to pay the balance only, upon which monition, if disobeyed, one attachment alone could issue. One party only was, or may well be said to have been, "made liable in damages." The question then is how to apply the 54th section of the Merchant Shipping Amendment Act 1862, to such a procedure? The limitation of liability is applicable as well to cases in which the defendant's ship is solely to blame as to cases in which both ships are to blame. It was therefore when the statute was passed, applicable to claims enforced by common law actions as well as to claims enforced in the Admiralty, only that the complication arising from action and cross-action in which both ships should be held to blame could only arise in the Admiralty, for upon such a finding in the common law actions neither party could be liable to pay any damages. Again, the limitation might be required either where the only claim against the defendant was by the owner of the other ship or where there were several persons claiming against him. In the former case, if the action were at common law, the amount of the verdict was, I have no doubt upon evidence given, confined to the limitation amount; the verdict being practically the last step in the cause other than mere administrative steps taken as a matter of course, by the party. If the suit were in the Admiralty Court, and the defendants' ship was declared solely to blame, there must have been an inquiry by the court, i.e., the registrar and merchants, as to the amount of damage suffered by the plaintiff's ship, and if that amount was greater than the limitation amount, the "order for payment" must have been confined to the limitation amount. But if, in either court, there were several claims in different actions against the defendant, or if several claims were apprehended, the defendant as against all those actual or apprehended claimants, might proceed in Chancery by a bill, or after the Admiralty Court Act 1861, in the Admiralty by a petition for a declaration of the amount of his liability, and for an injunction to stay actions, and for an order

as to the distribution of such amount rateably amongst the several claimants. This power was given to the Court of Chancery formerly by the statute 53 Geo. 3, c. 159, s. 7, and afterwards by the Merchant Shipping Act 1854, in part 9, s. 514. It was given to the Court of Admiralty by the Admiralty Court Amendment Act 1861, s. 13. This application by a shipowner was, it must be observed, made in a different action or suit from the collision action or suit, and was made as between the shipowner and parties, who were not parties to any one collision action, or suit. The limitation suit, or petition, might be commenced before or after the judgment as to liability in an Admiralty suit, and, so far as I can see, if before execution, before or after judgment in a common law action. The claim for a limitation of liability as against several or aggregate claims, could not be made by any means in any of the suits brought in the Admiralty for compensation by reason of collision, or in any action at law brought to recover such compensation. And that being so, it seems to me to follow that every such suit or action must, if not stopped by injunction at an earlier stage, have proceeded to judgment as if no statute limiting the liability existed. How then could the statute affect such suit or action if allowed to proceed? Only after judgment, and before execution. Suppose then a cause in the Admiralty by the one shipowner against the other, and a cross-cause and judgment in each declaring that both ships were to blame, and ordering inquiry as to the amount of damage suffered by the ship proceeded against; and suppose such inquiry or inquiries held, and report or reports made as to the amount of damage suffered by each ship: if there were no Limitation Act, the one party would obtain an "order for payment" of the balance, and the other party would obtain no order for payment; or at the most one party alone would obtain a monition, and that would be a monition to pay the balance. But then suppose other claims are made or apprehended against him who would have to pay such balance, and he thereupon, in a suit instituted by him, or in a petition presented by him, claims a declaration of limitation of liability. He must claim a declaration to be answerable in damages to all claimants only to the extent of 8*l.* per ton in the aggregate. How would that affect the order for payment already obtained against him? It cannot alter it. The Court of Chancery could not direct the Court of Admiralty to alter its order already properly made in a cause properly before it. The Court of Admiralty could not, on the petition, alter its order given in the cause. There is no such power mentioned in the statutes giving power to declare the limitation. Upon such a petition or in such a suit, the court is directed to declare the amount of limitation, and to distribute such amount among the claimants. There is no other direction. The amount of one claim is in the case supposed already settled. There is no power to unsettle that amount. In such a state of circumstances, therefore, the amount of the shipowner's claim would be the amount already ascertained by the inquiry before the registrar as to the amount to be paid and recovered, which would be the balance ascertained without reference to limitation. If this would be the result where the application by bill in Chancery or by petition in Admiralty was made after judgment declaring liability was



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given in the collision causes, could the result be different, ought it to be held different, where the application for limitation is made before such judgment is given? Upon such application for limitation the court may or may not, "as it thinks fit," the statute says, restrain further proceeding in the collision causes. The present case is an instance. The Master of the Rolls has not stayed all further proceedings in the collision causes, but on the contrary has directed further proceedings in the limitation cause to stand over until the loss and damages which the plaintiffs and defendants, the Royal Netherlands Steam Navigation Company, have sustained, have been assessed in the Admiralty Division. But the court in the limitation cause does not restrain further proceedings in the collision causes, it cannot give any direction as to the form of proceeding in those causes. Then the proceedings in those causes must follow the ordinary form. In such case, therefore, of cause and cross-cause, and decrees or judgments therein declaring both ships to blame, the inquiry or inquiries before the registrar must proceed in the ordinary form, and then the amount of loss or damage suffered by both vessels must be ascertained, and the balance be ascertained, and so the right to payment in favour of the party to be paid be ascertained, and the amount which he is entitled to be paid ascertained, all in ordinary form. Then, the court acting in the limitation suit interposes and distributes the limitation amount. It seems to me impossible that the court could in such a case distribute upon a different amount than that thus ascertained. Where, therefore, the limitation action or application by petition is instituted after the judgment in a damage cause or causes, or where either of them is instituted before such judgment but no order is made to stay any proceedings in the damage causes, the 54th section of the Merchant Shipping Acts Amendment Act 1862, to be invoked as against several claimants, cannot prevent the more successful party from ascertaining in the usual way and according to the usual rules the amount of loss or damage primarily due to him. In such cases the phrase, "answerable in damages," is applicable to the last proceeding only of the whole litigation; that is to say, to the distribution of the limitation amount among the parties. And if, in such cases, it would and could be applicable only to the last proceeding, it seems to me to follow that it ought only to be applied to the same last proceeding in all cases. If so, where the Court of Chancery in a limitation suit, or the Court of Admiralty on petition, thinks right to stop the proceedings in the Admiralty collision causes before the balance of the two losses is ascertained, and to ascertain itself the balance, it is bound, as it seems to me, to ascertain such balance according to the ordinary rules, and not to apply the 54th section until after such balance is ascertained, and it is about to perform the last act, namely, to distribute the limitation amount. It is suggested that by such a construction the plaintiff in the limitation cause, i.e., the defendant in one of the collision causes, is deprived of his right to obtain a deduction in respect of the damage done to his ship, but it does not seem to me that such objection is well founded. He does obtain such deduction. Such deduction is made in order to arrive at the rateable amount in respect of which

the other shipowner's share of the distribution is to be paid to him. The amount for which such other shipowner is to prove is the balance between his loss and the loss of the plaintiff in the limitation cause. It is not this, but the other construction which would work relative, if not direct injustice. The owner of the cargo in the one ship suing the other ship in the Admiralty where both ships are pronounced to be in fault, can recover only half the loss or damage done to his cargo: (*The Milan*, 1 Lush. 388.) But no deduction can be made from the half. Suppose then, by way of example, cross-causes by the two ships, and also a cause by owner of cargo against the ship claiming limitation. Let the limitation amount of the ship B. be 2000*l.*; let the damage to ship A. be 6000*l.*; half the damage to A. is 3000*l.*; half damage to ship B. is 1000*l.*; damage to cargo in ship A. is 6000*l.*; half damage is 3000*l.* Upon the construction of the Limitation Act adopted by the Master of the Rolls ship A. would prove for 2000*l.*, cargo in ship A. would prove for 3000*l.* But by force of the Limitation Statute neither could recover payment of the whole of his loss. The fund to distribute being 2000*l.*, ship A. would recover 800*l.*, cargo in ship A. 1200*l.* But upon the opposite construction ship A., though damaged to the extent of 6000*l.*, the half damage being 3000*l.*, would only be entitled to say that ship B. was liable to pay her 2000*l.* Ship B., damaged to the extent of 2000*l.*, would claim 1000*l.* Ship A. would prove only for 1000*l.*; cargo in ship A. would still prove for 3000*l.* The fund to be distributed being still 2000*l.*, ship A. would recover only 500*l.*; cargo in ship A. would recover 1500*l.* The Limitation Act was passed solely in favour of ship B. Why, without any advantage whatever to ship B., should it be construed so as thus to alter the relative rights of ship A. and the cargo of ship A.? A statute for the purposes of public policy derogating, to the extent of injustice, from the legal rights of individual parties, should be so construed as to do the least possible injustice. This statute, whenever applied, must derogate from the direct right of the shipowner against the other shipowner. Upon the construction suggested by the appeal, it would derogate also from his relative rights as regarding the parties. It should be so construed as to derogate as little as is possible, consistently with its phraseology, from the otherwise legal rights of the party. It seems to me that the phrase "answerable in damages" may be, and therefore on this last rule of construction ought to be, applicable to the last step in litigation; that is to say to the damages, which but for this section would be ultimately payable by the person seeking its protection. It need not, and therefore ought not to be applied until the last stage is reached. If so, it leaves untouched all the preceding steps necessary to ascertain the amount of that last payment which, but for it, would have to be made. In the present case, therefore, it is not to be applied until the balance, which would otherwise be payable to the owners of the *Vesuvius*, is ascertained by the same rules as it would be ascertained irrespective of the Limitation Act. That result is effected by the order of the Master of the Rolls. In my opinion that order is right, and ought to be affirmed. In consequence of the arguments used before us I have given reasons for my judgment more techni-

cal than those given by the Master of the Rolls for his. I, however, entirely agree with him in the larger reasons given by him for his judgment.

COTTON, L.J.—This appeal is against so much of an order of the Master of the Rolls as declares that the defendants are entitled to prove for one moiety of the loss and damage sustained by them less a moiety of the loss and damage sustained by the steamship *Savernake*, which belonged to the plaintiff, and against the directions consequential on that declaration. The plaintiff, the owner of the *Savernake*, commenced an action to obtain the protection given by the Merchant Shipping Acts. Under an order of the Master of the Rolls the plaintiff paid into court the sum fixed by sect. 54 of the Act of 1862 as the amount of his liability, and is entitled to the benefit of that section, which enacts that "the owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity—that is to say, first, where any loss of life or personal injury is caused to any person being carried in such ship; secondly, where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship; thirdly, where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat; fourthly, where any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat—be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding 15*l.* for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury, or not, to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage." Where an action is commenced and money paid into court under sect. 54 of the Act of 1862, the liability is provided for under that Act by proof against the fund paid into court. It is provided that the sum paid into court shall be the limit of the statutory liability for the loss or damage caused by reason of the improper navigation of the ship. The effect of the order of the Master of the Rolls is to deprive the owners of the *Savernake* of the amount of one-half the damage occasioned to their vessel, for which the owners of the *Vesuvius* were, by the order of the 24th July 1876, in the Admiralty Court, condemned or declared to be liable, and it does so for the purpose of satisfying a portion of the amount of the damages sustained by the *Vesuvius* by reason of the improper navigation of the *Savernake* which, under the Acts referred to, is to be provided for solely out of the fund in court. This is apparently against the words and meaning of the Merchant Shipping Acts and the provisions therein contained limiting the liability of the owners of the *Savernake*, and certainly is so, if the amount assessed as half the damage to the *Vesuvius* is the damage for which the owners of the *Savernake* would, independently of the Act be liable. But it is attempted to support the order appealed from by urging that in the Admiralty Court a monition to

enforce payment in such cases is issued only for the balance of the moiety of the loss sustained by the greater sufferer after deducting the moiety of the loss sustained by the other vessel. This, in fact, is the case, and on this it is contended, and I understand this was the view of the Master of the Rolls, that the action and cross action in the Admiralty Court, and all the proceedings therein up to and including the monition, are means taken to ascertain one set only of damages, viz., that to which the greater sufferer is entitled, being the balance mentioned in the monition. I am unable to agree with this view. The monition was preceded by the decree of the 24th July 1876, in which both vessels were declared to be in fault, and each was condemned in a moiety of the claim of the owners of the other vessel. A monition is, according to the practice of the Admiralty Court, the first step in the process to enforce payment, not the declaration of liability, and though it issues only for the balance of the sums for which the parties have been declared liable, each to each, yet this, in my opinion, is done only as a matter of convenience to work out the result of the cross claims and to avoid process being issued by each party against the other. It is said that the monition is the judgment. This depends on the meaning in which that word is used. It is so in the sense of being the order in which process to enforce payment is issued, but, in my opinion, it is not so in the sense of being the order of the court, which declares and establishes the liability. What takes place is, in my opinion, like what frequently occurs in proceedings in the Court of Chancery where parties have cross claims against each other, the amount of which depends upon accounts or enquires to be taken or made in chambers. In such cases the decree declares the liability of each; the necessary accounts or inquiries to ascertain the amount are directed, and the decree on further consideration directs payment of the balance. Looking to the form of the order of the Master of the Rolls, it can hardly be supposed that he intended the proceedings in the Court of Admiralty to be carried on till a monition for payment was obtained. But even if a monition were obtained in this case, it would not be right (if the view which I take is otherwise correct) that it should be for the balance of half the damage sustained by the *Vesuvius* after deducting half the damage sustained by the *Savernake*, for, under the circumstances, there can be no set-off, as the owner of the *Savernake* has claimed the benefit of the limited liability given by the Act, which leaves to the owners of the *Vesuvius* a right to be paid a dividend only on the damage sustained by that ship while they, the owners of the *Vesuvius*, remain liable in full. For these reasons I agree with Baggallay, L.J., that the order appealed from must be reversed, and that the defendants, the owners of the *Vesuvius*, must rank against the fund in court for the entire amount of the moiety of the damage to which they have been declared entitled.

*Appeal allowed.*

Solicitors: T. Cooper and Co.; Stokes, Saunders, and Stokes; Pritchard and Co.

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THE CONDOR.

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March 29 and 31.

(Before JAMES, BAGGALLAY, and BRAMWELL, L. JJ., assisted by Nautical Assessors.)

THE CONDOR. (a)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

*Damages—Collision—Thames Conservancy Rules—Lights—Practice—Costs—36 & 37 Vict. c. 85, s. 17.*

*The owners of a vessel which has infringed a regulation as to lights, made by a competent authority, must, when plaintiffs, show that that infringement could not have caused or contributed to the collision. It is not necessary for the defendants, who are not counter-claiming for damages, to prove that in point of fact it did cause or contribute to it.*

*Quere, whether an infringement of the Thames Conservancy Rules 1875 causes the vessel infringing them to be "deemed to be in fault," within the meaning of sect. 17 of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85).*

*In future the costs in Admiralty appeals, as in all other appeals, will follow the event, notwithstanding the former practice of the Judicial Committee of the Privy Council in certain Admiralty appeals.*

THIS was an appeal in an action for damage by collision. The action was brought in the Admiralty Division by the owners of the dumb barge *Swansea* against the steamship *Condor* and her owners, the General Steam Navigation Company (Limited). The collision took place in the Lower Pool, river Thames, opposite the Aberdeen Steam Wharf, about midnight on the 24th Oct. 1877. The night was dark but fine and calm, and the tide flood running about three knots. The *Swansea* was proceeding up the river, in company with two other dumb barges, in tow of the steam launch *Jane*, at full speed. The two other barges were astern of the launch, and abreast of each other, the *Swansea* being astern of them, the steam launch had the proper lights for a tug, i.e., two bright white masthead lights vertically in addition to the ordinary side lights. The barges had no lights of any sort.

The *Condor* was proceeding down the river under steam. There was evidence that the river was very crowded. There was a great conflict of testimony as to what took place on board both vessels before the collision happened, but the *Condor's* stem struck the *Swansea* on the port-side abaft the beam. There was no counter-claim on the part of the *Condor*, and the defence was that, so far as the *Condor* was concerned, the collision was the result of inevitable accident, and was occasioned by negligence on board the *Swansea* and the steam launch *Jane*.

The argument principally turned upon the construction and effect of rule 3 of the Bye-laws for the Navigation of the River Thames, made by the conservators of the river, under the provisions of the Thames Conservancy Acts 1857, 1864, and 1867, and the Thames Navigation Acts 1866 and 1870, and approved by Order in Council of the 17th March 1875, and of Sect. 17 of the Merchant Shipping Act 1873. Rule 3, is as follows:

3. The person in charge of the sternmost or last of a line of barges, when being towed, shall exhibit between sunset and sunrise a white light from the stern of his barge.

And the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85) sect. 17:

If in case of any collision it is proved to the court before which the case is tried that any of the regulations for preventing collisions contained in or made under the Merchant Shipping Acts 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it be shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary.

June 20, 1878.—The cause came on for hearing before Sir R. Phillimore and Trinity Masters.

*Milward, Q.C. and Phillimore*, for plaintiffs, owners of the *Swansea*.—The bye-law in question has never been properly published; those on board the *Swansea*, in common with the generality of people using the Thames, had never heard of it; its absence did not cause or contribute to this collision; the *Condor* could see the barge in plenty of time to have avoided it; the two masthead lights on board the steam tug were notice to her that there were barges in tow. The object of the stern light is to show vessels coming up astern the position of the barges; this is shown by rule 2 of the same bye-laws, which requires all independent dumb barges to have a light ready to show. She knew that vessels in tow coming up with the tide could not be stopped and reversed with the ease of an independent steamer. We did no wrongful act, we were in a proper place and properly navigated; it was the duty of the *Condor* to keep out of the way, and she did not do so, therefore she is to blame for the collision. A bye-law for the navigation of the river Thames, made by the Conservators of the Thames in 1875, is not a "regulation for preventing collision contained in or made under the Merchant Shipping Acts 1854 to 1873," and therefore the breach of it does not carry with it the consequences that have been held to result from sect. 17 of the Merchant Shipping Act 1873.

*Butt, Q.C. and Clarke*, for defendants, the General Steam Navigation Company, owners of the *Condor*.—The barge ought to have carried a light, she did not do so, and therefore has infringed the regulations, and is to blame under sect. 17 of the Merchant Shipping Act 1873. The object of the regulation as to lights is not merely to show vessels coming up astern their position, but—since where there is a string of barges in tow, that string may, following the curves of the river or alterations in the course of the tug, be far from a straight line—to show to vessels approaching from any direction where the end of that line is, to allow time to get past in safety. This, in fact, was shown by the fact that the regulation as to exhibiting a light by barges in tow only applies where there is a string of barges. If only a single barge or two abreast are in tow, the towing lights of the tugs are sufficient notice; but where there is a train, the termination of that train of uncertain length is required to be marked. If there had been a light on the last barge, which was the one we came into collision with, we could have seen her sooner, and should have known she was in tow, and might have avoided the collision. We were hardly moving at all, and the barge swept across our bow. We could do nothing more than we did to avoid the collision. The speed at which

(a) Reported by J. P. ASPINALL and F. W. BAIKES, Esqs., Barristers-at-Law.

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the barges were coming up the river was improper, seeing the crowded condition of the navigation, and the admitted difficulty of stopping them when going with the tide.

*Millward, Q.C. in reply.*

Sir E. PHILLIMORE, after consultation with the Trinity Masters.—This is a case of collision which happened about midnight, or later, on the 24th Oct. 1877, in the river Thames, opposite the Aberdeen Steam Wharf. The vessels which came into collision were the *Swansea*, a dumb barge in tow of a tug called the *Jane*, and the steamship *Condor*. The stem of the *Condor* went into the port midships of the *Swansea*, abaft her beam, and did her considerable damage. The state of the weather may be taken, both on the admissions of the *Condor* and on the general result of the evidence, to have been what is well known and often described in this court as "clear but dark," and the pilot of the *Condor*, in his evidence, states distinctly that it was a night in which lights could be seen at a reasonable distance. The main defence, as it appears, and I think was hardly denied by the counsel for the *Condor* in this case, was, that, looking at the crowded state of the river and other circumstances, the collision was the result of unavoidable accident. In the first place, I have consulted the Elder Brethren on the nautical points of the case—there are several points of this nature that present themselves more for their opinion than for mine—and we have no doubt whatever that the *Jane*, with her three barges, two immediately astern of her and one immediately astern of the two, were properly navigated on the north side of the mid-channel, with this one exception, that she disobeyed the rule of the Thames Conservancy, which was binding on her, and which is in these words [His Lordship read rule 3, and proceeded:] There was a clear infringement of this rule here, for no such light was exhibited from the stern of the last barge. The defence—that the parties were ignorant of the existence of the rule, and that it was generally not observed—is not valid, in my judgment, and I should be very sorry that anything I should say should by any possibility lead to the conclusion that the court would listen to such a defence as this. Therefore there has been in this case what amounts to a direct infringement of the 17th section of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), and the court is at liberty to consider whether the disobedience to the rule I have referred to did or did not contribute to the collision in this case. (a) The Elder Brethren are very clearly of opinion, and I agree with them, that it did not contribute to the collision. What is necessary for the decision of this case may be stated in a few words. The *Condor's* engines had been stopped previous to clearing the single barge that was lying about mid-river. Those on board the *Condor*, it appears from the evidence, had seen the lights of the tug *Jane* with barges in tow, crossing her bows, as the pilot and captain of the *Condor* say. Now, if the

pilot of the *Condor* had not set her engines on, as he did do, until the tug and the barges that the tug was towing had passed clear of her, there would have been, in the judgment of the Elder Brethren, in which I agree, no collision. The collision was caused by the *Condor* going ahead before the tug got clear. The Elder Brethren are also of opinion that the tug *Jane* was quite right in going full speed, as by so doing the chance of a collision was lessened. I must therefore pronounce the *Condor* alone to blame for the collision.

From this judgment the defendants appealed.

The appeal was heard on 29th and 31st March 1879, before James, Baggeallay, and Bramwell, L.JJ. (assisted by two nautical assessors).

*Butt, Q.C. and Clarkson* for appellants.

*Millward, Q.C. and Phillimore* for respondents.

The arguments used were the same as those reported in the court below.

JAMES, L.J.—We have had the opportunity of considering this case with our nautical assessors, who, as well as ourselves, have very carefully read the evidence, and heard the arguments based upon it, and we find ourselves unable to concur with the judgment given in the court below. Bearing in mind the crowded state of the river, and the fact that the *Condor* was compelled to do something to get out of the way of another barge drifting up in mid-river, she did nothing, in our opinion, except give herself the very smallest headway possible to enable her to clear that barge. There was nothing in what the *Condor* did to render her liable to a charge of bad seamanship, or neglect, or other improper conduct in clearing that barge, but it brought her into the place where the collision occurred with the barge *Swansea*, which was going up the river, together with other barges, in tow of a steam tug, and which (it is not immaterial to consider) were going up the river at full speed, as great a speed as the tug could go, and with a strong flood-tide giving an additional speed of two or three knots an hour. The *Condor*, moreover, was placed in a position of additional difficulty by another matter, in the view of which, taken by the court below, we cannot agree—the absence of a light. It is quite clear that the steam tug, with its train of barges, in coming up the river under the circumstances I have mentioned, did violate the express rule of navigation of the Thames, by not having a light on the stern of the barge which should have carried it; the object of which must be to give everybody, having anything to do with the navigation of the river, notice of what it is they are likely to come into collision with. If the steam tug and its barges had shown that light, it is impossible to know what would have been the conduct of the master and pilot of the *Condor* on seeing it, and knowing that the tug and barges were coming full speed up the river incapable of stopping themselves. If the steam tug had been, like the *Condor*, without the burthen of barges behind it, it seems to me it would have been as much the duty of the steam tug to stop as of the *Condor*. Their duty would have been the same each to the other. But the steam tug could not stop her barges, and there was no notice given to the *Condor* that that state of things existed. There was nothing to inform the *Condor* of the fact that there was a train of barges behind the tug, and

(a) This sentence is a correct transcript of the judgment of the court below as printed for the appeal; but there would appear to be some typographical error in it, having regard to the decided cases in sect. 17 of the Merchant Shipping Act 1873, and the fact that it has never been decided that the Thames Conservancy Rules are such "regulations" as are contemplated by that section.

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she had to deal with the lights in the river as they appeared to her. In the absence of that intimation, the circumstances being so likely to throw the *Condor* into a difficulty, I cannot consider that we ought to hold the master of the *Condor* to blame for not having done that which he might have done, or rather for having done that which he probably would not have done if he had known what the true state of affairs was, and if he had had that full intimation which he ought to have received from the tug and barges by the exhibition of that light which plainly, by the rules, ought to have been exhibited.

BAGGALLAY, L.J.—I am of the same opinion. It appears to me that the *Condor* was in a position of very considerable difficulty. The navigable portion of the river is very narrow where the collision happened, and there were a number of barges about. There was a strong adverse tide, and she was therefore obliged to keep her engines going ahead to a certain extent to stem the tide and keep steerage way. I am unable to take the same view that was taken in the court below as to the absence of a proper light in the stern of the last barge in tow, and it appears to me that, having regard to all the circumstances, the *Condor* adopted a reasonable course, and the accident was the result of circumstances which could not have been avoided by her. In point of fact she might have a right to assume, seeing the mast-head lights in the steam tug, and no other light indicating where the tow ended, that there were only one barge or two barges abreast astern of the steam tug, and had there been no more than that, the accident would not have occurred, for in the result the first two passed by safely, and it was only the last barge, which had no light on it, which was struck. I agree therefore with James, L.J., that the judgment of the court below should be reversed.

BRAMWELL, L.J.—I am of the same opinion. The learned judge in the court below, after stating a few of the facts, says that "the main defence . . . was, that . . . the collision was the result of unavoidable accident;" but it seems to me that we should consider what was the conduct on the part of the plaintiffs. I asked the counsel for the plaintiffs why it was wrong for the *Condor* to get way on her as she did; but he did not, to my mind, give a satisfactory answer to that question. I could not think that that act was wrong in itself, unless there was some reason to suppose that there was something for her to run against, and I cannot see that there was such reason.

CLARKSON applied for costs below and of appeal. There is now one uniform practice in the Court of Appeal as to costs:

*The City of Berlin*, 2 P. Div. 187; 37 L. T. Rep. N. S. 307.

The practice of the Court of Admiralty was not uniform to the contrary:

*The Innisfail*; *The Secret*, 35 L. T. Rep. N. S. 819.

MILWARD, *contra*.—When a collision is the result of inevitable accident it has always been the rule in the Court of Admiralty and the Privy Council that there should be no order as to costs; and this court, sitting as a Court of Appeal in Admiralty causes, will follow the practice of the Privy Council in such cases:

*The City of Cambridge*, 35 L. T. Rep. N. S. 781;

*The Corinna*, 35 L. T. Rep. N. S. 781;

*The Davis*, 37 L. T. Rep. N. S. 137.

JAMES, L.J.—With regard to the question of costs in this case, it is quite clear, from what has been said on both sides, that there has been a general impression in the profession that the old rule of the Judicial Committee of the Privy Council should be followed, and there is colour for that opinion in the decisions which have been shown to us by the registrar, and it appears that this court, in a particular case, decided the same thing. We think that requires great consideration, and we should consider whether it can be right that there should be one rule as to costs in one branch of the High Court of Justice, and another rule in another branch of that court. I think in future that the rule will in every case follow the result, as it does in other branches of the High Court; but we are not prepared to apply that rule for the first time in this case. I am not satisfied with the evidence given on behalf of the *Condor*, and on the general facts of the case, and all the circumstances, and with regard to the former decision of this court, I think we should dismiss the action without costs. I think it may be considered as settled that for the future there will be no difference as to the costs between Admiralty and other appeals.

BAGGALLAY and BRAMWELL, L.JJ. concurred.

*Appeal allowed and action dismissed, but without costs either below or on appeal.*

Solicitor for appellants, owners of *Condor*, W. Batham.

Solicitors for respondents, owners of *Swansea*, *Wattons*, *Bubb*, and *Wattons*.

Friday, March 28.

(Before JAMES, BRAMWELL, and BAGGALLAY, L.JJ.)

THE LAURETTA. (a)

APPEAL FROM ADMIRALTY DIVISION.

*Admiralty appeal—Costs—Both vessels to blame—Motion by way of cross appeal—Rules of Supreme Court, Order LVIII., r. 6.*

*The fact that respondents in an appeal from the Admiralty Division, where both have been held to blame, have given notice under Order LVIII., r. 6, of their intention to ask for a variation of the decree below makes no difference in the practice of dismissing the appeal with costs if the judgment below be confirmed, provided such costs as are occasioned by the respondent's notice will be deducted.*

AN action *in rem* was brought by the owners of the *City of New York* (Inman Line) against the brigantine *Lauretta* to recover damages for a collision between the two vessels, and the owners of the *Lauretta* counter-claimed for the damages sustained by their vessel in the same collision.

The action was tried in the Admiralty Division on the 16th April 1878, and the judge (Sir R. Phillimore) pronounced both vessels to blame and made the usual decree.

From this decree the owners of the *City of New York* appealed, giving notice of appeal in accordance with Order LVIII., rr. 2 and 4. The owners of the *Lauretta* thereupon gave notice under Order LVIII., r. 6, that they intended on the hearing of the appeal to contend that the decision of the court below should be varied by pronouncing the *City of New York* alone to blame.

(a) Reported by J. P. ASPINALL and F. W. MAIKES, Esqs., Barristers-at-Law.

CHAN. DIV.]

BESANT v. WOOD.

[CHAN. DIV.]

The Court of Appeal, after hearing counsel for the appellants and respondents, confirmed the finding of the court below and dismissed the appeal.

*Myburgh and Phillimore* (with them *Aspinall, Q.C. and Goldney*), for the respondents, applied for costs of the appeal.—The notice given by the respondents does not effect their right to costs, as they could, under Order LVIII., r. 6, have raised any question as to the decree without notice. The notice has occasioned no extra costs. All the costs have been occasioned by the appellants appealing. They brought the respondents here. The notice is not a cross appeal, such as was necessary in the Privy Council, and the respondents could never have been before this court at all if the appellants had not appealed.

*Butt, Q.C.* (with him *Milward, Q.C. and Clarkson*), for the respondent, submitted that the notice was in fact a cross appeal, and that it had always been the practice of the Privy Council to leave each party to pay his own costs; here there were cross appeals, and both vessels were held to blame.

*JAMES, L.J.*—There appears to me to be no necessity under the Rules of the Supreme Court, Order LVIII., r. 6, to give this notice at all. All questions could be raised without the notice. Hence the respondents have done more than they need. The appeal will be dismissed with costs, but if any costs have been occasioned by the respondents' notice these costs will be deducted.

*BRAMWELL and BAGGALLAY, L.JJ.* concurred.

Solicitors for the appellants *Duncan Hill and Dickinson*.

Solicitor for the respondent, *J. W. Carr*.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Thursday, March 27.

(Before *JESSEL, M.B.*)

*BESANT v. WOOD.* (a)

*Husband and wife—Action by husband against wife to enforce separation deed—Counter-claim by wife for judicial separation—Breach of covenants—Infants Custody Act 1873 (36 Vict. c. 12).*

*A husband brought an action against his wife, and the trustees of a deed of separation dated the 25th Oct. 1873, to enforce the covenants in the deed, and to restrain the wife from molesting or annoying him, and from taking any proceedings to compel him to cohabit with her. The deed provided that the wife should have the custody of one of the children of the marriage, a daughter. The wife by her defence alleged that the plaintiff had broken several of the covenants contained in the deed of separation, and in Jan. 1879 she put in a counter-claim, alleging certain acts of cruelty on the part of the husband between Feb. 1870 and Sept. 1873, and asked for a decree for a judicial separation.*

*Held, that the deed of separation might be enforced against the husband for the wife's protection, notwithstanding any breaches of covenants on the part of the husband, and was therefore a bar to*

*the wife's claim for a decree for a judicial separation.*

*Held, also, that an agreement by a wife, to live separate from her husband might be enforced by an action by the husband against the wife.*

*Held, also, that the circumstance of an order having been made by the court, upon the application of the daughter, an infant, by the husband as her next friend, giving the custody of the daughter to the husband, did not constitute a breach of the covenant by the husband that the wife should have the custody of the daughter whilst an infant.*

*Injunction granted restraining the wife from taking any action or other proceeding for the purpose of compelling the husband to cohabit with her.*

THIS was an action by the Rev. Frank Besant against his wife and the trustees of a deed of separation, which had been executed by the plaintiff and his wife, to enforce the covenants contained in the deed, and to restrain Mrs. Besant from molesting or annoying the plaintiff, and also from instituting any action or other proceeding for the purpose of compelling him to cohabit with her.

The deed of separation recited that unhappy differences had arisen between the plaintiff and his wife, and they had consequently agreed to live, and were then living, separate from each other, upon the terms and conditions thereafter mentioned. The deed then provided that the plaintiff should pay to the trustees an annuity of 110*l.* a year for the benefit of Mrs. Besant; that Mrs. Besant should have the custody of the daughter, Mabel Emily Besant, except during one month in every year, when she was to reside with the plaintiff; and that the son, Arthur Digby Besant, should visit and reside with Mrs. Besant during one month in every year.

On the 18th May 1878 the Master of the Rolls made an order directing that Mrs. Besant should deliver over the daughter, Mabel Emily Besant, to the custody of the plaintiff.

On the 22nd July 1878 Mrs. Besant's solicitors wrote to the plaintiff, stating that Mrs. Besant had decided to go home and live with him; and on the 31st July 1878 Mrs. Besant's solicitors wrote to the plaintiff's solicitors saying that they should be glad to know whether it was their client's determination to refuse to receive Mrs. Besant and to return to cohabitation with her. The letter then proceeded: "We are of course wishful to avoid any unpleasant scene at his house, and unless we hear from you definitely one way or the other, she will be compelled to return."

Mrs. Besant by her defence alleged that the plaintiff had failed to perform several of the covenants in the deed of separation, and in particular that he interfered with the use by her of her name in her profession of author and lecturer; that he retained the daughter, Mabel Emily Besant, in his custody for some days beyond the time which she was to stay with him under the deed; that the plaintiff did not on the 1st June 1878 make the monthly payment of the annuity of 110*l.*, nor any of the monthly payments which had since become due; and that in July 1878 he had refused to allow the son to visit her. She also put in a counter-claim in Jan. 1879, by which she asked that the trusts of the deed might be specifically performed; and she also alleged cer-

(a) Reported by G. WELBY KING, Esq., Barrister-at-Law.

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tain acts of cruelty on the part of the plaintiff between Feb. 1870 and Sept. 1873, and asked for a judicial separation. The plaintiff by his reply denied the several acts of cruelty alleged.

*Ince, Q.C. and Wellington Cooper*, for the plaintiff, contended that on the counter-claim the defendant was not entitled to a judicial separation, the separation deed being a bar to such a claim. They referred to

*Matthews v. Matthews*, 29 L. J. N. S. 118, P. & M.;  
*Curtis v. Curtis*, 1 Sw. & Tr. 192;  
*Marshall v. Marshall*, 27 W. R. 590.

Mrs. Besant appeared in person, and contended that, as the provisions of the separation deed had not been performed by the plaintiff, all her original rights revived, including the right to a judicial separation, and referred to

*Brown v. Brown*, 48 L. J. N. S. 47, P. & M.

JESSEL, M.R.—I have no doubt whatever as to the decision I ought to give. First of all I will state what my view is of the law upon the subject, and then I will refer to one or two authorities upon the question, and then consider the circumstances of the case. The counter-claim in this case is an application by the wife for a judicial separation from the husband on the ground of cruelty. The foundation of that jurisdiction, as I understand it, was always this, that the apprehension of cruelty or cruel treatment on the part of the husband made it impossible for the wife with safety to herself to continue to cohabit. The proof of the actual cruelty committed was only brought in to show that it was likely to be renewed, because it was perfectly well settled that the effects of cruelty might reasonably cause the same apprehension in the wife's mind, and might, therefore, be a foundation for a divorce *a mensâ et thoro*, or a decree of judicial separation. That being so, it is very difficult to understand that that law can have any application to a case where the cohabitation has ceased for years by mutual consent and cannot be renewed without such consent. It cannot be said in that case that the wife is entitled to the protection of the court to separate her from her husband, because she is already separated by an instrument which could be enforced by a court of equity. The reason of the court's intervention entirely disappears when the separation has once taken place and is agreed to by deed. Of course that involves the question as to whether the deed has or has not ceased to have any operation. I am told that James, L.J. has thrown out an intimation of his opinion that this deed has so ceased to operate. I do not know how that may be, but I have the gratification of knowing that this case will certainly be taken to the Court of Appeal, and that he will give his reasons for that opinion if he entertained it. All I can say is, I see no ground whatever for supposing that this deed has ceased to operate. No doubt one of the terms of the deed was that one of the children should be given to Mrs. Besant; but the court, in exercise of the power reposed in it by the Legislature, has provided otherwise for the custody of the infant, and, notwithstanding the provisions of the deed, has taken away that custody from her. It appears to me that that does not destroy the deed; it was one of the considerations, but it must have been a consideration dependent entirely upon the interest of the infant requiring the court's intervention. That

is my view—although the attention of the court was called to it by the husband, and although the husband was the next friend of the infant, the interference of the court, according to my view, was in favour of the infant, and I am of opinion that there was not a breach of the covenant on the part of the husband: whether you consider this as being a covenant originally made subject to the terms of the Act of Parliament, or whether you consider the Act of Parliament itself, it, *pro tanto*, would still not be a breach on his part. It does not appear to me that that would destroy the deed, nor do I understand that anything would destroy a deed properly so called except a return of the wife to cohabitation. No doubt the husband might so conduct himself that the court might refuse at his instance to enforce the deed. I understood that would be one of the points to be urged in the claim in this case, but it certainly cannot be alleged for one moment that the breach of the covenant by the husband could destroy the deed so as to have prevented the wife insisting upon it as a bar to a suit for a return to cohabitation instituted by the husband, and it is in that view I am inclined to see it. It appears to me that it is impossible that any breach of covenant on his part can prevent her insisting on the deed as a protection to her from any threatened violence, so that she is entitled to invoke the interposition of a court of equity to restrain any action on the part of the husband for a restitution of conjugal rights. That being so, it seems to me that in this case the lapse of time, coupled with the deed, is a complete bar to the cruelty alleged, and all of which I see is alleged by the amended counter-claim to have taken place not later than some time in the year 1873, before the execution of the deed of the 23rd Oct. in that year. That being so, and assuming for this purpose that the acts of cruelty are proved, which I am bound to do, the husband and wife agreed to separate on the 23rd Oct. 1873, and this allegation is introduced by the defendant on the 28th Jan. 1879, nearly six years after the alleged cruelty, and nearly six years after the execution of the deed of separation. I think that lapse of time coupled with the deed of separation would be a bar, but I think also that there are circumstances in this case which would make the lapse of time alone a bar. There is another ground on which I think the claim for judicial separation could not be admitted. I am satisfied that it is not a *bonâ fide* claim on the ground of actual apprehension of violence. It is clear to my mind that the object of the claim is for another purpose—I by no means say an improper purpose. The object of the lady is to be free from having anything to do with her husband, and to acquire certain rights which separated women have, and which only women who are thus separated can have. I have not a word to say against the motive, but the motive and purpose are evidently collateral, and are not the real motives which ought to be the mainspring in such a suit—protection of the wife from the violence of her husband. That that is so is clear from what has taken place in the suit. If the wife had really been in fear of the husband she would not have desired to return. But this suit has been instituted by the husband on account not only of expression of such a desire, but of a threat on her part to institute a suit for a restitution of conjugal rights. It is only necessary



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for me for this purpose to read a portion of two letters which are written in the case, and which were written by Messrs. Lewis and Lewis, who are the solicitors of the wife, to the husband. The first letter is a letter of the 22nd July 1878. After describing in a feeling way the state of anxiety and grief Mrs. Besant was in on account of her separation from her little daughter, the letter goes on to say that, as the children are refused to Mrs. Besant, she has "determined to make every sacrifice for them," and will return to Mr. Besant's house to be with the children, "from whom she will not live separate." Then there is a letter from the solicitors of Mr. Besant, stating that, having regard to the decision of the Master of the Rolls in regard to the daughter, he cannot allow the son to visit her. That is another question. In the deed the son was to visit the mother, I think, one month in the year, and there is a question, which has been very properly brought before me at chambers, which raises in Mr. Besant's mind something more than a doubt as to the propriety of the son being allowed to visit her. That matter is still under consideration. The answer to that letter is: "We must therefore leave you to take such proceedings as you may think proper to adopt." And then there is a reply on the 31st July 1878, from Messrs. Lewis and Lewis to Messrs. Scott, which says that unless some answer be given definitely "Mrs. Besant will be compelled to return." I think it is impossible with these letters, written by Mrs. Besant's solicitor, and not repudiated by her, to believe for one moment that she is under any dread of any danger of personal violence which will prevent her from returning in safety. Therefore I have come to the conclusion that this suit is instituted, as I said before, for a collateral, though I do not mean to say it is from an improper motive. Now, with regard to the authorities. The authorities to which I have been referred on the subject are, to my mind, conclusive upon it. First of all we have the case of *Matthews v. Matthews*, in which there was lapse of time less—not much less—than in the present case. The cruelty was before Oct. 1853, and the suit was instituted, I should think, some time in 1859. It was heard for the first time either in 1858 or 1859; I do not know how fast they did the work in the Probate Court at that time. It was either late in 1858 or early in 1859. Well, then there was a separation deed, and the Judge Ordinary said: "The ground on which the Ecclesiastical Court in such cases interfered was to protect the person of the wife. In fact, the wife in this case is in no danger." On appeal Martin, B. said, in agreeing that the lapse of time alone would not do, "You must also take into consideration the deed of separation." Willes, J. says: "This is a case which we ought not to encourage. We ought to carry out the law as far as we can," and "no apprehension of danger is now alleged." The case also cited of *Milford v. Milford* has this passage in Lord Penzance's judgment: "The ground of the court's interference is the wife's safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread." As I said before, this lady is now in no dread. That being the position of matters, I have now to consider what would be the result if a suit were instituted by the husband for restitution of conjugal rights. There is a

recent decision by the present President of the Probate and Divorce Division in the case of *Marshall v. Marshall*. There he goes through the authorities, and comes to the conclusion that a deed of separation is a bar to a suit for restitution of conjugal rights, and he therefore held that when a wife brought a suit—the same thing would apply to the husband, of course—the plea of the deed of separation was a sufficient defence. As I said before, if the husband brought the suit and the wife raised the deed, the plea of the deed would be a sufficient defence, and it is not possible that any breach on his part of any of the covenants would prevent the wife from availing herself of the deed as a sufficient defence. I now come to consider the only case that was cited by Mrs. Besant. That is the case of *Brown v. Brown*. That case was very different as regards dates from this. The last act of cruelty took place in June 1872. The husband entered into an agreement with the wife that they should live separate, and the deed of separation was executed. I cannot tell the exact date, but some time in 1873 the husband instituted a suit for divorce by reason of adultery. I say I cannot ascertain the exact date, because that suit came on to be heard on the 24th June 1874. The jury found in favour of the wife as regards the adultery, and also found against the husband on the question of cruelty. About 21st July 1874 a motion was made for a judicial separation, which was granted. The next thing to be considered is this—on what grounds the judge gave the wife this benefit. Now, I must say that this case was decided before the learned judge had decided *Marshall v. Marshall*. He does not seem to have taken into consideration the fact that the wife had a complete answer to a suit for the restitution of conjugal rights—it had not then been decided that she had, and perhaps that is the reason he did not take it. But he seems to have considered this—that the husband had so misconducted himself that he was not entitled to rely upon the agreement for separation, and that therefore the wife was also entitled to repudiate it. But with the greatest respect for the learned judge, the repudiation of the deed of separation means, I suppose, the right to return to cohabitation, and if so—if that must be the voluntary act of the wife—it does not appear to me possible that she can say that she is in dread, or that there is any danger. He seems to have omitted from his consideration the foundation of the law, which was the apprehension of danger on the part of the wife. She could be, as in *Marshall v. Marshall*, in no danger at all. He says this: "I was asked on behalf of the petitioner not to grant a decree of judicial separation on the ground that the petitioner and respondent were, at the time of the institution of the suit, living apart under the deed of separation, the terms of which have always been complied with by the husband, and to the obligations of which he still remains liable. I have several times expressed an opinion that it is not the duty of the court to discourage the settlement of matrimonial differences by arrangement between the parties rather than by litigation. It is always for the benefit of the children if there be any. A wife who has reason to complain of her husband's conduct may be disposed to submit to very disadvantageous terms rather than injure her children's prospects. If the

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husband, by bringing an unfounded charge against the wife, compels her to make known in self-defence her own grounds of complaint against him, the foundation of the settlement between them is removed, and the consideration fails upon which it was entered into." I must say that I cannot accede to that argument; he cannot certainly destroy the deed when one of the motives of the deed, no doubt, is to keep from the public eye the details of these matrimonial quarrels. But that is not the consideration for the deed. It is a motive, but not the consideration. And therefore, when he says that this is the consideration, it appears to me to be a mistake. There was no failure of consideration—at all events there is no total failure of consideration—nothing to destroy the deed, although it might be that one of the parties to an agreement might so misconduct himself or herself that a court of equity would refuse to enforce specific performance at his or her instance. But that does not, as it appears to me, destroy the effect of the instrument or prevent either, not misconducting himself or herself, from relying on the deed. It seems to me that the learned judge's objection will not hold good. When there is no danger, there is no ground for the interference of the Divorce Court. Then he says: "In such a state of things it is only just that the wife should be remitted to her original position." That has put an end to the deed. As I said before the question is—what the law does give. If the law is correctly stated in the cases to which I have referred, the law only gives judicial separation in cases where there is apprehended danger. But irrespective of the reasons for differing to some extent from the judgment of the learned judge, I must say that, assuming every word of it to be as well founded in law as his decisions usually are, it does not apply to the case before me. The ground that he puts it on is this—that the husband, by bringing a suit for divorce by reason of adultery, compels a wife to disclose in open court her grounds of complaint against him. I have assumed that that was so. It was inevitable in discussing the one charge that the other should be discussed. That is in no relation to a simple suit like this, for restraining the wife from instituting a suit for restitution of conjugal rights. The institution of a suit for restitution of conjugal rights cannot compel the wife to disclose the details of cruelty. She wants to go back—to return to cohabitation. It is her interest and her duty under those circumstances to cast a veil over all the wrongs her husband may have previously committed. She wishes to return to his home, and regain or retain his affection. How, then, can it be a case of compulsion on her to make known, in self-defence, acts of cruelty? It seems to me that there is no pretence for saying that in a suit of this kind there was any such compulsion, her object being, as alleged, to return. That was entirely contrary to the object of the husband—namely, to obtain a divorce. It seems to me, taking every word of that judgment to be unassailable, it not only has no application to the case before me, but so far as it has any indirect application it is against the contention of the wife. I am therefore of opinion that this counter-claim for cruelty is barred by lapse of time, and by the execution of the deed of separation, and that, even if I came to the conclusion that the husband was not entitled to enforce it, it

would still be an absolute bar to the right of judicial separation.

*Ince, Q.C. and Wellington Cooper*, for the plaintiff, then asked for judgment in the action awarding an injunction in the terms asked for by the statement of claim.

Mrs. Besant contended that a husband could not bring such an action as this against his wife, and referred to *The Duke of Bolton v. Williams*, (2 Ves. 138), and *Aylett v. Ashton* (1 My. & Cr. 105). Further, that the plaintiff had not performed his covenants in the deed, and therefore was not entitled to come to the court to have the deed enforced against her.

JESSEL, M.R.—This case is a most singular one. It is a suit between a husband and his wife who have been living apart for several years. The curious thing about it is that the husband does not wish to live again with the wife, and the wife does not want to live again with the husband; and yet the whole question before me is whether I ought to restrain the suit for restitution of conjugal rights which has been threatened on behalf of Mrs. Besant, and which would fail if it was instituted, and which I am equally well satisfied the wife did not intend to institute. That is the odd position in which I am placed, and in which I have to decide some very important questions of law, there being no real intention on the one part or on the other to live otherwise than separately. The real contest between the parties is of a totally different character, as to the custody of the children of the marriage. As I understand it, the object of the wife first of all in threatening to institute a suit for the restitution of conjugal rights, and not asking for a decree of judicial separation, was really with reference to the custody of these children. That is the real question between these two people, and it is a question I cannot entertain in this suit at all except to a very moderate extent. The suit raises points of the very greatest importance as regards the general law, upon which I can give my opinion—and I say "my opinion" advisedly, because I am free to confess that the law is not so nearly settled on the point that the judge can law down the law; he can only give his opinion of the law. Judicial opinion has varied a great deal, and must vary a great deal, when you consider the grounds upon which that judicial opinion or those judicial opinions have been founded. This is a branch of law which depends upon what is commonly called "public policy." Now, public policy has no definite meaning; you cannot lay down any definite meaning to the term "public policy." You cannot say it comprises such and such a proposition, and does not comprise such and such another; that must be, to a great extent, a matter of opinion—a matter of individual opinion—because what one man, or one judge, and perhaps I ought to say one woman also in this case, might think against public policy, another might think altogether excellent public policy. Consequently it is impossible to say what the opinion of a man or a judge might be as to what public policy is. Now, for a very long time, for a great number of years, both ecclesiastical judges and the lay judges thought it was something very horrible, and against public policy, that the husband and wife should agree to live separate, and it was supposed that a civilised country could no longer

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exist if such agreements were enforced by courts of law, whether ecclesiastical or not. Well, a change came over judicial opinion as to public policy, other considerations arose, and people began to think that after all it might be better and more beneficial for married people to avoid in many cases the expense and the scandal of suits of divorce by settling their differences quietly by the aid of friends out of court, although the one consequence might be that they would live separately, and that was the view carried out by the courts when it became once decided that separation deeds *per se* were not against public policy. The next question was, whether they could be enforced, and if they were to be enforced, should they be enforced against the wife as well as against the husband? There are express decisions as to enforcing them against the husband; I think there are also decisions—or what amount to decisions—that they might be enforced against the wife. These decisions however are not so clear, and, possibly, opinions may vary as to the effect of them. I think that is the effect of them. If they can be enforced against the wife, on what grounds? It has been said over and over again, that a married woman cannot contract. That again is too wide a proposition. She undoubtedly can contract in certain cases. She can contract, we all know, with respect to property settled to her separate use. But it is a contract which at first in a sense was not personally binding on a woman, but it now binds her just as much as it binds a man. It no longer personally binds a man in a sense that you can send him to prison for a breach of it. There is another kind of contract, not relating to separate use at all, but a contract for the disposal of real estate, freehold estate, by which our law requires the concurrence of the husband, or a dispensation by a court of law with such concurrence. It is a contract by a conveyance acknowledged by a married woman. That is a case in which a married woman can contract. Well, now I come to the circumstances. Suppose a married woman is entitled to sue or defend alone—there are a great many cases in the Ecclesiastical Court, now the Matrimonial and Probate Court, where a woman sues for separation, or divorce, or restitution of conjugal rights. She sues the husband. Under the Judicature Act, the married woman by leave of the court is entitled to sue or defend alone even without a next friend. Of course all the old issues in equity still remain where a wife sues as plaintiff by her next friend. Well, now, in these cases what are the wife's rights? She is, so to say, the mistress of the situation. She can sue through her friend, or she can bring on her case in the usual way, and conduct it in such a way as she thinks fit or directs. Is it conceivable that, having all these authorities, she has not also the power of compromising the case, and that she cannot withdraw or consent to terms? Is it conceivable that a court of justice which allows a married woman to institute a suit for divorce, or to institute a suit for restitution of conjugal rights, shall say—you have no right to anything beyond that; you have no right to effect a compromise, but must go on to the bitter end; that she can accede to no terms which can be binding; that no terms shall be binding on her, because she is incapable of entering into that agreement? I think that is not conceivable. Having regard to

that which is rational, and which I hope will always be law, I think the moment you empower a married woman to sue or defend in her own name, you must empower her also to compromise that suit on terms which may be fairly arranged, and consequently in all those cases, whether they have or have not reference to her personal status, she must take as an incident to the right to sue, the right to contract—to compromise that suit. Therefore, I think that is again an exception, and that the woman in that case must have a right to contract. I do not find it laid down in these very terms, though I think I can extract as much from the decisions. I do not pretend to say it was laid down in these large and plain terms as the law. Now we come to the next point. If she can compromise a suit after she commences it, why not when she threatens it, or before she begins it? If, after instituting a suit for a divorce, or having a suit for a divorce instituted against her, and she defending it, she can compromise by agreeing to live separate on terms as regards maintenance of herself, custody of her children, and so forth, why not before? Why not after the quarrel and before the litigation commenced? The very same reasons appear to me to apply to the one case as to the other. If the wife has the right to sue for restitution of conjugal rights, for separation, or for divorce, if she has the right after beginning a suit to compromise the suit, she ought to have a right to do so before; and, if she has the right afterwards in the sense of being bound by her agreement, why should she not have the same right before as regards these matters as to which she has a clear right to institute the suit, these matters being matters of personal status, and the question that of living together or not? It seems to me to follow as a necessary corollary to the right to sue by herself that she must have the right to contract not to sue, and I should think that there would be no difficulty at all about it. At the same time I confess there are to be found numerous dicta the other way, though there are some my way as to what the law is. I think that the law is therefore that a woman can contract to live separate and apart from her husband. That contract, like all other contracts, if not against public policy, is one which may be upheld and enforced. The next point I have to consider is one of much less importance, though of some importance to the parties, therefore I will say a word or two about it. Now the case which really decided that these contracts to live separate and apart from each other were not against the policy of the law is the well-known case of *Wilson v. Wilson* (1 H. of L. Cas. 538). The form of the appeal in that case was relating to the execution of the deed of separation, and not to enforcing the separation itself. But of course, if the deed when executed had been against public policy, no order could have been made, or ought to have been made, but the House of Lords decided in that case that there was nothing against public policy in the deed of separation itself, and I think it must be considered to be established by that case that any notion of such deeds being against public policy was finally dispelled or got rid of. No judgment in that case was given on the question as to whether the court could enforce by injunction a stipulation to live separate. The point came on afterwards in the case of *Hunt v. Hunt* (4 De G. F. & J. 221). There the Master of

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the Rolls refused to grant an injunction, and amongst other grounds the injunction was refused upon the ground that there was no mutuality of agreement. It was appealed to Lord Westbury, and Lord Westbury (at page 233) gives a clear expression of opinion that the ordinary power of contracting, of course on both sides, ought to be enforced in the ordinary way. He afterwards gave a final judgment, which is reported at page 235. I think from that judgment that the opinion of Lord Westbury was that you might sue the wife, and that you might claim and obtain an injunction against her. But here again I can support my conclusion by the case of *Marshall v. Marshall* (27 W. R. 399), before the President of the Probate Division. There is a clear expression of opinion by Sir James Hannen, coming to the same conclusion as that to which I have arrived, that Lord Westbury's opinion was in favour of the power of the court to prevent the wife, in a suit instituted against her by the husband, from instituting a suit for the restitution of conjugal rights. I may mention, in addition to those cases, a case which is of very little importance, because it is a case in which the wife did not appear, but it does show the opinion of a learned judge—the late Vice-Chancellor Wickens—that such an injunction could be granted. It is the case of *Flower v. Flower* (20 W. R. 231). There is, as I said before briefly, a considerable mass of judicial opinion to be found in favour of the injunction. There are cases on the other side equally numerous, but, with one or two exceptions, all of them anterior to the decision of the House of Lords in *Wilson v. Wilson*. I will only mention one more case; it is the case of *Bowley v. Bowley* (L. Rep. 1 Sc. Ap. 63). There a divorce was sought by the wife; it was compromised by agreement, a juror being withdrawn, and the petitioner moving at the proper time to have the petition taken off the file. The petitioner was the wife; the respondent assented to the application. The wife undertook to execute the deed of separation, which contained a covenant that she would not molest the husband or institute proceedings in the Divorce Court. She did institute proceedings, and it was held that her contract was a bar to those proceedings. Now the case was put entirely on the contract. It says the agreement has been violated, and why should not the court give it effect. Sir James Wilde, before whom the case came in the first instance, refers to a class of suits for restitution of conjugal rights, and that applies emphatically in this case, because the wife promised by this agreement to live apart. Taking it in the narrower view of Sir James Wilde, that case would apply. That was the opinion of the full court, and finally it went to the House of Lords. The House of Lords confirmed the decision, and the Lord Chancellor, in approving it, said the whole question in the case turned upon the meaning of the words in the agreement, and went on to discuss them, and Lord Cranworth said the same. Therefore everybody treated it as a contract, and called it an agreement binding on the wife, a contract that she would live separate and apart. The moment we get rid of the distinction, as it is now got rid of by the passing of the Judicature Act, that case seems to me to clearly apply to show that it is a contract to be properly enforced. I believe, therefore, that so far as the general law is con-

cerned, though you cannot treat it as settled, but according to my opinion of what is the law and what it ought to be, the remedy is mutual, and the husband as well as the wife is entitled to specific performance of the agreement to live apart. Now, as to this agreement. What have we here? We have here a covenant or agreement to live apart, with special covenants in the agreement as to the custody of the children. Now, I am not going through the long series of cases which have finally settled that a father has not the power—here again public policy is invoked—to give up the custody of his children. He has not either in law or equity the power to abrogate his parental functions, and say that the custody of the children shall be given to the wife. The result was that those covenants and agreements contained in deeds of separation relating to the custody by which the father gave up the custody, care, and education of infant children to the wife, were held to be void, and consequently the instrument founded upon them was held to be void also. This was considered a hardship, and the Legislature ultimately took a different view of public policy from that taken by the judicial decisions, and it ended by the Act of Parliament, the 36 Vict. c. 12, which received the Royal assent on the 24th April 1873, by which it was enacted that no separation deeds made between the father and mother of an infant should be held to be void by reason only of its providing that the father of such an infant should give up the custody or control thereof to the mother, provided always that no court should enforce any such agreement, unless the court shall be of opinion that it would be for the benefit of the infant or infants to give effect thereto. Now, as I read that passage, it refers to an agreement between the father and mother, and to that extent says that they may agree—it says no agreement shall be void. It appears to me there to entirely confirm the view of the law, which I think is the correct view, but it does introduce a proviso that the court shall not enforce the agreement as regards the children, unless it be to the advantage of the children. Now I come to this particular case before me, and I find the only agreement between the husband and wife directly is an agreement contained in the beginning of the deed. It recites that unhappy differences had arisen between Frank Besant and Annie Besant, and they were now consequently agreed to live separately from each other, upon the terms and conditions thereafter mentioned, and when we come to the covenant by the trustees we find it in these words—so the parties completely understood there was an agreement between the husband and wife: "In pursuance and performance of the said agreement on the part of the said Annie Besant, and in consideration of the covenants of the respondent herein-after contained, the trustees covenant and agree." Besides that there is another covenant by the husband with the trustees that she is to enjoy her property for her separate use, and if she dies and leaves no will her property is to be divided amongst her next of kin, and that all after-acquired property shall be her own: that he will pay an annuity of 110*l.* per year by twelve equal monthly instalments, and then there are provisions for the custody of the children of the marriage. They are in substance that the daughter Mabel Emily shall reside with her

mother free from the interference or control of the husband, and that the son shall reside with her for one month in the year, and then there is a proviso putting an end to the annuity if she molests her husband or interferes with him in any way; then there is the usual covenant by the trustees indemnifying the husband from her debts during the separation, and also a covenant by the trustees that the lady shall not molest her husband or prosecute any suit or proceedings in any court or courts whatever to compel the said Frank Besant to cohabit or live with the said Annie Besant. If I am right as to the view I have taken of the law, the only questions I have to decide are—first, whether the lady has broken her agreement; and secondly, if I decide that against her, whether the husband has by reason of any conduct or misconduct on his part lost that right which he otherwise would have possessed to enforce specific performance of the agreement. As to the alleged breach on the part of the lady there can be no doubt. What happened was this: On the 18th May 1878, on a petition presented by the father, in the name of his daughter Mabel Emily, I made an order directing the delivery over by the lady of the daughter, on grounds which I may mention shortly, and after that order Mrs. Besant, through her solicitors, gave notice by letter that she had determined to go home and live with her husband again, and she threatened a suit for restitution, and also gave him notice that she would go to the house. Therefore, there can be no doubt about the breach of the agreement on her part. I must say I do not think she intended anything of the kind. I believe she used those words really as a means of obtaining the custody of the child, and in fact she has admitted almost as much in the speech which she made to-day; but still, there they are. The husband was entitled to regard them as serious threats, and as clearly a breach of the agreement. I now come to a most material part of the defence, as to whether the plaintiff comes into court with clean hands. Courts of Equity have always held that a man might so misconduct himself as to lose the right of specific performance of an agreement. What the lady says in substance is this: "You have broken every covenant you could break, and now you are asking me to perform mine." I must now examine, first, as to whether it is so in fact; and secondly, whether there has been any waiver of those breaches. First as regards the facts, the breaches are these: She says that in July or Aug. 1874, she then being an itinerant lecturer, and lecturing on the "Rights of Women," and various subjects of that kind, was endeavouring to add by her own exertions to the scanty allowance which was made to her under the separation deed. When I say scanty, I mean scanty in fact, but not in proportion to her husband's means, which were limited. It seems that the husband was a beneficed clergyman of the Church of England, and he felt annoyed that his wife, bearing his name, was going about the country, lecturing, as he says, in a way he did not approve of; and he did write letters to a publisher and to another gentleman, asking that in publishing the lectures her name should not be stated to the public. What his object was I think is pretty clear. It was not to prevent her getting her livelihood, but to prevent its being known that it was his wife getting her livelihood in this way; and I will not

say whether it was reasonable or unreasonable. In one view of the case it was very reasonable for her to lecture in her own name if she so pleased. But there is no disgrace that I am aware of in adopting a *nom de plume*. Many authors do it, and many others who have attained to very great celebrity have done it, but of course there was no obligation on the lady to do so. It was a very small matter. Perhaps in strictness it was—I am not sure that it was—a breach of his covenant not to interfere with her. The covenant is that he is not to compel her to cohabit or live with him, and not to molest or otherwise interfere with the said Annie Besant in her manner of living. I am not prepared to decide that it was an interference, but I will assume it was. It was a very slight matter, and has been entirely got rid of by their going on as they did before, both as regards the payment of the annuity and the custody of the children. I should not have held it to be such a breach of covenant as would have prevented his obtaining specific performance, even if I were quite clear that it was a breach at all, considering the very peculiar circumstances of the case. It is not every breach of a covenant upon his part which prevents a man coming to a court of equity to have covenants enforced. Take a simple instance. A man is a lessee, with a proviso that he may purchase on a six months' notice. He does not pay his rent, but that does not prevent his coming here for a specific performance of the purchase. It must not only have some connection with the matter for which specific performance is sought, but it must be some such material and substantial breach as will enable the court to say that his conduct has been such that it ought not to interfere in his behalf at all. Now, passing from that to the next breach, this appears also to me to be a very small matter. In July or Aug. 1875 there was some difficulty on his part as to giving up the daughter after the one month she had to pass with him. The daughter was to stay eleven months with the mother and one month with the father, and the son was to stay eleven months with the father and one month with the mother, and in fact there was four days' delay in giving the daughter up; but, however, she was received back after that. This was in the year 1875, and everything went on as before, both as regards the receipt of the annuity and as regards the children. Here again if it was a breach it was a very trifling matter, and, whether it was a breach or not, it certainly in my opinion would not be a bar to the husband's instituting a suit against the wife to restrain the wife from bringing an action for restitution of conjugal rights. The next point is this: After the institution of proceedings to get back the custody of the daughter, the husband for some time neglected to pay the monthly allowance. There seems to have been some misunderstanding on the part of the plaintiff's solicitor as to what the lady's wishes were on the subject. It was not an absolute refusal in the ordinary sense of the word, but it was on account of some misunderstanding, and the misunderstanding arose in this way: the lady, by means of lectures and writing, was fortunate enough to gain a good livelihood, and became wholly independent of this small allowance of her husband, and she said so, and she not only said so before the petition was heard, but she said so on the hearing of the petition, and I will take from the statements in her

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own answer what she did say: "If you should think it right"—addressing me—"to put the child into the hands of a third person, there is an offer I wish to make. There is a sum of money which is paid to the trustee under the deed amounting to 110*l.* a year; that sum of money I have always considered as belonging to the child rather than to myself. I have no kind of need of provision. I am able to maintain myself by my own pen and my own tongue, and I would ask your Lordship, if you think it your duty to deprive me of my child, to direct that that sum of money should be paid into this court name of two trustees, one of whom should be appointed by myself, and that the 110*l.* should be applied for the education and for the maintenance of the child, and anything that may be left over year by year might be allowed to accumulate for her benefit until she came of age and then be handed over to her. I venture to make that suggestion as one that will, if approved of by the court, offer some kind of real provision for the child, who has been made a ward in Chancery." She meant this: that, as the money was allowed to her whilst she was maintaining the child, of course the whole sum was not intended to be paid for her sole benefit. It was, however, supposed by the husband's advisers to mean that she did not want the money any more. I must say that I took the same view myself, and I really understood her to make that offer as an offer that could be entertained during the course of the suit, and an offer to provide for the child if away from her, and the husband's advisers thought that the matter could be subsequently disposed of by a summons at chambers, and the allowance of 110*l.* was applied accordingly. However, the lady changed her mind; the offer did not require, as I understand it, to be accepted, because of course it would be accepted—it was supposed to be immediately accepted. I should have thought the acceptance was not required to be intimated at any time, but, not being intimated in any way, that there was an acceptance. Mrs. Besant did what she was entitled to do. She said she would have her own money paid to her, and after some correspondence the money was paid to her, and since that time the monthly payments have been made to her and received by her as usual. In my opinion there is nothing in that accidental delay, caused by this misapprehension by Mr. Besant, in which, as far as I am concerned, I certainly shared. I now come to the last and most serious question, the real serious question between the parties, that is, the custody of the children. The husband certainly covenanted and agreed that the girl should remain for eleven months with the mother and the boy one month, and he has not allowed them to do so. He has not allowed the girl to remain. That, I take it, standing alone would be a clear breach of a most important covenant, but we must look at the subject in a broad sense, as I said before. First of all, what was the covenant? The covenant was entered into after the passing of the Act of Parliament. Before that Act of Parliament it was simply void, but after that Act of Parliament it is not an absolute covenant, because it is a covenant controlled by the Act, and everybody must be taken to have known it. It is a covenant, though it is not to be enforced in the High Court of Chancery, unless the High Court of Chancery should be of opinion that it would be

for the benefit of the infant that it should be enforced. The deed therefore stands precisely in the same position as if the words of the Act of Parliament had been put into the deed that she shall have the custody unless the court takes the custody away. That is really the contract between the parties. She knew he could not covenant absolutely by law, he could not give away absolutely and for ever the custody of these children, and there was always a power in the court to intervene and take them away, and that being so, and the court having intervened, how can I say that that act of the court is a breach on his part of the covenant, because he happened to be of the same opinion as to the custody of the infant as the court? The covenant being a covenant subject to the interference of the court, and the interference having been made, it does not appear to me to be possible for her to say that is a breach of covenant on his part which will destroy the effect of the deed or prevent his enforcing it. So much for the girl. But the boy stands on the same footing exactly. The reason I took away the custody of the girl was that I was of opinion that the lady had shown herself unfit for the custody of the girl by reason of certain publications issued by her, to which her name was affixed, with her knowledge and sanction, after the separation deed. That applied quite as much to the boy as to the girl. If she was not fit to have custody of the one, having regard, of course, to the benefit of the infant, she was not fit to have the custody of the other. Having regard to the decision of the Master of the Rolls as regards the girl, they say, "We cannot send you the boy." It was then on the application of the lady at her own request referred to the judge in chambers to decide what should be done as regards the boy, and that application is still before the judge at chambers except to this extent, that she had access given her by the judge at chambers to the children. The question as to the boy is still undecided, but I hoped when it was last before me, and I still hope, that some arrangement may be made consistent with the benefit of the infants by which she might have the children for a certain period of the year; but I say this: that it depends entirely on herself whether or not such an arrangement can be carried out. That being the position of matters, here again can I say there has been that wilful breach on the part of the husband of his covenant which is to deprive him of the right of coming before the court and getting the deed enforced? I think not. My opinion of what has been done, as far as the defendant is concerned—namely, putting the court in motion to do that which the court only could do—is not such an act of misconduct on his part as deprives him of the benefit of the agreement, and therefore I hold that the plaintiff has committed no material breach of the covenant. As regards the form of the injunction in this case I propose merely to grant an injunction to restrain Mrs. Besant from taking any action or other proceeding for the purpose of compelling him to cohabit with her. As regards the injunction it must be remembered that you cannot restrain a pending motion, but you can restrain a person from instituting proceedings, and there is another consideration which strongly favours the view that the injunction ought to be granted: Under the Judicature Act, if the lady had been desirous, as she was not, of returning to

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cohabitation, she might by counter-claim have claimed a right then and there, and then the deed could have been pleaded as a defence to the claim. There was no difficulty in so pleading if she had thought fit to do so; but there is the other alternative of asking for judicial separation. Therefore there seems to the court reason for granting the injunction. She ought not to have the opportunity of raising this contention when and where she likes, but when brought face to face with her husband she should be compelled to say which course she would adopt—whether she would return to cohabitation or live separate and apart. There only remains one other matter. I am by no means prepared to say that I cannot make a married woman pay the costs. I can make her separate property liable for payment. Therefore it is not on any ground that she is not liable to pay that I am going to make the order I am about to do; but I think the husband has certainly occasioned to the wife costs which ought not to have been occasioned. What happened was this: when the case was before me on the former occasion the lady said that she had a case for judicial separation. I suggested it was a pity there should be two suits, as this court is now competent to decide those questions, and that, as probably the case would go to appeal, it would be more convenient to raise the matter by counter-claim and dispose of the whole matter at once. Then there would be but one public exhibition—but one hearing in this court, and one hearing on the appeal; and the lady acceded to the suggestion and it was arranged that she should amend her counter-claim by stating her case for judicial separation. She does so, and then the case came on for trial. It has been on the paper several days before it was reached. Of course that adds to the expense, and she has brought up witnesses whom she has considered important to support her case, and kept them here at considerable expense. When the case came on for trial the counsel for the plaintiff put forward an objection in the shape of a demurrer. After hearing the facts and looking into dates, I considered that I ought to come to the conclusion to allow it. All the expense incurred by the lady with regard to witnesses has been entirely thrown away, and thrown away through the action of the plaintiff, who prevented the issues of cruelty being tried by me. That being so, I do not think I ought to measure the costs very exactly, or to say that he ought to pay a part of the costs and obtain a part from the wife. I think a fair course to take under all the circumstances is for me to say I shall make the order without costs. The plaintiff must however pay the trustees 10*l*. for their costs.

Solicitors for the plaintiff, *Scott, Jarmain, and Truss*.

Solicitors for the trustees, *Stibbard, Gibson, and Co*.

Saturday, March 22.

(Before BACON, V.C.)

Re THE NORWICH PROVIDENT INSURANCE SOCIETY;  
BATH'S CASE. (a)

*Company — Winding-up — Contributory — Past member—Companies Act 1862, sect. 38—Distinct departments—Distinct liability.*

*A company originally established for effecting life insurances, resolved by a special general meeting that fire insurance and fidelity guarantees should be added as a distinct and separate department; a special issue of fire shares was made to provide for this business, of which 2000 were in July 1873 allotted to B.*

*In Sept. 1873 a new company was formed to carry on the fire business, and the fire shares in the old company were cancelled.*

*In April 1874 a resolution was passed for winding-up the old company. B. was subsequently placed on the list of contributories as a past member.*

*A call was made on B. by the liquidator at a time when the present members in the life department had not been exhausted, and it was contended by B. that as a past member he was not liable to contribute to claims on fire policies until it was shown that contributions from present members, life as well as fire shareholders, had been exhausted. On a summons by the liquidator to enforce this call:*

*Held, that the company had constituted two classes of assets and two classes of liabilities. And that the existing fire shareholders having been exhausted, the official liquidator had rightly called upon the past fire shareholders to contribute towards the discharge of the fire claims.*

#### ADJOURNED SUMMONS.

This was a summons on the part of the official liquidator of the Norwich Provident Insurance Society for an order for payment, within fourteen days, by Mr. E. A. Bath, as a past member, of a call made on the 8th July 1878, on 2000 B. shares, formerly held by him in the company. The society was originally an unlimited company, formed in 1860 for effecting life insurances, and insurances against such other kinds of risk as might thereafter be determined upon by general meeting. On the passing of the Companies Act 1862 this company was registered under it. In March 1872 it was resolved by a special general meeting that fire insurance and fidelity guarantees should be added to their business, as a distinct and separate department, and a special issue of B. shares of £1 each was made to provide for this new branch of business; and the policies insuring against fire risks contained a clause confining the remedy of the policy-holders to the unpaid portions of the B. shares, and the funds appropriated to this department. Mr. Bath took 2000 of these shares, which were allotted to him in July 1873, and upon which he paid 5*s*. per share. Doubts having arisen as to the validity of these proceedings, a new company was formed in Sept. 1873 for the purpose of taking over the fire and fidelity guarantee department. The assets of the fire and fidelity guarantee department were handed over to the new company, which undertook the fulfilment of the contracts of that department. The new company issued to the B. shareholders shares credited with the

(a) Reported by W. COWELL DAVIES, Esq., Barrister-at-Law.



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amounts paid by them respectively on their B. shares, and the B. shares were cancelled on the 24th Sept. 1873. Under this arrangement 2000 shares in the new company were allotted to Mr. Bath. On the 24th April 1874 a resolution was passed for a voluntary winding-up of the old company, which, on the 1st July following, was ordered to be continued under supervision. Mr. Bath's name having been placed on the list of contributories, an application to remove it was refused by Bacon, V.C., in chambers, on the ground that Mr. Bath's case was covered by the cases of other contributories already decided by him (reported 37 L. T. Rep. N. S. 272, where the constitution and history of this company are more fully detailed). On appeal, Mr. Bath's name was retained on the list of contributories of the old company as a past member only: (see *Bath's case*, 38 L. T. Rep. N. S. 267; L. Rep. 8 Ch. Div. 384.)

The point raised by the present application was whether Mr. Bath, as a past member, was under the Companies Act 1862, s. 38, liable to contribute to claims under the fire policies until it was shown that the contributions to be obtained from existing shareholders in the life department had been exhausted. There were claims against the company in respect of both fire and life policies, and after the existing fire shareholders had been exhausted, there still remained fire claims unsatisfied. The liquidator thereupon made the call which the present summons sought to enforce.

*Hemming, Q.C. and Brett* for the liquidator.—According to the constitution of this company, and the terms of the policies, having exhausted all the existing members of the fire department, we must place the past members on the list, and Mr. Bath is now liable. They referred to

*Bath's case*, 38 L. T. Rep. N. S. 267; L. Rep. 8 Ch. Div. 384;

*Creyke's case* L. Rep. 5 Ch. 63;

The Companies Act 1862, s. 38.

*Ingle Joyce* for Messrs. Butterworth, judgment creditors in respect of a fire claim.

Sir H. M. Jackson, Q.C. and Seward Brice for Mr. Bath.—By the decision in *Bath's case* it is established that there is here one distinct, undivided company, and a past member is under the statute to contribute to the debts and liabilities of the whole company. Sect. 38 of the Companies Act 1862, distinctly states (sub-sect. 3) that no past member is liable to contribute unless it appears to the court that the existing members are unable to pay. It is admitted that there are existing members of this company who could pay if called upon (whether in respect of life policies or not, is not material). Therefore, until all these present members have been exhausted, Mr. Bath is not liable. The fire policies are contracts by the whole company that certain specified funds shall in certain events be liable for a particular purpose, but as against creditors the whole company is primarily liable, whatever the subsequent rights of the two sets of members, fire and life, may hereafter be as between themselves. There can be no special application of the contributories' moneys to any particular set of creditors:

*Webb v. Whiffin*, L. Rep. 5 E & I. App. 711;

*Hemming, Q.C.* in reply.

BACON, V.C.—No doubt a very ingenious argument has been suggested on the words of the

Act of Parliament. The Act talks about companies. There is no distinction about the subdivision of companies, or any division of companies into classes; but it provides, as we should expect the Legislature would provide, first, for the satisfaction of the debts due of the creditors of the company and others, and later on provides for settling all questions which may exist between the contributories with respect to their several rights. But is there anything in the Act of Parliament which says that that which has been done in this case—supposing it is a subdivision, and supposing it is a creation of two companies—is unlawful? The company has the management of its own affairs, and it seems good to them at a certain time that they should say, "We will make two separate departments, life insurance we will treat as one, fire insurance we will treat as another. And in order that there may be no doubt about our respective rights as well as our respective liabilities, we will insert into the written contract with our creditors a stipulation that the life policy holders shall only have recourse to certain portions of our property, and the fire policy holders shall have recourse only to certain other portions of our property." Now is there anything unlawful or unreasonable in that stipulation? Then comes the winding-up and the rights of the creditors are to be respected. But none the less are the rights of the shareholders *inter se* to be respected. Now the rights of the creditors are plain. No fire policy holder can ask for any portion of the general funds of the company; for that is contrary to the contract. No judgment recovered by Mr. Ingle Joyce's client can alter the law in that respect. He may have got a judgment, and may say, "It is a judgment against the company, and I will not go behind the judgment." What is to be done with that will be settled hereafter. I have nothing to do with it at present, except only to listen to the complaint which he very reasonably makes, that being unquestionably a creditor of the company, and naturally desiring payment of his debt, he is postponed, baffled, thwarted, because of the proceedings which have taken place under this winding-up. Then the liquidator whose duty it is to hold an even hand is called upon to provide money to pay the fire policies. He collects all that he can. He exhausts all the persons who are liable to pay in respect of the fire policies, and he finds, and the fact is proved beyond question, that it is now necessary for him, in the discharge of his duty and in justice to the creditors, to call upon Mr. Bath for example, the gentleman now before me, to pay up that which according to his plain contract he is liable to pay. Not involving him in any other liabilities with the company and paying perfect respect to the enactment of the 38th section, and the subdivision of that section (sub-sect. 3), he asks that he should only pay up what is due on the shares of the fire policies in which he has been engaged and for which he is liable. I have listened to Sir Henry Jackson's argument. If I could find it was unlawful for the company to do what they have done; if the mode of conducting their own internal business were open to reproach or suspicion, I should be glad to avail myself of it. But I find everything has been done in a perfectly straightforward manner. It was investigated by this court, and in the Court of Appeal no objection whatever was taken or suggested to

what had been done. There can be no doubt about the limits and extent of the liabilities which are entered into by these policies. I think the account which the official liquidator has given upon his cross-examination has been very explicit. It satisfies me that the other persons mentioned in his list are unable to pay, and he cannot discharge his duty unless he is at liberty to summon Mr. Bath and to require from him payment of the sum which is mentioned in the call. The summons must therefore be allowed; but, as it is a new test case, the costs of all parties may come out of the fire department assets.

Solicitors: *E. Tillyard; Valpy, Chaplin, and Peckham.*

Wednesday, April 9.

(Before FRY, J.).

COYLE v. CUMING. (a)

Practice—Scandal—Relevancy—Order XXVII., r. 1—Next friend—Costs.

*The plaintiff, a married woman, commenced an action by her next friend against her husband and the trustees of a settlement made by him upon the marriage, claiming to have certain alleged promises by the husband to settle an income upon the plaintiff from the date of the marriage fulfilled, and for an injunction to restrain the husband from interfering with the property of the plaintiff or otherwise molesting her. The statement of claim alleged that the husband had, immediately after the marriage, taken the plaintiff out of England and deserted her, that she had returned to England and had refused to return to him, "having heard, as the fact is, that a verdict was obtained against the husband for an assault upon a girl under the age of fourteen years."*

*The husband moved, under Order XXVII., r. 1, to strike out the words "having heard," &c., as scandalous.*

*Held, that the words were scandalous and irrelevant, and must be struck out with costs of the objectant, as between solicitor and client, to be paid by the next friend personally.*

*The plaintiff brought an action by her next friend against her husband and the trustees of a settlement executed immediately before the marriage, by which her husband granted certain freehold estates to the trustees and their heirs after the solemnization of the marriage to the use of the husband for life, without impeachment of waste, and after his death to the use of the plaintiff for her life without impeachment of waste.*

*The statement of claim contained allegations to the effect that, previous to the marriage, the plaintiff and her husband had agreed that the latter should execute a settlement in favour of the former, of part of his property, and should thereby grant and settle, as from the date of the marriage, a sum of 200*l.* per annum for the separate use of the plaintiff during the joint lives of her husband and herself, and, after the death of the former, a further sum of 400*l.* per annum during the life of the plaintiff. That the husband undertook to get the settlement prepared, and afterwards said that it was prepared, that there was no use in the plaintiff seeing it as she would not understand it, but that it was all right; that the*

*plaintiff had no independent legal advice; that, on the faith of the husband's promises and representations, the marriage was solemnised, that the husband had taken the plaintiff to Ireland and there deserted her, upon which she had returned to England and had refused to return to him, "having heard, as the fact is, that a verdict was obtained against the said [husband] for an assault upon a girl under the age of fourteen years."*

*The claim of the plaintiff was to have the husband's representation of fact declared to be binding on him, and that he might be ordered to make good the same to the plaintiff, and to grant her the income as alleged to be promised; that until the trial the trustees of the settlement might be ordered to pay to the plaintiff 200*l.* per annum out of the rents and profits of the settled property, for an injunction to restrain the husband from interfering with the property of the plaintiff or otherwise molesting her; and for damages for the wrongful representations.*

*A motion was made on behalf of the defendant under Order XXVII., r. 1, to strike out the words "having heard, &c.," as scandalous and irrelevant.*

*T. Brett for the defendant.*—Unless the plaintiff can show that the fact of a woman leaving her husband without just cause is a ground of forfeiture of her right under a settlement, or can show that the fact asserted by her, if proved, is evidence of fraud on the part of the husband, the part of the statement of claim objected to must come out. In *Burton v. Sturgeon* (34 L. T. Rep. N. S. 706; L. Rep. 2 Ch. Div. 318), it was held by the Court of Appeal, affirming the Master of the Rolls, that even when a decree of dissolution of marriage had been made against a husband, his rights under the settlement made on the marriage of his wife and himself were not forfeited. Some earlier cases are against me, but the Master of the Rolls refused to follow them in *Fitzgerald v. Chapman* (33 L. T. Rep. N. S. 587; L. Rep. 1 Ch. Div. 563). His Lordship in his judgment says: "This is not a court of criminal jurisdiction. It does not enforce forfeiture upon anybody for any offence whatever." With regard to the question of the fact of a person having been guilty of an offence being evidence of his being guilty of another of a totally different character, the case of *Christie v. Christie* (27 L. T. Rep. N. S. 607; L. Rep. 8 Ch. App. 499) is conclusively in my favour. Lord Selborne in delivering judgment in that case says: "The sole question in such a case is, whether the matter alleged to be scandalous has a tendency, or, in other words, would be admissible in evidence, to show the truth of any allegation in the bill that is material with reference to the ruling that is prayed. It is argued that it may tend to prove misrepresentation in the prospectus. If the meaning of that argument is, that because a man committed a criminal offence two years ago, he is presumed likely to commit a fraud now; the answer is, that our law does not admit of any such mode of proof." I must ask for my costs as against the next friend personally on the authority of

*Re Wills's Trusts*, 9 L. T. Rep. N. S. 570.

*Higgins Q.C. and Mulligan for the plaintiff.*—*Burton v. Sturgeon* does not apply. [FRY, J.—What is relevant is not scandalous.] The paragraph is relevant. Paragraph 12 might be said

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

CHAN. DIV.]

Re ALLEN'S SETTLEMENT.

[CHAN. DIV.]

to be irrelevant also, and the defendants have not objected to it. Both paragraphs are properly inserted.

FRY, J.—What authority is there that the fact of a wife leaving her husband is an answer to an application to specifically perform a promise for a settlement? There is no doubt that the words objected to are scandalous; are they relevant? It appears to me to be clear that they are not. It is said that because another paragraph was irrelevant, these words ought not to be struck out. The part of the statement of claim objected to must be struck out, and the costs of the defendant as between solicitor and client must be borne by the next friend personally.

Solicitors for the defendant, *G. L. P. Eyre and Co.*

Solicitors for the plaintiff, *W. and T. Gibson.*

Monday, April 7.

Re ALLEN'S SETTLEMENT. (a)

*Practice—Trustee Relief Act (10 & 11 Vict. c. 96)—Stop-order—Cons. Ord. 26, s. 26—Costs.*

*It is the duty of a trustee paying money into court under the Trustee Relief Act to mention in the affidavit on which the money is paid in, or, if that has been already filed, by a supplemental affidavit, all claims on the fund of which he receives notice.*

*Where a trustee who had filed an affidavit before transferring funds into court, subsequently, but before the money was paid in, became aware that an assignee of some of the funds had placed a distringas thereon, omitted to mention the claim of such assignee in his subsequent affidavit, and the assignee, in order to prevent the funds being transferred out, obtained a stop-order:*

*Held, that the trustee was personally liable for the costs thereof.*

UNDER certain indentures of settlement of the 3rd July 1837, and the 19th Nov. 1853, William Hugh Dennett was possessed, as surviving trustee, of sums of 1569*l.* 12*s.* 4*d.* Consols, 530*l.* 10*s.* 1*d.* Consols, and sums of India Five per cent. and New Three per Cents., in trust for Mrs. Mary Allen for life, and, after her death, for her son, William Henry Craven Allen.

William Hugh Dennett died on the 3rd Sept. 1877, having by his will dated the 6th March 1877 appointed George Gattton Hardingham and Alan Maclean his executors, and given all his trust estates to them. They proved his will in Oct. 1877.

George Gattton Hardingham and Alan Maclean made inquiries about the trusts of the settlement, but could gain little information concerning it, and they requested Mrs. Allen either to appoint new trustees (which she had power to do under the settlements), or to consent to the settled funds being transferred into court.

Mrs. Allen consented to the latter course being pursued by the executors, who, on the 10th April 1878, filed an affidavit in accordance with the provisions of the Trustee Relief Act, in which they stated that to the best of their knowledge and belief the only persons interested in or entitled to the trust funds were Mrs. Allen and William Henry Craven Allen.

On the 28th Sept. 1878 Alan Maclean died.

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

Fresh directions were obtained, and on the 21st Nov. 1878 George Gattton Hardingham attended at the Bank of England to transfer the stock, when he found himself prevented from doing so by certain writs of distringas which had been placed on the stock, one of which had been placed on by the trustees of the General Reversionary and Investment Company.

Hardingham thereupon gave warning to each person who had obtained a distringas, and on the 23rd Nov. his solicitor received a letter from the solicitors of the company requesting him to inform them "for what purpose the transfer of the funds was intended to be made."

On the 25th Nov. Hardingham's solicitor wrote that Mrs. Allen had "decided, on making the court her trustees," and asking whether it was intended to remove the distringas, or to proceed on it.

On the 30th Nov. the company's solicitor sent another letter saying that, assuming Mr. Hardingham was rightly advised that he would be justified in transferring the fund into court, the company would "offer no opposition."

The claim of the company was in respect of an absolute assignment by Mr. W. H. C. Allen of his reversionary interest in a considerable portion of the stock.

On the 4th Dec. the fund was transferred into court.

Hardingham filed several supplemental affidavits in the matter before and after his co-trustee's death, but in none of them was any mention made of the company's claim.

On the 11th Jan. 1879 an order was made, on the petition of Mrs. Allen, for payment of the income to her for life.

On the 19th Feb. 1879 the company's solicitor, having complained to Hardingham's solicitor that no mention had been made of their claim in the trustee's affidavit, took out a summons for a stop-order on the share of W. H. C. Allen in the funds, and that the costs of the application and consequent thereon might be paid by Hardingham.

*Dunning* for the company.—No mention has been made by the trustee of our claim, although he had notice of it. We have in consequence been exposed to the peril of having the fund paid or transferred out behind our backs, whereas if our claim had been mentioned, we should be entitled to notice of any petition for transfer out. We have been compelled by the omission of the trustee to obtain a stop-order, and he ought to pay the costs occasioned. He cited

*Chancery Fund Rules and Amended Rules; Morgan Ch. Acts, 5th edit., 65, 66;*

*Re Woodburn's Trust, 29 L. T. Rep. N. S. 206, 222; 1 De G. & J. 333.*

*H. B. Buckley* for Hardingham.—The executor has told the court everything he knew. After the warning to the person who has obtained a distringas, he must either remove it or take action on it. The Trustee Relief Act does not oblige the person paying in to state all the title to the fund. Under the practice as now settled, it is only now necessary on obtaining a stop-order to serve the assignor. It is not our fault that the company have obtained a stop-order. If we had mentioned them in the affidavit, they would have been compelled to take the same course in order to render their interest safe. He cited

Cons. Ord. 26, 27;

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5 Vict. c. 5, s. 4;  
Morg. Ch. Acts, 4th edit. 508-9;  
Dan. Ch. Pr. 1545, 1792-7;  
Re Miller, 6 W. R. 238;  
Re Blunt, 10 W. R. 379;  
Glasbrook v. Gillatt, 9 Beav. 611.

Fry, J.—I think that the trustee must be ordered to pay the costs asked for. He and his co-trustee filed an affidavit as to the circumstances of the trust, and before the funds were transferred into court his co-trustee died. Supplemental affidavits were filed by the surviving trustee, and the money was paid in. When the court requires the trustee to state in his affidavit the names of the persons entitled to the fund, he ought to state the names of those persons of whose claims he has received notice. The question is whether Mr. Hardingham did receive notice of the claim of the company. In the first place he knew of the distringas, and on the 25th November the letter of the company's solicitor gave him distinct notice of their claims. After the receipt of that letter he filed more affidavits, in which he took no notice of the company's claim. He ought to have at least stated the existence of the claim. It was said that a stop-order ought to have been obtained by the company under the Consolidated Order 26, and that only the assignor ought to have been served, but this would be to compel the company to incur a personal liability for costs. The stop-order must cease, and the trustee must bear the costs.

Solicitors for the company, *Shoobridge and May*.

Solicitor for the trustee, *A. S. Hardingham*.

# QUEEN'S BENCH DIVISION.

Tuesday, Feb. 25.

(Before MELLOR and FIELD, JJ.)

LAMB V. BREWSTER AND ANOTHER. (a)

*Landlord and tenant—Property tax—Agreement by landlord to repay tax not deducted from rent—Illegal contract—5 & 6 Vict. c. 35, ss. 60, 123.*

*If a landlord agrees with his tenant to repay him property tax at some future time, instead of allowing a deduction from the rent for the amount of the tax, such an agreement is not illegal, and the tenant may recover the amounts paid in accordance therewith.*

## DEMURRER.

Plaintiff claimed against the defendants as executors for 37*l.* for six years' property tax paid by the plaintiff as tenant of the testator for him, and which the executors had refused to return to the plaintiff.

The statement of defence alleged that, assuming that the property tax was paid by the plaintiff as alleged, no demand of or application was ever made by the plaintiff for the said property tax to be paid, or allowed, or deducted out of the rent which became due and payable by the plaintiff to the testator next after each payment of the said property tax respectively; that the said plaintiff made each payment of rent without making or claiming any such deduction of the amount liable to be deducted in respect of property tax according to the statutes in such case made and provided.

In his reply, plaintiff stated that demands or requests were frequently made by the plaintiff for

the said property tax to be paid, allowed, or deducted out of the rent which became due and payable by the plaintiff to the testator next after such payment of the said property tax respectively.

That the said testator promised the plaintiff that, if he would continue to pay the said rent in full without deducting anything for the said payment of property tax, the testator would pay to him all sums which he had paid or should pay for such property tax: and that the plaintiff did continue to pay the rent in full, yet the testator did not repay such sum as agreed.

To this reply the defendants demurred.

5 & 6 Vict. c. 35 sect. 103 enacts:

That if any person shall refuse to allow any deduction authorised to be made by this Act out of (*inter alia*) "any rent or other annual payment mentioned in the 9th and 10th rules of No. 4, sched. A. . . . every such person shall forfeit the sum of fifty pounds, and all contracts, covenants, and agreements made or entered into, or to be made or entered into for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid shall be utterly void.

*A. P. Stone (Meadows White, Q.U. with him)*, in support of the demurrer.—This was a merely voluntary payment on the part of the defendant to the landlord—he cannot therefore recover it. The agreement set up by the plaintiff is bad, as it clearly comes within sect. 103 of 5 & 6 Vict. c. 35. *Denby v. Moore* (1 B. & Ad. 123) is a decision upon this question, and supports the defendant's contention. A payment of this kind is altogether contrary to the policy of the Property Tax Act:

*Cumming v. Bedborough*, 15 M. & W. 438.

*Day, Q.C. (Cyril Dodd with him)*, *contra*.—In the cases cited the payment was voluntary, as there had been no request made not to deduct. The provisions of sect. 103 of the Act are for the protection of the tenant. This agreement is that the landlord should bear the tax which is in accordance with the policy of the Act. There is nothing illegal in such an agreement.

*Stone* in reply.

MELLOR, J.—I am of opinion our judgment must be for plaintiff, for according to the form of the reply there appears to be, independently of the statute, a sufficient promise and consideration to sustain this agreement. With regard to sect. 103 of 5 & 6 Vict. c. 35, I am of opinion that it was intended to apply to all contracts, covenants, and agreements by which it was agreed that the tenant should pay the property tax and not the landlord, for the act contemplated that the tenant should deduct the amount of the tax from the full amount of the rent. In the cases cited the judges have used strong expressions as to the policy of the Property Tax Act; but I do not think that the decisions in those cases go further than this, that where a tenant does not take the opportunity upon the next payment of rent to deduct the amount of the property tax, then the payment of the tax must be held to have been voluntary, and so no action would lie for its recovery. But here the case is altogether different, for a demand for deduction was made, and it was only at the request of the landlord that the tenant abstained from insisting upon it, and that, too, upon promise of subsequent payment. This is an arrangement not within the decision in *Denby v. Moore*, and the dicta in that case are more fully dealt with by *Holroyd, J.* in *Stubbs v. Parsons* (3 B. & Ald.

(a) Reported by A. H. FOYSE, Esq., Barrister-at-Law.

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516). In his judgment in that case he says, "The occupier has, as it seems to me, a lien on the next rent given him by the legislature for the land tax paid by him; but if he parts with the rent without making the deduction he loses his lien, and has only his remedy by action, or set off;" and that appears to me to be the correct view to take of the principle of this Act. In the case before us the tenant has given up a lien which he had upon the rent, and he has done so upon the consideration that the landlord would re-pay to him at some future time the amount of this tax. That appears to me to be a valid consideration; the payment, therefore, was not a voluntary payment, nor was the contract contrary to the policy of the statute. Our judgment must, therefore, be against the demurrer.

FIELD, J.—I am of the same opinion. The defendant contends that the reply contains no answer to the defence, because the agreement set out there is illegal and without consideration. We must see first whether this agreement is illegal, remembering that this is a demurrer which can only deal with the facts as stated. I cannot see what the illegality here is. The legislature has not made this illegal by any provisions actually made in the statute. The legislature here merely says, "We want money, and for that purpose we will tax the land, and collect the tax in the first place from the occupiers of the land, but eventually from the owners of the land, whom we wish to bear the burden of the tax." When the tenant pays his rent, the landlord is bound, under a penalty, to allow the amount of the tax, and the legislature will not allow the tenant to make a contract to pay it. But here there is no contract that the tenant shall pay, but only an agreement that the landlord will repay the amount at some future time, if the tenant will abstain from immediate deduction. The distinguished judges who decided *Denby v. Moore* were striking at a fraud upon the revenue; but the revenue is not defrauded by an agreement of this kind. Before we can decide that this agreement is illegal, we must see that the statute has expressly made it so; but we do not find that is the case. Nor can it be said that these were voluntary payments by the plaintiff, for they were made under a specific contract, and this is not an attempt to recover from the landlord for money paid as was done in the cases cited. On both grounds, therefore, defendants fail, and judgment must be therefore for the plaintiff.

*Demurrer overruled.*

Solicitors for plaintiff, *Marsh, for Bescooby, East Retford.*

Solicitors for defendants, *Collyer-Bristow and Co., for Hett, Freer and Co., Brigg.*

*Tuesday, March 25.*

(Before MELLOR and LUSH, JJ.)

TAYLOR (app.) v. GOODWIN (resp.) (a)

*Highway—Furious driving—Bicycle—5 & 6 Will. 4, c. 50, s. 78.*

*A bicycle is within the meaning of the words "any sort of carriage" in the 78th section of 5 & 6 Will. 4, c. 50.*

*The appellant was convicted of driving a bicycle furiously on a certain highway so as to endanger the lives and limbs of passengers thereon.*

(a) Reported by A. H. POYER, Esq., Barrister-at-Law.

*Held (upon appeal) that the conviction was right, as the words "any sort of carriage" were wide enough to include a bicycle, although that machine had not been invented at the time the Act was passed.*

THIS was a case stated by justices under 20 & 21 Vict. c. 43.

CASE.

At a petty sessions held at Highgate on the 31st day of July 1878, Charles Ernest Taylor, hereinafter called the appellant, was duly convicted for that he did on the 8th day of July unlawfully and furiously drive a carriage called a bicycle in a highway at Muswell Hill so as to endanger the lives and limbs of passengers thereon, against the form of the statute in that case made and provided, and he was adjudged to forfeit the sum of forty shillings, and seven shillings costs, for the said offence.

The conviction took place under the provisions of the 78th sect. of 5 & 6 Will. 4, c. 50, which, among other things, enacts that "if any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously, so as to endanger the life or limb of any passenger, he shall for every such offence forfeit any sum not exceeding five pounds."

In his defence, it was urged on behalf of the appellant that a bicycle was not a "carriage" within the meaning of the Act 5 & 6 Will. 4, c. 50, which was passed before the introduction of bicycles. That this Act only applies to carriages of any kind drawn by horses or other animals, but not to such as are automatic, and that other Acts of Parliament referring to carriages shew that this kind of carriages was not contemplated.

The justices considered that the appellant was driving by propelling a bicycle on a highway at a furious rate, so as to endanger the lives and limbs of passengers thereon.

The question for the decision of the court is whether a bicycle on which a person is seated, and which is driven by his propulsion is a carriage within the meaning of the 78th section of 5 & 6 Will. 4, c. 50, although it is not drawn by any animal, and had not been introduced (in its present form, although of a similar description with the ancient "hobby horse") at the time when 5 & 6 Will. 4, c. 50, was passed in 1836.

If the court shall be of opinion that a bicycle is a "carriage," and that the propulsion of it by means of the person seated on and carried by it is a "driving of a carriage" within the meaning of the said 78th section of the above-quoted Act, the conviction is to be enforced; if the court shall otherwise decide, the complaint is to be dismissed.

*John Rose (Poyser with him) for the appellant.* The question for the opinion of the court is whether the words "drive any carriage" are wide enough to include a bicycle. It is clear that machines of this kind were not known at the time 5 & 6 Will. 4, c. 50, was passed. If a bicycle comes within the terms of the Act, everything that goes on wheels might be included, e.g., a wheelbarrow, roller skates, a perambulator, or even a wheel trundled along the street by a coach-builder. Moreover, appellant was riding the bicycle, and not driving it, and a rider is not liable to summary conviction:

*Reg. v. Bacon, 11 Cox Cr. Cas. 540.*

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*Paterson (amicus curiæ)* referred to*Williams v. Evans*, L. Rep. 1 Ex. Div. 277; 35 L. T. Rep. 864.

The distinction between bicycles and ordinary carriages is recognised by the Legislature in 41 & 42 Vict. c. 77, s. 26, where there is a special authority given for "regulating the use of bicycles."

*Gorst, Q.C. (C. Bowen with him)* for the respondent.—The word carriage is not restricted to a thing on wheels—anything that bears or carries a load is a carriage. In "Hamlet" the word is applied to a small strap. Then, again, the word to drive is an old English word, which signifies to make it move; it is not necessarily applied to animals. Thus an engine-driver causes the train to move, and we have the expression to drive a nail. To drive a carriage, therefore, means in its widest sense to propel or cause to move something on which a thing or person is carried, irrespective of the motive power. That is applicable to bicycles, which are clearly, therefore, within the terms of the 78th section of this Act.

MELLOR, J.—The question we have to determine appears to me to be an exceedingly simple one, and one which scarcely requires to be decided by lawyers. We have to interpret the meaning of the section of the Act of Parliament, and it seems to me that the magistrates were right in the construction they put upon it. After going through a number of provisions, the 78th section says: "If any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger life or limb," then he is to be liable to a penalty. Now the words "any sort of carriage" is the largest description of the word carriage that can be given, and I confess that I myself think that although the bicycle was probably unknown at the time of the passing of the Act, yet clearly it was the intention of the Legislature to prohibit riding or driving of any carriage of any description whatever in such a manner as to endanger life. It does not seem necessary even that the carriage should be on wheels, for the words are wide enough to embrace anything that might be drawn along a road in the manner of a sledge; but beyond a doubt the words "any sort of carriage" are large enough to include the machine which gives a seat to a person riding on it—which goes on wheels, and which the person on it guides and propels, and therefore drives, just in the way that an engine driver guides and drives a train, although the motive power is supplied from a different source. I do not think it is necessary for us to deal with the numerous cases that have been suggested to us as illustrations to show that a machine of this kind is not within the purview of the Act. The word drive has abundant applications to things similar to that with which we are dealing. I therefore am of opinion that the magistrates were right in holding that the rider of this bicycle was liable under the section—whether a bicycle may be said to be ridden or driven, the mischief is the same. I think that the bicycle was a carriage driven, and driven at such a pace as to endanger life, by the person seated upon it, and therefore that it came within the section referred to. The magistrates therefore were right, and the conviction must be affirmed.

LUSH, J.—I am also of opinion that the magistrates were right. The mischief the Act was

intended to prevent was furious riding or driving upon highways, and it was immaterial whether that which was ridden or driven was an animal or a vehicle if it was propelled along the highway at a great pace. Although at the time the Act was passed bicycles were not invented, it is quite clear the Legislature intended to include every kind of vehicle which could do the mischief contemplated by the Act. The words are, "That if any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously, so as to endanger life or limb, he shall be liable," and those words are large enough, and intentionally large enough, to include every kind of vehicle that could be propelled along a highway. This particular bicycle was going at the rate of fourteen miles an hour, and well might be dangerous to the public—it clearly comes within the description of "carriage"—it carries its rider, and is propelled by the driver—it is utterly immaterial what may be the motive power. It is embraced in the large words of the Act of Parliament, and the conviction must be affirmed.

*Conviction affirmed.*Solicitor for appellant, *S. F. Langham*.Solicitor for respondent, *Solicitor to the Treasury*.

Tuesday, March 25.

(Before MELLOR and LUSH, JJ.)

TOMLINSON v. BULLOCK. (a)

*Act of Parliament—Commencement of operation of Act—Interpretation—"After the passing of this Act"—Bastardy Act (35 & 36 Vict. c. 65), s. 3.*

*An Act of Parliament which comes into operation upon a given day becomes law as soon as the day commences, and any event which occurs during that day is, in contemplation of law, an event which takes place after the passing of the Act.*

THIS was a case stated by justices under 20 & 21 Vict. c. 43.

The facts are fully set out in the judgment below.

*Lockwood* for the appellant.—The statute 35 & 36 Vict. c. 65, must be taken to have come into force at the earliest moment of the 10th Aug. 1872, as that was the day upon which it received the Royal assent. This child, which was born on the 10th Aug., was therefore born after the passing of the Act. If that is not so, it will become necessary to ascertain the exact moment at which the Royal assent was actually given, so as to distinguish which of the two events happened first:

*Campbell v. Strangeways*, L. Rep. 3 C. P. Div. 105; 37 L. T. Rep. 672.

In *Combe v. Pitt* (3 Burr. 1434) Lord Mansfield says, "Though the law does not in general allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish." See also on this point

*Chick v. Smith*, 8 Dowd. 337;

Maxwell on Statutes, p. 311.

*A. Crompton*, for the respondent, contended that the law would not take cognisance of the fragments of a day, and that the Act, therefore, only came into operation on the day following that on which the Royal assent was given. He referred

(a) Reported by A. H. POTTER, Esq., Barrister-at-Law.

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to 33 Geo. 3, c. 13, as to the date on which an Act of Parliament received the Royal assent.

*Cur. adv. vult.*

*March 27.*—The written judgment of the court was delivered by

LUSH, J.—This is an appeal from the decision of justices dismissing an application for an order under the Bastardy Act. The application was made on the 5th Sept. 1872, but by reason of the absence of the respondent from England the summons was not taken out till the 26th July, 1878. It appeared on the hearing that the child was born on the 10th Aug. 1872, being the day on which the 35 & 36 Vict. c. 65 received the Royal assent. That Act, which came into operation immediately on its passing, repealed the 7 & 8 Vict. c. 101, and enacted other provisions in lieu thereof. The third section enacts that “any single woman who may be delivered of a bastard child *after the passing of this Act*, may either before the birth, or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, or at any time within the twelve months next after the return to England of the man alleged to be the father of such child, upon proof that he ceased to reside in England within the twelve months next after the birth of such child, make application, &c.” The repealing clause excepted anything therefore duly done under the repealed Act, and kept the latter Act alive for the purpose of supporting and continuing any proceeding taken before the passing of the Act in question; but it made no provision as to children born before its passing, and in respect of which no proceeding had been taken, consequently the mother of a child born on the 9th Aug. 1872 had no remedy under the Act then in force (the 7 & 8 Vict. c. 101), because that Act was repealed on the following day; and no remedy under the repealing Act, because that applied only to children born *after* its passing. To supply this defect another Act was passed at the commencement of the following session, the Act 36 Vict. c. 9. The 3rd section of that Act enacts that any woman delivered of a bastard child *on or before the 10th day of August 1872* (the day on which the repealing Act was passed), who but for the repeal by the last-mentioned Act would have been entitled to apply for a summons against the putative father of such child, shall be entitled to apply for such summons as follows: “In any case in which she would have been entitled to apply at any time under twelve months from the birth of the child, she shall be entitled to apply at any time within six months next after the passing of this Act.” If the 7 & 8 Vict. c. 101, had not been repealed, the applicant would have been entitled to apply for a summons within twelve months from the birth of the child. She might, therefore, have availed herself of the amending Act by applying within six months after its passing, but she did not do so; and although that Act in the 8th section rendered valid all orders made in respect of children born before the 10th Aug. 1872, it says nothing of pending applications, nor does it say anything in respect of children born, not before, but on the day on which the Act of 1872 passed. It seems to have been assumed on all hands that a child

born on the 10th Aug. was not within the Act of 1872, and the justices, upon this assumption, considered that, as the applicant had not brought herself within the remedial Act of 1873, she had no *locus standi*. If this assumption were well founded, we should be of opinion that the decision was right. But we think that is an erroneous assumption. At common law all statutes passed in a session of Parliament had relation back to the first day of the session, unless some other day was appointed for the Act coming into operation. This relation was productive of the most serious consequences, many instances of which are found in the books. And in the 33rd year of the reign of Geo. III. an Act was passed which required the clerk of the Parliament to indorse on every Act the day, month, and year when the same received the Royal assent, and enacted that such indorsement should be taken as part of the Act, and should be the date of its commencement where no other commencement was provided. The only point of time which this Act makes material is the *day* on which the Royal assent was given. It thus recognises the well known maxim that the law takes no notice of fractions of a day, and except in cases where there are conflicting rights between subject and subject, for the determination of which it is necessary to ascertain the actual priority, such is the universal rule. An act which comes into operation on a given day becomes law as soon as the day commences. By the operation of the repealing clause of the Act of 1872, the Act of 7 & 8 Vict. c. 101 was repealed, and the new Act came into effect at the first moment of the 10th of August, 1872. Every event which occurred during that day was, in contemplation of law, an event which took place after the passing of the Act. The same maxim it is true applies to the birth of a child. In computing the age of a person, the day, and not the hour, of his birth is regarded, when no conflicting right is in question. A person born on the 3rd Sept. was held to be of age twenty-one years afterwards, without regard to the fractions of the days (1 Lord Raym. 490). But, on the other hand, a fiction of law is not allowed to prevail against the plain intent of an Act. Now it is clear that the Act of 1872 was not intended to deprive the mother of a child born *on* the day on which it passed of a remedy against the putative father. It intended to substitute another remedy for that which it took away, and if that intent can be effectuated without violence to its language, our duty is so to construe the Act as to carry out that intent. We do no violence to its language by holding that a child born at any time during the 10th of August was born “after the passing of the Act,” which, in contemplation of law, took place as soon as the clock began to strike twelve in the night of the 9th of August. We are therefore of opinion that the decision of the justices was erroneous, and we remit the case to them to be determined upon the merits.

*Decision of justices reversed.*

Solicitor for appellant, G. B. Wheeler.  
Solicitor for respondent, Backhouse.



Ex. Div.] JONES (app.) v. THE CWMORTHIN SLATE COMPANY (LIMITED) (resps.). [Ex. Div.]

## EXCHEQUER DIVISION.

Wednesday, March 5.

(Before KELLY, C.B. and POLLOCK, B.)

JONES (app.) v. THE CWMORTHIN SLATE COMPANY, LIMITED (resps.). (a)

*Property tax—Quarries and mines—Rules under schedule (A.), No. 3, of 5 & 6 Vict. c. 35.*

Where a slate quarry, originally worked in the open, had for some years been worked by means of levels driven straight into the mountain to a distance of from 250 to 300 yards, and the whole process of quarrying was carried on underground, the commissioners held that the concern was a mine, and came within the 2nd rule of schedule (A.), No. 3.

Held, on case stated for the opinion of the court, (reversing the decision of the commissioners), that the concern was a quarry, and therefore within the 1st rule of schedule (A.), No. 3.

Case stated for the opinion of the court under part 3 of the 37 & 38 Vict. c. 16.

At a meeting of the commissioners of income tax for the division of Ardudwy Uwch, in the county of Merioneth, held at Penrhdyndraeth, on the 28th March 1878,

Mr. Albert Bromwich, as cashier to, and on behalf of the Cwmorthin Slate Company (Limited), appealed against a charge of 6373<sup>1</sup>/<sub>2</sub>l. made upon the company in the assessment under schedule (D.) for the parish of Ffestiniog for the year 1877-8 in respect of profits as a slate company under rule 1 of No. 3 of schedule (A.) 5 & 6 Vict. c. 35.

The appellant contended that the concern was a mine, and claimed to be assessed on the average profits of the five preceding years under rule 2 of No. 3 of schedule (A.) 5 & 6 Vict. c. 35, as coming within the terms "and other mines."

It appeared that originally the quarry was worked in the open, but for some years the slates had been got by means of levels driven straight into the mountain to a distance of from 250 to 300 yards; those levels are about 5ft. wide and 7ft. high; the whole process was carried on underground.

Mr. Jones, the surveyor of taxes, on the part of the Government, held the concern to be a quarry, and that the wording of rule 1 of No. 3 of schedule (A.) 5 & 6 Vict. c. 35, as follows "Of quarries of stone, slate, limestone, or chalk, on the amount of profits in the preceding year," was decisive of the question, and that it was impossible to regard a slate quarry as a mine for income tax purposes.

The commissioners were of opinion that the concern was a mine, and gave their decision accordingly; whereupon the surveyor of taxes, being dissatisfied, requested a case for the opinion of the court, which they stated accordingly.

The following are the rules and schedule of the Act 5 & 6 Vict. c. 35, referred to in the case.

Schedule (A.) is as follows:

For all lands, tenements, and hereditaments, or heritages in Great Britain, there shall be charged yearly, in respect of the property thereof, for every twenty shillings of the annual value thereof, the sum of sevenpence.

No. 3. Rules for estimating the lands, tenements, hereditaments, or heritages hereinafter mentioned, which

are not to be charged according to the preceding general rule.

The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited.

First. Of quarries of stone, slate, limestone, or chalk on the amount of profits in the preceding year:

Secondly. Of mines of coal, tin, lead, copper, mundic, iron, and other mines, on an average of the five preceding years, subject to the provisions concerning mines contained in this Act.

*Dicey* for the appellant.—The whole question arises under these two rules of schedule (A.), and resolves itself into this, whether a stone quarry ceases to be one on being worked underground, and becomes a mine. The place from which stone is got is *prima facie* a quarry. A quarry is described in Johnson's Dictionary as a "stone mine," and the burden is on the respondents of showing that it is a mine. Further, the distinction which has been drawn in the two rules is one determined by the nature of the produce; and to say that the words "and other mines" in the second rule comprehend quarries, makes it overlap the first rule, and violates the reasonable construction.

*A. L. Smith* for the respondents.—The question whether this is a mine is a question of fact, and has already been determined; it is not now open. [KELLY, C.B.—You must take it that the question is whether it is a mine within the meaning of the Act. POLLOCK, B.—Assume in your favour that these workings are such that if they were workings of coal they would be called a mine, is it then a mine and not a quarry when the produce that is got from it is slate?] That question is decided by authority. Whether a working is a mine depends on the mode of working, and not on the nature of the produce:

*Duchess of Cleveland v. Merrick*, 37 L. J. Ch. 125.

The case of *Sims v. Evans*, in which the now respondents were defendants, was a proceeding under the Metalliferous Mines Regulation Act (35 & 36 Vict. c. 77). That Act does not specify quarries. By sect. 3 it is to "apply to every mine of whatever description other than a mine to which the Coal Mines Regulation Act 1872 applies." The proceeding was for non-compliance with the provisions of the 11th section, and the question was whether the Act applied to a slate quarry where the slates were got by underground working. By sect. 41 the term "mine" includes "every shaft in the course of being sunk, and every level and inclined plane in the course of being driven for commencing or opening any mine, or for searching for or proving minerals, and all the shafts, levels, planes, work, machinery, tramways, and sidings, both below ground and above ground, in and adjacent to a mine, and any such shaft, level, and inclined plane, and belonging to the mine." It was held that slate was a mineral, and that this was a "mine," to which the Metalliferous Mines Regulation Act applied.

KELLY, C.B.—If we construe the words of these two rules in a popular sense, and put on them the interpretation which in common parlance is given them, we must hesitate in adopting the view of the respondents; for no one ever hears the expression "slate mines," and without very special circumstances we cannot hold that the word "mines" can be extended to comprise

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MUD HOPPER, No. 4—THE EIDER.

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quarries. Further, when we look at the precise terms of these rules, we find two distinct descriptions of property given; and if the Legislature, or the framers of the Act, had considered slate quarries to be properly described as mines, and intended to include them in the second class, they would surely have done so. If we look at the popular signification of the word mines we must conclude that it does not include slate quarries, and when we consider the Act of Parliament we must say that its provisions are to bear a natural and popular construction; and we must hold that quarries of slate, limestone, &c., are to be taxed in accordance with the first rule, mines of coal, tin, &c., according to the second. The present case falls entirely within the former rule.

POLLOCK, B.—We have to look at the terms of the Act of Parliament, and considering the whole scope of the Act, discover the intention of the Legislature; always giving such meaning as would best effect the object to be carried out by the Act. Now the cases which have been cited give us little assistance. In the case of *The Duchess of Cleveland v. Merrick* there was no antithesis between mines and quarries, and, had not the testator's shares in the slate quarries passed under the word mines, the codicil would have failed of its effect with regard to that property. Again, the Metalliferous Mines Regulation Act, considered in the case of *Sims v. Evans*, was a statute intended to shield persons from the dangers incident to improper sinking of shafts and carrying of adits and levels. Regulation of the mode of working therefore, and not the character of the materials produced, was contemplated by the statute. See also the interpretation of the word "mines" in the 41st section. Now in the Act before us there is a strong antithesis between "quarries" in the first rule and "mines" in the second, and the distinction is marked by the different products which are got from the quarries and from the mines. And there is a further distinction besides that drawn in the Act, namely, that the workings of quarries are not commenced by shafts, as mines are, and that when they subsequently are worked underground it is not by shafts, but by adits, a process after all more like a deep quarrying than mining.

*Judgment for the appellant, with costs.*

Solicitors for the appellant, *The Solicitors for the Inland Revenue.*

Solicitors for the respondents, *Gregory, Rowcliffe, Rowcliffe, and Rawle.*

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*April 4 and 5.*

(Before Sir R. PHILLIMORE.)

MUD HOPPER, No. 4. (a)

*Salvage—Damage to salvor—Demurrage.*

*Where a vessel in rendering salvage service sustains damage without negligence on her part, she is entitled to be repaid for such damage, and demurrage during repairs by the owners of the vessel salvaged.*

THESE were consolidated actions of salvage brought by the owners of steam tug *Lord Lyon*

(a) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

and the steam tug *Toiler*, to recover salvage reward for services rendered to *Mud Hopper No. 4*, a steam barge, the property of the Mersey Docks and Harbour Board. The *Hopper* was coming out of the Sandon Dock Basin into the Mersey, when she came into collision with a large steamship, the *Neera*, which cut the *Hopper* nearly in two, and the two vessels remained fast together. The two tugs towed the *Hopper* clear, and she, being kept afloat by her water-tight compartments, was, by the tugs, put ashore at Seacombe, on the Mersey, and afterwards taken into the docks and repaired. In rendering the service the *Lord Lyon*, without any negligence on her part, sustained damage; in her statement of claim she claimed 78*l.* for the damage and four days demurrage at the rate of 25*l.* a day. At the hearing the plaintiffs tendered evidence to shew the amount of the damage and the rate of demurrage; the evidence as to the latter being a letter from the defendants' solicitor admitting that 60*l.* would be a fair amount of demurrage; this latter sum the plaintiffs were willing to accept.

There also was, in another action heard at the same time, a claim by the same tugs against the *Neera* for salvage reward.

Butt, Q.C. (*Gully*, Q.C. and *J. P. Aspinall* with him) objected to the admission of the evidence as to the demurrage on the ground that such evidence was never allowed by the court which gave its award in a lump sum to cover all such claims. The service was rendered without much risk or danger.

*Phillimore* (*Goldney* with him), for the *Lord Lyon*, contended that demurrage was part of the damages sustained in rendering the service, and was always allowed in such cases.

*Milward*, Q.C. and *Clarkson* for the *Toiler*.

*Myburgh* and *Stewart* for the *Neera*.

Sir R. PHILLIMORE.—There is no doubt a salvage service was rendered to both vessels. The contention that the demurrage is not to be allowed to the *Lord Lyon*, I cannot accede to, and I may say at once that the sum—which is not to be included in the amount given as reward for salvage, but is to be considered as paid for repairs and demurrage—amounts to 138*l.* (78*l.* for damage and 60*l.* for demurrage). The vessels whilst fast together were in a position of danger to themselves and so the navigation of the river, but there was no danger to the salvors. I award 500*l.* beyond the 738*l.* above-mentioned, 372*l.* to be paid by the *Neera*, 188*l.* to be paid by the *Hopper*.

Solicitor for the owners of the *Lord Lyon*, *J. W. Carr*.

Solicitors for the owners of the *Toiler*, *Slone and Fletcher*.

Solicitor for the owners of the Mersey Docks and Harbour Board, *A. T. Squarey*.

Solicitors for the owner of the *Neera*, *Field and Weightman*.

*Tuesday, April 8.*

(Before Sir R. PHILLIMORE.)

THE EIDER. (a)

*Co-ownership accounts—Settlement of—Not after date of writ—Agent—Right of action—Admiralty Court Act 1961, s. 8.*

*In an action brought by one co-owner of a ship*

(a) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

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THE EIDER.

[ADM.]

*against the other co-owners under the Admiralty Court Act 1861, sect. 8, for a settlement of accounts between the co-owners, the plaintiff is entitled to a settlement of such accounts only as are or ought to be rendered to the co-owners prior to the date of the writ in the action, and cannot recover any sum due upon accounts, which in the due course of the ship's business could not be rendered to the co-owners until after such date.*

*Where a ship's accounts are rendered half-yearly, a co-owner is not entitled to recover upon accounts rendered for and at the end of the half-year in which the writ is issued.*

*When a co-owner acts as ship's agent (not managing owner) for a coasting steamer at one of her ports of call, he cannot in a co-ownership action for the settlement of ship's accounts recover amounts due to him as agent.*

There was an action brought *in rem*, under the Admiralty Court Act 1861, s. 8, by William Holden, owner of sixteen 64th shares in the steamship *Eider* against that vessel and her other owners to obtain, as appeared by the indorsement on the writ (dated 24th Jan. 1878).—1. An inquiry into the conduct of the managing owner, Henry Ward; 2. An account of the earnings of the ship from the month of May 1876 to the date of writ, with a decree for payment of the amount that should appear due to him; 3. A sale, if necessary, of the shares of certain of the defendants.

In his statement of claim (delivered April 2, 1878) the plaintiff alleged that he had become owner of the said shares in the ship with the knowledge and consent of the defendant Ward upon the terms that he (the plaintiff) was to act as agent for the ship at Hull, between which place and Ipswich she was engaged in trading; and that he was to be paid for his agency at the rate of 5 per cent. on the gross freight inward and outward manifests and of the said vessel, that the plaintiff acted as such agent from Nov. 1875 until Jan. 1877, when he was wrongfully and improperly dismissed by the defendant Henry Ward, and thereby lost his commission; and that the defendant Henry Ward managed the business of the vessel at Ipswich from May 1876 until the commencement of the action, and acted as managing owner thereof, and that it was his duty to render to the plaintiff from time to time true and correct accounts of the earnings and disbursements of the vessel, and of all charges and matters relating to the business of the vessel at Ipswich, and to pay over a proportion of the profits which became due to the plaintiff, but that the defendant Ward did not render true accounts but rendered incorrect accounts, and did not pay over to the plaintiff his share of the profits, and neglected to manage the business of the vessel with due skill, and managed her to his own advantage, and to the plaintiff's disadvantage, and caused her to be employed in a less profitable way than she might have been; and the plaintiff claimed—first, an inquiry into the accounts of the earnings and disbursements of the said vessel from the 19th May to the then present time, and concerning the commission payable to the plaintiff as such agent at Hull as aforesaid; 2nd, an inquiry into the conduct of the defendant, H. Ward, the managing owner, touching the matters alleged as to the employment of the vessel; third, a

decree for the payment to the plaintiff of such sums as might be found due to him on a true statement of accounts; fourthly, a decree for such damages as the court might think fit to award in respect of the wrongful acts complained.

Upon this statement of claim being delivered, the defendants took out a summons, to strike out so much of it as related to the claim for wrongful dismissal of the plaintiff from his agency as being embarrassing, and the Registrar on the hearing of the summons struck out all such portions of the statement of claim as related to such agency and the dismissal, on the ground that the court had no jurisdiction *in rem* over a claim for the wrongful dismissal of an agent, and hence the statement of claim was in this respect embarrassing.

The statement of defence thereupon delivered alleged that the accounts of the ship were made up half yearly by the defendant Ward, and that he had duly rendered them to the plaintiff and the other owners within a reasonable time, and that if there had been any delay it had been occasioned by the plaintiff not sending to the defendant the accounts of the Hull agency for a long and unreasonable time; that nothing was due to the plaintiff as his share of profits of the vessel, but in the accounts the plaintiff owed money to defendant Ward; that the ship's business and employment had been properly managed, and by way of counter-claim the defendant Ward alleged that the plaintiff, as owner of the said shares, was indebted to the said defendant Ward on a balance of co-ownership accounts between them; and the defendant Ward claimed a reference to the registrar and merchants, and judgment for the amount found due with costs. Upon this issue was joined.

On the 26th Oct. 1878 the parties agreed that all questions raised by the pleadings should be referred to the registrar, assisted by merchants, to report thereon, and that as to any question raised by the pleadings which either party was entitled to have tried by the court the action should, after the filing of the said report, proceed in the ordinary manner. An order of reference was made in the terms of this agreement, and the reference was heard on Dec. 16 1878, Jan. 4 and 11 1879.

The defendant, Ward, filed no accounts at the reference, alleging that he had rendered to the plaintiff sufficient accounts. The plaintiff filed such co-ownership accounts as had been delivered to him by Ward, including all the half yearly accounts from May 1876 to Dec. 1877, and the account for the half year ending June 30, 1878, and also filed the agency accounts rendered to him by Ward showing the amounts due to him as agent at Hull. At the reference it was contended, on behalf of the plaintiff, that he was entitled to have all accounts investigated up to the date of the hearing of the reference, and, hence, that he was entitled to go into the accounts for the half year ending June 30th, 1878; for the defendants it was objected that no accounts could be investigated to the delivery of which the plaintiff was not entitled prior to the date of the writ, and that the plaintiff could only recover in this action such sums as appeared due upon accounts deliverable before action brought, *i.e.*, before Jan. 24, 1878. The registrar upheld the defendant's objection and declined to investigate the accounts for the half year ending June 30th, 1878.

The plaintiff also claimed at the reference to

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be entitled to have his Hull agency accounts settled by the registrar and to recover in this action the amount found due to him upon these accounts; the defendants admitted the necessity for the investigation of the agency accounts, the amount due to the plaintiff upon them being a necessary figure for the settlement of the co-ownership accounts, but the defendants disputed the plaintiff's right to recover in this action as agent or in any other way than as a co-owner.

On the 22nd March 1879 the Registrar made his report, and after setting out the facts, said:—"The result of this prolonged investigation, which I think by a little moderation and sound judgment on the part of the plaintiff might easily have been avoided, is as appears by the schedule that there is due from the plaintiff to the defendant on the co-ownership account the sum of 11l. 2s. 3d. The amount due to him as agent, including his commission, is 52l. 5s.; if, therefore, his share of the loss on the profit and loss account be deducted, the balance due to him as agent will be further reduced to 41l. 2s. 9d. Under the circumstances thereby stated above, as the plaintiff has failed to establish any of the grounds of complaint urged on his behalf against the defendants, I am of opinion that there was no adequate cause for the lengthened inquiry which has taken place before me and the merchant by whom I have been assisted, and that the costs of such inquiry ought to be paid by Mr. Holden, the plaintiff."

On the 26th March 1879 the plaintiff gave notice that he should move the court for an order directing the defendants to pay the costs of the action and reference, and directing the registrar to add to the amount found to be due to the plaintiff the sum of 62l. 3s. 8d. admitted to be due to the plaintiff in the co-ownership account rendered to the 30th June 1878.

On the following day the defendants gave notice that they should move the court to confirm the registrar's report, pronounce judgment in the defendants' favour for the sum of 11l. 2s. 3d., and condemn the plaintiff therein, and in the costs of the action, reference, and that application.

April 8.—*Gainsford Bruce* for the plaintiff.—Upon the account rendered to June 1878 there is a balance due to the plaintiff on the co-ownership account, which he is entitled to recover. [Sir R. PHILLIMORE.—It became due after the date of writ, and how can you recover it in this action?] By the practice of the Court of Chancery, accounts are always settled up to the date of the chief clerk's certificate (*Daniell's Chancery Practice*, 5th edit. p. 1120 *et seq.*) It would be a great hardship to drive the plaintiff to bring another action for this balance. Moreover, the registrar has reported that there is a balance due to the plaintiff on the accounts prior to the date of writ, and on these grounds alone the plaintiff is entitled to his costs of the action and reference.

*J. P. Aspinall* for the defendants.—The plaintiff can recover in this action only what is due to him on the co-ownership accounts up to the date of writ, and as on these accounts the registrar has reported a balance against him, he cannot recover at all. The agency accounts were only incidentally gone into, and the balance found due upon them cannot be recovered in this action. I ask for judgment on the claim and counter-claim with costs.

*Bruce* in reply.

Sir R. PHILLIMORE.—In this case the writ appears to have been issued on Jan. 24, 1878, and the registrar by his report appears to have investigated all the co-ownership accounts due and rendered up to that date. Now the registrar has followed the invariable practice by so taking the accounts up to the date of writ and by refusing to take any subsequent accounts. In fact, in all co-ownership actions in this court it has been the practice without exception, as I am informed by the registrar, to lodge accounts up to the date of writ, and the registrar in dealing with them limits the taking of such accounts to the date of writ, so that the plaintiff cannot in any event recover anything which has become due after that date. This being the settled practice of the court, it is not likely to be altered, and I should only depart from it if it was made clear to me that the practice was founded on a wrong principle; but I am of opinion that the practice is not founded on a wrong principle. Counsel for the plaintiff has referred to the practice of the Court of Chancery, but the Court of Admiralty has always had an independent practice of its own. If I were to hold otherwise it might very well be that in the case of a vessel making weekly or monthly voyages, the accounts would never be finally settled and the registrar might be kept sitting *de die in diem*, and the reference would never come to an end. I shall not alter the practice of the court. The registrar has reported that there is a balance of 11l. 2s. 3d. due to the defendant on the co-ownership accounts, and as these were the only accounts referred to the registrar I shall not disturb his report. The report therefore is confirmed, and I give judgment for the defendants; and with regard to the costs the plaintiff must pay the costs of the action as well as the costs of the reference.

Solicitors for the plaintiff, *Chester and Co.*  
Solicitors for the defendant, *H. C. Coote.*

## COURT OF BANKRUPTCY.

March 31 and April 7.

(Before the CHIEF JUDGE.)

Ex parte SCHOFIELD; Re FRITH. (a)

*Proof—Bills deposited for discount—Bankers' lien. Bankers with whom bills of exchange have been deposited by a customer for discount, and who in the mean time have made advances to the customer in respect of those bills, are entitled, upon the customer going into liquidation, to retain all the bills in their hands and prove for the full amount thereof, and receive dividends thereon from time to time, giving credit only for the sums received by them in respect of such of the bills as may have been paid in the mean time.*

THIS was an appeal from the decision of the judge of the County Court of Yorkshire, holden at Huddersfield, refusing to order the delivery up to the trustees in the liquidation of certain bills of exchange and other securities.

The debtor, James Frith, had opened an account with the London and Yorkshire Bank (Limited), and the course of business was as follows: The debtor having indorsed bills of exchange drawn or received by him from customers, from time to time paid them into the bank for discount. Of

(a) Reported by A. A. DORIA, Esq., Barrister-at-Law.

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the bills so paid in some were discounted by the bank at once, and the amounts carried to the credit of the debtor. Other bills so paid in were retained by the bank for the purpose of making inquiries, and, in the event of those inquiries being satisfactorily answered, were discounted and the amounts credited to the debtor in his account with the bank. Pending these inquiries the bank was in the habit of making advances to the debtor, such advances not exceeding 5000*l*.

The bills which were not immediately discounted by the bank were carried by them to an account intitled "Bills pending discount." At the time the debtor filed his petition for liquidation, the bank had in its possession bills of his to the amount of about 25,490*l*. Of this number, bills amounting to about 11,000*l*. had been discounted by the bank, and the amounts carried to the debtor's credit, and the remainder were entered under the head of "Bills pending discount."

The bank also held certain shares and Russian bonds, which the debtor had deposited with them by way of security.

Under these circumstances, the bank at the first meeting sought to prove for about 18,000*l*., alleging in their affidavit of proof that they had no security except such as were specified in the schedule, and in the schedule were specified bills of exchange, shares, and bonds, which were estimated to be of the value of 1000*l*. This proof was admitted accordingly for the sum of 17,000*l*., and in respect of that debt the bank voted in the appointment of trustees, and in other matters in the liquidation.

The creditors having resolved upon a liquidation by arrangement, one of the trustees applied to the County Court that the bank might be ordered to give up the securities, including the bills of exchange mentioned in the schedule to the affidavit of proof, but the learned judge held that the bank was not bound to value the bills of exchange, and being of opinion that the affidavit could not be construed as meaning that the bank valued the bills of exchange and the rest of the securities in their hands at 1000*l*., but that only the shares and bonds were intended to be valued at that sum, he refused the application. From this decision the trustees appealed.

*De Gex*, Q.C. (with him *E. Cooper Willis*) appeared for the appellant.—They contended that those bills of exchange which had been deposited with the bankers, and by them entered under the head of "bills pending discount," were really short bills, and should be treated as such; and that, as they had not been specifically appropriated, they should be treated as an ordinary security, to which the bankers' lien attached. The bank was in reality in the position of an ordinary secured creditor, and as the bills in question had not been discounted, the property in them remained with the debtor, who would be entitled to redeem them from the bankers' lien. Bills of exchange might be mortgaged like any other property:

*Ex parte Price*; *Re Gibbs*, 3 M. D. & De G. 586.

The bank having valued these bills and the other securities at 1000*l*., could not now say that that was not the meaning of the affidavit of proof. Moreover the bank had voted in respect of the full amount of their proof, whereby they lost the benefit of their security:

Bankruptcy Rules 1870, 272.

Vol. XL, N. S., 1021.

They further cited

*Ex parte Hornby*; *Re Tarleton*, Bucks. 351;

*Ex parte Solomon*; *Re Aubusson*, 1 G. & J. 25.

*Ex parte Egginton*; *Re Farmer*, Mont. 72;

*Ex parte Middleton*; *Re Middleton*, 3 De. J. & S. 201;

*Stammers v. Elliott*, L. Rep. 4 Eq. 675; 3 Ch. 195;

*Ex parte Ashworth*; *Re Hoare*, L. Rep. 18 Eq. 705.

They also contended that the fact that the bills were indorsed to the bank made no difference:

*Ex parte Twoood*, 19 Ves. 229.

*Winslow*, Q.C. and *Finlay Knight*, for the respondents, were not called upon.

The CHIEF JUDGE.—This seems to me to be a very clear case. Nothing is more common than such transactions between bankers and their customers, and they are not merely confined to bankers, but extend to every one who has anything to do with bill transactions. The words of the last case referred to, although the case itself is not in point, are very valuable. It is attempted to be said that these bills were deposited with the bankers. They were not in any sense deposited, but they were handed to the bankers for the purpose of being discounted. The particulars of the bills are sent with a request "that you, the bankers, will be so good as to discount the bills for me." And the answer returned was this: "We cannot do that, because we want to see what they are worth, but you may draw upon us." And yet it is said that the bills were not sent to the bankers for the purpose of discounting, but for deposit, with the accommodation of drawing upon them by the debtor. It is, however, proved that his object in giving the bills to the bank was for discounting transactions, though no opportunity for discounting might have occurred. But that does not dispose of the case. It is an every day practice, in the administration of the bankruptcy law, that when a man holds bills of exchange upon which a debtor or bankrupt and other persons are liable, he has a right to retain those bills of exchange, and to get what he can for them. He may prove for the whole debt which the debtor owes him, he being liable to return the amount of the debt so proved if, when the dividend is declared, it turns out that he has received any of the bills mentioned. He is bound to state them in his schedule, and that is all he is required to do. It cannot be disputed that the banker's lien extends to everything that is in his hands, and I am at a loss to conceive what kind of application *Hornby's* case and *Solomon's* case have to this case. In those cases certain solicitors had a lien upon books, papers, and other things which I need not mention, and they deducted the value of their lien without mentioning it in their proof. But here the bankers do in all frankness and honesty say, "The debts due to us amount to so much for which we have no security except the bills the particulars of which we have scheduled," and some other things the particulars of which I need not go into, "and we estimate the value of them at 1000*l*." Now, it was said at first that the terms of the proof have precluded the questions. It runs thus "for which we have not received any manner of satisfaction or security save and except the bills of exchange mentioned in the schedule hereon endorsed," and there they make a full stop. There is no account of anything else. I see no necessity for amending the proof, but if there were any

I do not hesitate to say that I should have no difficulty in allowing such an amendment to be made as might be necessary to allow the true and intelligible meaning of the proof to be disclosed. It is not a case where a man asks for leave to amend his proof, after voting for the choice of assignees, upon a proof which he says is erroneous, and upon which he wants to make a new case, relying upon a different construction of the proof. I think that the proof is accurate and proper in every respect, but if it were otherwise, and it was desired for the purpose merely of completing and showing more clearly and distinctly the meaning of what the deponent had in his mind when he swore to that proof I should, without hesitation, allow him to amend it. I feel fully the justice of Mr. De Gex's remark that this court does not allow a man who has made a proof in mistake to change his front and come with a different kind of demand; but here I find no such case. The case here is consistent with the every day practice in bankruptcy, with respect to a proof for a debt, part of which is involved in bill transactions, and that is to quote the bills but not to deduct any value in respect of them. Who can tell that these bills have any value? Are the bankers prepared to represent that they are worth 20s. in the pound? How can they say what accident may happen to the other persons, who are parties to the bills, or whether they may not become bankrupt, or what dividend may be resolved upon? It is necessary in the ordinary administration of a bankrupt's estate that the trustee and creditors should know the nature of the bills, upon which the debtor or the bankrupt is liable. In this particular case there is no possibility of doubt. It is said that you cannot take a part as a whole, or the whole as a part. No doubt that is irresistible. That is a fundamental doctrine, but in order to prove that, you must make out your case that it is a part of the bankrupt's estate. In my opinion it is no part of it. A man who holds bills of exchange indorses them to his banker, and says, "I owe you a good deal of money; you can collect these bills for me and carry them to my account." Those bills can no longer remain part of the bankrupt's estate in such a manner as to deprive the bankers of their full title in law and equity arising out of transactions as between bankers and their customers. None of the cases referred to touch on the cardinal principles to which I have adverted, or say that the established practice in bankruptcy is erroneous in respect of the subject of proof. It is impossible that the bankers could be in the position of men acquainted with the matter so as to be able to set any value whatever upon these bills, except that value which is expressed by mentioning the sum for which the bills are drawn. I think the learned judge below was in all respects right, and I think that there was no ground whatever for this application. That it is capable of a good deal of argument I freely admit, but I cannot see any principle upon which this proof can be impugned. It is upon the face of it preposterous to imagine that the bank meant by 1000l. worth of bills the loans and other things worth 1000l. A fair meaning must be given to the proof, not an extensive meaning, not a meaning to include things which the parties themselves did not intend to include. I find that the words "bills due" fairly expressed the meaning of what they were in-

tended to import. Mr. De Gex's argument was that it was in the nature of the assignment of a bond or something subject to an equity of redemption, and that there remained a balance which was deposited with the bankers. Now in the first place a bill of exchange is not in the slightest degree like a bond or a mortgage, but even if there were, as a matter of law in respect of these bills, an equity of redemption, I say that it cannot be satisfied until 20s. in the pound have been paid upon the bills of exchange. If the trustees are willing to do that, of course there would be no objection. I do not distinguish this case from the ordinary case of proof by bankers or persons engaged in large transactions, who have a general lien over every security that comes into their hands from which no particulars of the security can be abstracted. Unless the bankers have made a mistake, or attempted a fraud, I say that they are entitled to prove, and that there is no ground for this appeal.

#### *Appeal dismissed.*

Solicitors: *Sykes*, for *Barnesden* and *Sykes*, *Huddersfield*; *Bischoff*, *Bompas*, and *Bischoff*.

### House of Lords.

Feb. 28, March 3, 4, 6, and May 5.

(Before the LORD CHANCELLOR (Cairns), Lords SELBORNE and GORDON.)

THE GOVERNORS OF THE MAGDALEN HOSPITAL v. KNOTTS AND OTHERS. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.  
*Lease by charitable corporation—Void or voidable—Stat. 13 Eliz. c. 10—Statute of Limitations.*

*The appellants were the governors of a charitable hospital founded in 1758, and incorporated by Act of Parliament in 1768.*

*In 1783 the then governors of the hospital granted a lease of certain lands of the hospital to the respondents' predecessors in title for ninety-nine years at a peppercorn rent. In an action to recover possession of the demised premises:*

*Held, that the appellants being a "hospital" within the meaning of the stat. 13 Eliz. c. 10, as explained by 14 Eliz. c. 14, the lease was void ab initio by virtue of sect. 3 of the former Act, and that the Statute of Limitations ran from the execution of the lease, and that the action could not be maintained.*

*Judgment of the Court of Appeal affirmed, for different reasons.*

THE appellants in this case were the governors of a charitable corporation founded in the year 1758, and incorporated in 1768 by an Act of Parliament, 9 Geo. 3, c. 31. The action was brought by them with the sanction of the Charity Commissioners, to recover possession of a house and premises known as The Tower public-house, situate in Tower-street, Westminster Bridge-road.

The defendant Knotts was the tenant in occupation of the house, and the other defendants were the landlords, and the mortgagees of Knotts' interest, who severally obtained leave to appear and defend the action.

The action was commenced on 11th July 1876.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

on the ground that a lease of the premises granted by the corporation in 1783 to one Charles Gilbert, through whom the defendants derived title, for ninety-nine years, at a peppercorn rent, was void under the Act 13 Eliz. c. 10, sect. 3.

That section enacts that

All leases, gifts, grants, feoffments, conveyances, or estates to be made, had, done, or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or other having any spiritual or ecclesiastical living, of any houses, lands, tithes, tenements, or other hereditaments, being any parcel of the possessions of any such college, cathedral, church, chapter, hospital, parsonage, vicarage, or other spiritual promotion, or any ways appertaining or belonging to the same, or any of them, to any person or persons, bodies politic or corporate, other than for the term of one and twenty years or three lives, from the time as any such lease or grant shall be made or granted, wherupon the accustomed yearly rent or more shall be reserved and payable yearly during the said term, shall be utterly void and of none effect, to all intents, constructions, and purposes, any law, custom, or usage to the contrary anywise notwithstanding.

Down to the issue of the writ in the action. no act had been done by the plaintiffs to avoid the lease.

The defendants demurred to the statement of claim, on the ground that the plaintiffs' right was barred by the Statute of Limitations; but Jessel, M.R. overruled the demurrer, holding that the effect of the statute of Elizabeth was only to make the lease voidable, and that the Statute of Limitations consequently did not begin to run till the issue of the writ. His judgment is reported in 36 L. T. Rep. N. S. 139, and 5 Ch. Div. 175.

The action then came on for trial before Fry, J., who gave judgment for the plaintiffs (37 L. T. Rep. N. S. 428).

The defendants appealed from both these decisions, and the Court of Appeal (James, Cotton, and Thesiger, L.JJ.) adopting the same construction of the statute of Elizabeth that the Master of the Rolls had done, held that the Statute of Limitations ran against the lessors from the date of the lease, and entered judgment for the defendants (38 L. T. Rep. N. S. 624; 8 Ch. Div. 709).

From this decision the present appeal was brought.

Cookson, Q.C., Davey, Q.C., and Sturges appeared for the appellants, and contended that, assuming that the hospital was within the statute, as explained by the 14 Eliz. c. 14, which must be admitted, the lease was not "void" *ab initio*, but only "voidable;" many authorities show that the words were interchangeable at the time when this Act was passed, as also appears from the cases in which a distinction has been drawn between such corporations as have a head and such as have not: unless such a lease were voidable, no question as to estoppel by acceptance of rent could ever have arisen. Either the lease was only voidable, or the lessee entered as a stranger without any title, and continued in possession as a tenant at will; in neither case did the statute begin to run till the issue of the writ, which either avoided the lease, if voidable, or determined the tenancy at will if the lease was originally void. They cited

*Case of Magdalen College, Cambridge*, 11 Rep. 67;  
*Dean and Chapter of York v. Middleborough*, 2 Y. & J. 196;  
*Attorney-General v. Glyn*, 12 Sim. 84;  
*Chapter of Southwell v. Bishop of Lincoln*, 1 Mod. 204, 2 Mod. 56;

*Moore v. Clench*, 1 Ch. Div. 447; 34 L. T. Rep. N. S. 13;  
*Archbold v. Scully*, 9 H. of L. Cas. 360; 5 L. T. Rep. N. S. 160;  
*Case of Lincoln College*, 3 Rep. 58;  
*Edwards v. Dick*, 4 B. & Ald. 212;  
*Pennington v. Taniers*, 12 Q. B. 998;  
*Doe v. Barrell*, 12 Q. B. 1011, n.;  
*Pennington v. Cardale*, 3 H. & N. 656;  
*Bishop of Winchester v. Freeland*, Bridg. 29;  
*Lyn v. Wym*, Ib. 181;  
*Hunt v. Singleton*, Cro. Eliz. 473;  
*Bishop of Salisbury's case*, 10 Rep. 59;  
*Carter v. Claycole*, 1 Leon. 306;  
*Bacon's Abr.*, tit. Leases;  
*Attorney-General v. Warren*, 1 Wils. 387;  
*Kemp v. Westbrook*, 1 Ves. sen. 278;  
*Earl of Abergavenny v. Brace*, L. Rep. 7 Ex. 145;  
26 L. T. Rep. N. S. 514;  
*Rickman v. Garth*, Cro. Jac. 173;  
*Abbot of Westminster's case*, Dyer, 126;  
*Doe v. Archbishop of York*, 6 East, 86.

Sir H. Jackson, Q.C. and Warmington (*Oozens Hardy and Hilbery* with them) appeared for the respondents, and argued that, this being in fact an action of ejectment, and the respondents being in possession, the appellants must show a title on the strength of which they are entitled to succeed. They produce a lease signed by Gilbert, but they must show that Gilbert entered under the lease, and that there is a privity of estate between him and the respondents. It is at least doubtful if such a case as this falls within the statute of Elizabeth, which was intended to restrain improvident alienations; but, if it does so, then the Act makes the lease absolutely void. Judicial decisions have held that in some cases the actual grantors of such a lease may be estopped in equity from taking advantage of their own wrong, but they do not go further. In this case the right to bring the action accrued as soon as the lease was granted, and the Statute of Limitations began to run from that time. The old line of authorities makes no distinction between void and voidable, but suspends the operation of the Act in certain cases, such as corporations sole and corporations with heads, where such a lease was only held void as against the successor. In other cases it is void to all intents and purposes, and the Statute of Limitations began to run before the demand was made. They cited

*Attorney-General v. Foundling Hospital*, 2 Ves. jun. 42;  
*Bacon's Abr.* tit. Leases;  
*Crossley v. Arkwright*, 2 T. R. 608;  
*Co. Litt.* 45a;  
*Dumpon's case*, 4 Rep. 120;  
*Viner's Abr.*, tit. Leases and Estates;  
*Morris v. Antrobus*, Hardr. 325;  
*Doe v. Collings*, 7 C. B. 939;  
*Commissioners of Charitable Donations v. Wybrants*, 2 J. & Lat. 182;  
*Magdalen College, Oxford, v. Attorney-General*, 6 H. of L. Cas. 189;  
*Chadwick v. Broadwood*, 3 Beav. 306;  
*Attorney-General v. Payne*, 27 Beav. 168;  
and also the cases of *Lincoln College*, *Edwards v. Dick*, *Attorney-General v. Glyn*, *Dean of York v. Middleborough*, *Magdalen College, Cambridge*, *The Chapter of Southwell*, *Hunt v. Singleton*, *Pennington v. Taniers*, *Doe v. Barrell*, *Pennington v. Cardale*, and *Rickman v. Garth*, cited on the other side.

Cookson, Q.C. was heard in reply.

At the conclusion of the arguments, their Lordships took time to consider their judgment.

May 5.—Their Lordships gave judgment as follows:—



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THE GOVERNORS OF THE MAGDALEN HOSPITAL v. KNOTTS AND OTHERS.

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The LORD CHANCELLOR (Cairns).—My Lords, the facts of this case are stated by Thesiger, L.J., in delivering the judgment of the Court of Appeal, with so much care and accuracy, that I do not propose to repeat them; but I will at once approach that which is the main question in the case: Is the claim of the appellants to recover the premises known as the "Tower" public-house, in the parish of St. George the Martyr, in the county of Surrey, barred by the Statute of Limitations? I may in the first place say that I entertain no doubt that the appellants are a hospital within the meaning of the statute 14 Eliz. c. 14, and therefore also of the 13 Eliz. c. 10. Irrespective of the decision in the case of the *Attorney-General v. Glyn* (12 Sim. 87), it appears to me to be clear that upon the wording of sect. 3 of the latter statute an eleemosynary corporation, like that of the appellants, is distinctly brought within the operation of the enactment. This being so, it is too clear for argument, and indeed it was not disputed, that the lease of Dec. 4, 1783, by the charity of the property in question, is a lease which is rendered invalid by the operation of the statute. So far as anything appears upon the face of the lease, it is an alienation of the charity estate for ninety-nine years, which plainly could not be supported. The question then arises, was the lease voidable or void? The Court of Appeal, considering themselves bound by an authority in this respect, have treated the lease as voidable; but, treating it as voidable, have held that the right to enter and avoid it accrued to the hospital immediately after the lease was made, and was therefore barred at the end of twenty years under the statute 3 & 4 Will. 4, c. 27, sect. 2. I do not think it necessary to examine the reasoning by which the Court of Appeal arrived at this construction of the Statute of Limitations, or to say how far I should be prepared to concur in it, because I must submit to your Lordships that the lease was, *ab initio*, not merely voidable, but void. The words used by the Legislature in the statute of Elizabeth are precise, and as strong as it is possible to make them. The statute declares that every lease, such as is the one before your Lordships, shall be "utterly void and of none effect to all intents, constructions, and purposes, any law, custom, or usage to the contrary anyways notwithstanding." The onus lies, as it seems to me, upon those who would cut down or qualify the effect of these words to show some ground, either from the nature of the case, or from authority, for doing so. As to the character of the evil which it is sought by the statute to prevent, it is clear that in the case of an eleemosynary corporation, the whole property of which is devoted to charity, where the office-bearers and other members of the corporation have no personal interest whatever, the object must be to make the property of the corporation absolutely inalienable in any way other than by the particular form of lease which is authorised. There is no intention to protect a successor against a predecessor; there is no ground for admitting an intention that individual office-bearers of the corporation granting the lease should be bound, but that their successors should be free either to affirm or disaffirm it. The intention is to condemn the lease as a wrong and a void thing, even though every member of the corporation should have committed himself to it, and should be anxious to maintain it. These considerations show how inapposite, as applied

to these Acts of Parliament, is any analogy drawn from the ordinary stipulation between lessor and lessee, that if the lessee breaks certain covenants the lease shall be void. The object in such a case is to give the lessor an opportunity of terminating the lease if he is disposed to do so, but not to terminate it against his will or against his interest; and to hold that the lease must become void, even against the lessor's will, would enable the lessee to get rid of an onerous lease by wilfully breaking the covenant contained in it. So also with regard to cases (of which a great number were cited at your Lordships' bar) where a lease not warranted by the statutes of Elizabeth is made by an ecclesiastical corporation having a head, and where it has been held, while the same head continues, not indeed that the lease is voidable, but that it cannot be avoided even if the corporation desires it, and that after the death of the head the corporation as constituted under his successor may enter and avoid the lease, but may, on the other hand, so act as again to stop itself from so doing. A large number of these cases is collected in Bacon's Abridgment, title "Leases." There may be some difficulty in understanding how some of these cases with regard to ecclesiastical corporations with a head came originally to be decided as they were; probably they proceed on the principle of a personal estoppel by reason of a personal interest in the head of the corporation; but they appear to me to have no application to the case before your Lordships. There is indeed a case mentioned in Bacon's Abridgment under this title—the case of *The Collegiate Church of Southwell* (1 Mod. 204, 2 Mod. 56), which has some application to a corporation like the appellants, but it is an authority that the lease would be void and not voidable. It runs thus: "Where there is a chapter that hath no dean, as the chapter of the collegiate church of Southwell, there grants or leases made by them contrary to 13th Elizabeth, cap. 10, are void *ab initio* against themselves, and so the leases or grants by any other corporation aggregate who have no head or principal person; for they must be either void *ab initio* or good for ever, because they continue always the same, and one has no superiority or power more than another." To hold, in opposition to the precise words of the statute, that a lease by a corporation like the appellants was voidable would not merely be unmeaning—for to say that a lease is voidable implies a right to affirm which the corporation would not possess—but it might also inflict serious injury on the corporation. A valuable estate of the corporation might be alienated in utter recklessness or something worse, and when the corporation was put in motion to reclaim it, then, as the grant was valid until avoided, the right to mesne profits would not exist. The Court of Appeal, as the authority for the view that the lease is voidable only, refer to what they state was a principle of the decision and not a mere *obiter dictum* in *Pennington v. Cardale* (3 H. & N. 656). I cannot agree that it was any necessary part of the decision in *Pennington v. Cardale* that the lease was voidable. The question in that case was the meaning of an exception of certain premises in a lease granted by a dean and chapter in 1849. The excepted premises were described as rents reserved in any building leases granted by the dean and chapter; and the court held that these words upon the whole context meant leases which

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*de facto* had been granted by the dean and chapter, whether interests were lawfully created by them or not. The inquiry whether these leases were void or voidable was immaterial. It is true that, in delivering the judgment of the court, Martin, B. says of a lease granted by the dean and chapter contrary to the statute, "It seems quite clear from the authorities cited upon the argument that this lease was not void but voidable only." These observations do not appear to me to have been necessary for the decision of the case, and even if they were accurate, they did not relate to the effect of leases or grants by a corporation such as the appellants, but they referred to the class of cases as to ecclesiastical corporations with a head of which I have already spoken. Holding as I do that the lease of 1783 was absolutely void, the respondents, or those whom they represent, must be taken to have been in possession of the property from 1783 without any title whatever, and not having paid rent to the appellants, or in any way entered into the relation of tenants, there is nothing to prevent the full operation of the second section of the Statute of Limitations, and the right of the appellants to recover the land is, in my opinion, effectually barred. I shall therefore move your Lordships that the judgment of the Court of Appeal be affirmed, and the appeal dismissed with costs.

LORD SELBORNE.—My Lords, I am of the same opinion, and I only desire to make two observations. The first is, that the explanation of the doctrine laid down in the authorities as to leases by deans and chapters, and by colleges in the universities, is probably to be found in the fact that they were corporations coming within the original restraining Act of Queen Elizabeth, the governing members of which received the rents reserved on their leases for their own benefit; and that the succession in them of one head, having a principal share in the beneficial interest, after another, was thought—though by a process of reasoning which I cannot think accurate—to justify the courts in holding that the declared policy of that statute was satisfied so long as those particular successors were protected. That, however, cannot apply to a corporation under the government of persons of whom none has the beneficial interest; and the *Southwell* case is *a fortiori* an authority for not extending that doctrine to such a corporation. The other observation which I wish to make is, that the present case is one for which there was probably never any precedent, and is never likely to be followed by another similar to it, a long term having been attempted to be granted by a charitable corporation at a peppercorn rent. If any rent had been reserved and received, however small, the legal relation of tenant from year to year would have been created, and the Statute of Limitations could not have run.

LORD GORDON.—My Lords, I concur in the judgment which has been delivered by the Lord Chancellor. I am of opinion that the provisions of the statute of Elizabeth apply to the Magdalen Hospital, and to the lease in question; and that being so, I can entertain no doubt that the lease is not only voidable, but that it was from the beginning void. The terms of the Act are, I think, so express as to leave no room for any other construction. If the lease was *ab initio*

void, it follows that the respondents and their predecessors have been all along in possession of the property without any title; and as they have not paid rent to the appellants, or in any other way entered into the relation of tenants, I think that sect. 2 of the Statute of Limitations applies, and that all rights on the part of the appellants are effectually barred. I think, therefore, that the result arrived at by the Court of Appeal, though on different grounds, is right, and that their judgment should be affirmed.

*Decree appealed against affirmed, and appeal dismissed with costs.*

Solicitors for the appellants, Wordsworth, Blake, Harrie, and Parson.

Solicitors for the respondents, Pownall, Son, Cross, and Knott; Curtis and Betts.

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT LINCOLN'S INN.

March 24, April 4, 7, and 9.

(Before JAMES, BAGGALLAY, and BRAMWELL, L.JJ.)

Re MABEL EMILY BESANT (an Infant). (a)

*Custody of infant, ward of court—Deed of separation—Agreement by father for infant to remain in mother's custody—Immoral publication by mother—Petition for delivery of infant to father—Infants' Custody Act 1873 (36 & 37 Vict. c. 12), s. 2.*

A petition was presented by the father of an infant on his own behalf, and as next friend of the infant, for an order that she might be delivered to his custody by the mother. The parties were married in 1867, and they had two children, a boy born in 1869, and a girl, the infant petitioner, born in Aug. 1870. In Oct. 1873, a deed of separation was executed, whereby it was agreed that the mother should have the custody of the girl for eleven months, and the father for one month in the year, and the father the custody of the boy eleven months, and the mother for one month in the year. The petition alleged that the wife held and propagated atheistic opinions, that she deprived the child of all religious instruction, and that she had published books or pamphlets of an immoral character, one of which had already been condemned in other courts of competent jurisdiction, and that for these reasons she was unfit to have the custody of the child.

Held (affirming the decision of Jessel, M.B.), that the infant must be given up to her father.

Where the question is simply what is most beneficial for an infant, it is unnecessary to consider whether the father is in any way precluded by his own contract from asking the aid of the court in enforcing his legal power and natural authority. The law will not permit a father to delegate his rights and powers over his infant to the mother; and therefore if the utmost effect were given to the separation deed, it would only place the infant in the position of a fatherless child.

It is the settled rule of the court that a father—

(a) Reported by E. S. ROCHE, Esq., Barrister-at-Law.

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*less ward must be brought up in the religion of its father, the only exception being that where an infant ward is of sufficient age and intelligence to have received and formed, and has received and formed other religious convictions, strong and apparently fixed, the court will shrink from the consequences of any attempt to disturb them.*

*The court will not allow its female ward to run the risk of being brought up in opposition to the views of mankind generally as to what is moral, decent and womanly, merely because her mother differs from those views.*

THIS was an appeal from an order of the Master of the Rolls. A petition was presented by the Rev. Frank Besant, vicar of Sibsey, in Lincolnshire, the father of an infant who had been made a ward of court, and the infant, by her father as next friend, praying for an order that the infant might be delivered to her father's custody by her mother, Mrs. Annie Besant. The parties were married in 1867, and they had two children—a boy born in 1869, and a girl, Mabel Emily, the infant petitioner, born in Aug. 1870. Differences having arisen between Mr. and Mrs. Besant in consequence of Mrs. Besant's views as to religion, a deed of separation was executed on the 25th of Oct. 1873, whereby it was agreed that the mother should have the entire custody of the girl for eleven months, and the father for one month in the year, and the father the custody of the boy for eleven months, and the mother for one month in the year. From that time the parties had lived apart, the mother having the care of the girl in the above term, and the father the care of the boy. The petitioner alleged that Mrs. Besant held and propagated atheistical opinions; that she deprived the infant of all religious instruction; and that she had published books or pamphlets of an immoral character, one of which had been already condemned in other courts of competent jurisdiction, and that for these reasons she was unfit to have the custody of the child. The evidence adduced in support of these allegations went to show that in 1874 Mrs. Besant commenced her rationalistic writings, and joined Mr. Charles Bradlaugh in writing for him. In Feb. 1875 she delivered her first atheistical lecture, and she had continued to lecture ever since. From Feb. 1875 to Sept. 1877 the infant petitioner was taught by a Miss Morris, a member of the Church of England. In Sept. 1877 Mrs. Besant went into partnership as publisher with Mr. Bradlaugh, and in that month the child was sent to a day school, and the mistress was instructed that she was to receive no religious instruction, and since that time, while with her mother, she had not in fact received any at all.

An affidavit had been filed by Mr. Besant in which he stated that up to the time of the separation the child had been religiously brought up, and knew the Lord's Prayer and other simple prayers by heart, and that on the child's first visit to him in 1874 he noticed no change. On the second visit, however, in 1875 a great change had occurred; the child had forgotten all her prayers, and on his saying, "Good night, God bless you" to her, she said that her mother had told a servant not to say so to her, and had forbidden her to say any prayers, as there was no God to say them to. In 1876 and 1877 he found that she remembered no prayers, and that she had no religious teaching. He had also given her, during those visits, a New

Testament and a hymn book, and she told him that her mother had taken the Testament away. A Miss Everitt, with whom she had been at school during the months of 1876 and 1877 when she was with her father, gave evidence of a similar character.

On the 8th May 1879, judgment was delivered in the court below (see 40 L. T. Rep. N. S. 445).

Mrs. Besant appealed.

The appellant appeared in person, and submitted there was no ground for removing the infant from her custody, although she did not dispute the main facts alleged against her. It was laid down by the authorities, that where a father had, for valuable consideration, parted with the legal control of his child, he had no right capriciously to resume it, and here Mr. Besant had, by the separation deed, delegated his authority over the child to her, and could not repudiate his own act. She was therefore the child's legal guardian, and the court would only remove the child from her custody on the same grounds which would justify the removal of a child from the custody of its father. She relied on the fact that there was no sort of personal allegation against her. It was not like the case where a child had been removed from the charge of the mother because she had taken to drinking. It was merely a case of speculative opinions, without immorality of life, unlike the case of *Shelley v. Westbrook* (Jacob's Rep. 266) where Lord Eldon's decision depended upon the fact that he considered Shelley's course of life to be immoral. She admitted her views on religious subjects, but she had never taught those views to the child. Under the Elementary Education Act 1870 a parent was not compelled to give his child any religious instruction.

BAGGALLAY, L.J.—The Act does not interfere with the parents' domestic power.

BRAMWELL, L.J.—Is it not that the Legislature contemplated that as a certainty some religious education would be given.

Mrs. Besant submitted she was in this position, that she could give the child any religious instruction she liked, or withhold it altogether. The Act 9 Will. 4, c. 35, imposing a penalty on persons holding blasphemous opinions was obsolete, and, therefore, there was, in substance, nothing illegal in the opinions which she held. With regard to the alleged immoral book, it contained no more than would be found in any medical work, and very much the same things as the Government allowed to be taught to young girls in their physiological classes at South Kensington. The "Fruits of Philosophy" was written by an eminent physician, Dr. Knowlton, of Boston, in the United States, and the book had been sold by various persons in England, without molestation for fifty years. She relied upon the remarks of the Lord Chief Justice in summing up to the jury, before whom she and Mr. Bradlaugh had been tried for the publication of the book. His lordship spoke of the evil which had resulted from over population, and of this book as a scientific work. The jury, though they gave a verdict of "guilty," coupled it with a statement, that the act had been done with no wrong motive. The conviction had been quashed, and therefore there had been both legal and moral success in the case. With regard to the question of her right of access to the infant, she relied upon *Re Agar-Ellis* (39 L. T. Rep. N. S. 380; L. Rep. 10 Ch. Div. 49).

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*Bardwell*, for the father, said that no objection had ever been raised to Mrs. Besant having reasonable access.

Mrs. Besant was proceeding to draw their Lordships' attention to the judgment of the Master of the Rolls, when—

JAMES, L.J., said:—It is not necessary to adopt the opinion of the Master of the Rolls, or his strong language: but I think you have not dealt with the important part of the case. The question is, what would be the effect on the future prospects of the young lady from your devoting yourself, perfectly conscientiously, to a sort of martyrdom for the propagation of your opinions?

Mrs. Besant submitted that her daughter's social position would be lower in the family of a poor country clergyman, than with herself. The father's means were such that he could only give the child a third-rate education; whereas, if the child were left with the mother it would have the best education which could be obtained.

*Bardwell* (with whom was *Ince*, Q.C.), for the Rev. F. Besant, contended that the facts stated in the affidavits would justify the court in removing the infant from the custody of her mother. The father could not rid himself of the duty of seeing to the child's religious teaching, and under the Infants' Custody Act, 1873, the court was bound to refuse to enforce the separation deed if it considered it would not be for the infant's benefit. In the case of *Vansittart v. Vansittart* (31 L. T. Rep. 4; 2 De G. & J. 249), it was held that the provision in a separation deed giving the mother the entire custody of the children was contrary to public policy as interfering with the due discharge of the father's duties with respect to them. The only question here was whether it was for the good of the child that she should be taken from her mother. The published pamphlets showed that Mrs. Besant had no religious belief whatever, and the evidence showed that the child had no religious training and he submitted it would be most injurious to the welfare of the child if this system were continued. He also referred to,

*The Countess of Westmeath's case*, note to *Lyons v. Blenkin*, Jacob's Rep. 251; *Simpson on Infants* (1875), p. 139.

JAMES L. J. intimated that the court did not require to hear counsel for the respondent any further.

Mrs. Besant in reply contended that the Countess of Westmeath's case did not touch the present case, for there the husband was willing to receive his wife, who had absented herself, while here the husband had taken action to prevent his wife from returning to him. She denied that any stigma would attach to the child from its connection with her. On the contrary there were solid advantages to the child in living with her mother, as the father had no resources, and therefore could make no provision for her. If the child were allowed to be brought up by a third person, the mother being permitted to have free access, she was willing to set apart the annual sum of 110*l.* which she was to receive under the separation deed, to be accumulated for the child till she was twenty-one. That was the solid consideration she was willing to give.

JAMES, L.J.—Have you anything to say to this point; if Mr. Besant were dead, would not the

child have to be brought up in the father's religion, according to the rule of court?

Mrs. Besant was aware that of two possible guardians, one a Christian and the other not, the court would prefer the former, but she submitted that the rule of court was not applicable in this case.

JAMES, L.J., delivered the written judgment of the court as follows:—We have not in this case to consider any question as to the exercise of the power of the court to deprive a father of the paternal power over his children which the law recognizes as of the essence of that family constitution which lies at the foundation of our social organization. We have not to inquire, and we will not discuss, whether the things which are alleged as the grounds for removing the infant ward from the custody or control of the appellant, her mother, would or would not, if alleged against a father, have afforded sufficient ground, or any ground, for depriving him of his legal power and natural authority. On the other hand, we have not, having regard to the way in which the case has been presented to us on behalf of the respondent, as based entirely on the question of what is for the infant's good, to consider whether the father is or is not to any extent precluded by his own contract from asking for the assistance of the court in enforcing such power and authority. The father did by a separation deed, executed subsequently to the Act 36 and 37 Vic., cap. 12, for valuable consideration covenant as follows—viz., that, "Except during one month in every year hereinafter provided she, the said Annie Besant, may have the said Mabel Emily Besant so long as she shall continue an infant, to reside with her, the said Annie Besant, or where she shall from time to time direct, and that except as aforesaid she, the said Annie Besant, shall have the sole custody and control of the said Mabel Emily Besant free from interference or interruption on the part of the said Frank Besant." [The deed also provided that Mr. Besant might in each and every year for one month have the infant daughter to reside with him, where he should from time to time direct, and that during such period he should have the sole custody and control of her, free from interference or interruption on the part of Mrs. Besant.] And it may be necessary in some other case, or on some other occasion, to consider and determine what the exact effect is of such a covenant read with the provision of the Act, which says, (section 2), "No agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother; provided always that no court shall enforce any such agreement if the court shall be of opinion that it shall not be for the benefit of the infant or infants to give effect thereto." Indeed, we are informed that as between the husband and wife, parties to this proceeding, an appeal is likely to be presented to this court from a decision pronounced in a suit brought for determining their rights under the deed of separation. The appellant has contended that that deed has placed her with respect to the infant in the same position as the father would have been in if he had not executed it, amounting, in fact, to a delegation to her in respect of the

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infant of his rights and powers. Such a contention is, of course, untenable. No such substitution or delegation is possible by our law. For the purposes of this petition the utmost possible effect that could be given to such a deed would be that, as between the husband and wife, it created a personal disability in the former to exercise or to allege his parental power and authority in removing, or for the purpose of procuring the removal, of the child from her custody and control. But assume—and this is a very strong assumption—that it has in this respect the utmost effect contended for by the appellant, it only places the ward in the same position as a fatherless child, as the child of a father who is dead or of unsound mind, or otherwise incapacitated. And the court has, on that assumption, to deal with the ward accordingly. Now there is nothing more clearly established as the settled rule of the court than this: that it is the duty of the court to take care that a fatherless ward is brought up in the religion of the father. The only exception is that where an infant ward is of sufficient age and intelligence to have received and formed, and has received and formed, other religious impressions and convictions, strong and apparently fixed, the court shrinks from the consequences of any attempt on its part to disturb them. But, in view of this possible result, the court also and always takes what care it can to interfere at a sufficiently early period to prevent the ward from receiving such impressions. This consideration would have been sufficient, and is, in our judgment, sufficient alone to determine the question on this petition. It would be impossible for the court to allow its ward, a Christian child, the child of a Christian father, baptized in the Christian church, to remain under the guardianship and control of a person who professes and teaches and promulgates the religious, or anti-religious opinions which the appellant avows that she professes and intends to persevere in teaching and promulgating. We have nothing to do with the strength of the conscientious motives by which, as she alleges, she is impelled so to profess, teach, and promulgate. In the absence of the father (the father being assumed to be practically absent) the court is the real guardian of the infant, and must perform its duty to the ward accordingly, and, if necessary, wholly irrespective of the convictions or wishes of the mother, and by separating the child from her. It is a plain imperative duty which the law casts on the court; it is the plainest right of the infant ward. The same duty and the same right would exist if the child were the child of a Jew, a Parsee, a Mahomedan, or 'Buddhist. But, although this is, as we have said, alone sufficient for the determination of the case before us, we are bound to dispose of other matters, the matters on which the judgment of the court below mainly proceeded. The appellant has not only taught what she calls matters of speculative opinion in religion, but has published other works which she avers to be in the domain of physiology, of medical science, and political economy, some of which works she herself has written. She avers that she has done this from a desire to promote the happiness of the poorer millions of her fellow-creatures and from a conscientious conviction that she is doing a good work. From the particular nature of the topics which she has chosen to select they may easily be so handled or so published as to be immoral, inde-

cent, and corrupting. One of those publications was the subject of a prosecution and a trial, and after a hearing, in which everything that was alleged, with great ability, by the appellant and by her co-defendant was listened to patiently, and after a charge, a careful charge, in many respects favourable to the defendants, as is shown by the appellant's quotations from it to us, the jury found a verdict as follows:—"We are unanimously of opinion that the book in question is calculated to deprave public morals; but, at the same time, we entirely exonerate the defendants from any corrupt motives in publishing it." The court, evidently disposed to give every weight to the latter part of the finding, asked the defendants if they would undertake to discontinue the publication of a work which had been so stigmatized by an impartial jury. This they refused to do, and, accordingly, a severe sentence was passed on them. It is true that, on a technical objection, the proceedings were quashed, but that is, in our judgment, wholly immaterial to any question before us. We have it before us that the appellant was found guilty by a jury of publishing a work stigmatized by them as being calculated to deprave public morals, and that she, in spite of that finding, determined to persist, and did persist, in publishing that work. That the jury were right in their finding the judges of the Court of Queen's Bench had no doubt, and we are constrained to say that we entirely concur. The other works charged are substantially of the same character. It is impossible for us not to feel that the conduct of the appellant in writing and publishing such works is so repugnant, so abhorrent, to the feelings of the great majority of decent Englishmen and Englishwomen, and would be regarded by them with such disgust, not as matters of opinion, but as violations of morality, decency, and womanly propriety, that the future of a girl brought up in association with such a propaganda would be incalculably prejudiced. The appellant contends that these are unfounded and unwarranted antipathies and prejudices, like those with which rival sects were wont to regard one another. But the court cannot allow its ward to run the risk of being brought up, or growing up, in opposition to the views of mankind generally as to what is moral, what is decent, what is womanly or proper, merely because her mother differs from those views, and hopes that by the efforts of herself and her fellow-propagandists the world will be some day converted. If the ward were allowed to remain with the mother, it is possible, and, perhaps, not improbable, that she would grow up to be the writer and publisher of such works as those before us. From such a possible future the Master of the Rolls thought it his duty to protect her, and we have no hesitation in saying that we entirely concur with him. Removing the ward from her mother, the proper course was to restore her to her father, against whom there has been in this matter no allegation. With regard to the access of the mother to the child, as to which we have been asked to vary the order, there is nothing in the order as it stands which would prevent an application to the Judge in Chambers for all proper directions in that respect, and he has since given directions, and we cannot on this hearing give any further or other directions on the subject. We cannot and do not anticipate that he will not exercise his judicial discretion

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with all consideration for the appellant. The appeal must be dismissed, with costs to the extent of the security (20l.) given by the appellant.

*Appeal dismissed.*

Solicitors for the respondent, *Scott, Jarman and Trass.*

### SITTINGS AT WESTMINSTER.

*Feb. 27 and March 22.*

(Before BRETT, COTTON, and THESIGER L.JJ.)

GIRDLESTONE v. THE BRIGHTON AQUARIUM COMPANY. (a)

*Profanation of the Lord's Day*—21 Geo. 3, c. 49, ss. 1, 4.—*Action for penalties—Covin and collusion.*

*A judgment recovered in an action by arrangement between the parties in order to protect the offenders against bonâ fide actions for the penalties is covinous and collusive.*

The plaintiff sued the defendants to recover a penalty under 21 Geo. 3, c. 49, s. 1. for keeping open the Brighton Aquarium on a Sunday, 15th Aug. Subsequently to the issuing of the writ in the plaintiff's action, the solicitor of the defendants obtained permission from one B. to instruct a solicitor to bring an action in B.'s name for penalties incurred for keeping the Aquarium open on the 15th Aug. and the several Sundays intervening between that date and the 7th Oct.; it being understood that B. should not issue execution or claim the penalties, but that the company might do what they pleased with the judgment so to be obtained in B.'s name. At the time of making this arrangement neither B. nor the solicitor to the company were aware of the plaintiff's action. The object of the arrangement with B. was to protect the company against any action which might be brought for any of the several penalties, and also to obtain as early as possible a remission of the penalties by the Home Secretary under 38 & 39 Vict. c. 80. B. had nothing more to do with the action brought in his name. Judgment was signed by default on 28th Oct. This judgment the defendants pleaded in bar of the plaintiff's action, and the plaintiff replied that the judgment was obtained by covin and collusion.

*Held, that the judgment obtained under B.'s name was no bar to plaintiff's action, because it was in reality no judgment, as B. was only a nominal plaintiff, and the plaintiff and defendants were in substance identical.*

*And per Cotton and Thesiger, L.JJ., that, inasmuch as the result of the proceedings in B.'s action was to defraud and prejudice a third party, the judgment could not be a bar to plaintiff's action, being covinous and collusive.*

THIS was an appeal by the defendants from a judgment of the Exchequer Division, in an action to recover a penalty under 21 Geo. 3, 49. The facts (b) are stated as far as material in the report

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

(b) By 21 Geo. 3, c. 49, s. 1, "Any house, room, or other place which shall be opened or used for public entertainment or amusement . . . upon any part of the Lord's Day, called Sunday, and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place; and the keeper of such house, room, or place shall forfeit the sum of 300l. for every day that such house, room, or place shall be opened or used as afore-

of the proceedings in the court below (reported 38 L. T. Rep. N. S. 358; 1. Rep. 3 Ex. Div. p. 137), and in the judgment of Cotton, L.J.

*O. Russell, Q.C. and C. F. Macdonell (McMillan with them) for the appellants.*—The true definition of covin is "a secret assent determined in the hearts of two or more to the defrauding and prejudice of another" (Co. Lit. 357 b). Therefore, such a plea as this cannot be established without proving fraud, which is also implied in the word collusion. Covin and collusion are made penal by stat. 4 Hen. 7, c. 20, and therefore the plaintiff who alleges them must prove as strictly as upon an indictment, and he must prove these ingredients, none of which are present here, viz., two parties (*Trasham's case* 9 Rep. 195); fraud essential (*Maddowcroft v. Huguenin*) (4 Moo. P.C. 386); prejudice to third party. If two persons take a case by consent, and on proper materials, this is not collusive:

*Snaw v. Gould*, 1. Rep. 3 H. L. 55;

*Donegal v. Donegal*, 3 Phill. Ecc. Cas. 601.

Secondly, the rule that the first writ in point of date acquires a vested right is repealed by implication by the Uniformity of Process Act (2 Will. 4, c. 39). But even if the rule did exist, the plaintiff could not avail himself of it, because his writ does not specify for what Sunday he sues. They also cited

*Perry v. Maddowcroft*, 10 Beav. 122;

*Garth v. Cotton*, 3 Atk. 758;

*Hutchinson v. Thomas*, 2 Lev. 141;

*Sperry's case*, 5 Rep. 123;

*Combe v. Pitt*, 3 Burr. 1423;

*Viner's Abr.* VI. p. 475.

Sir Hardinge Giffard (Solicitor-General), Waddy, Q.C., and Bosanquet for the respondents.—There can be no question that the 15th Aug. was the day in respect of which the plaintiff sued, and the point was not taken at the trial. Covin does not *ex vi termini* require two parties. It is enough that the action was not brought *bonâ fide* for the purpose of recovering the penalties, and it is immaterial that the motives of the parties were in other respects good. Here Rolfe was merely nominal plaintiff, and for the purpose of overriding an Act of Parliament, therefore the action was not *bonâ fide*. Protective actions are expressly within the meaning of the statute of Hen. 7, and for this purpose it is enough that there was an agreement that no penalty should be recovered. The priority of respondent's writ makes him entitled, and the company should have pleaded this against plaintiff. He cited

*Chaucer's Prologue*;

*Year Books*, 39 Hen. VI. Mich. Term, No. 26, p. 19.

*Macdonell in reply.*

*March 22.*—The following judgments were delivered.

BRETT, L.J.—This case was tried before Cleasby, B., and it seems to me that his direction to the jury amounted to this, that they might find that the previous judgment which had been obtained had no effect, although they might be of opinion

said on the Lord's Day to such person as will sue for the same. . . .

By 38 & 39 Vict. c. 80, s. 1, "It shall be lawful for her Majesty to remit in whole or in part any penalty, fine, or forfeiture imposed or recovered for any offence under the said Act;" 21 Geo. 3, c. 49, "Whether on indictment, information, or summary conviction, or by action, or any other process."



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that there was no fraud. The Exchequer Division, after the jury had found a verdict for the plaintiff, confirmed this ruling. Now if it were necessary, in order to support the judgment of the court below, to say that there had been any fraud, or anything which could be called fraud, on the part of anyone, I could not agree to that, for in my opinion there was not a symptom of any fraud, but what was done was an honest transaction, and there was no harm in it morally. There was a division of opinion among different people as to the propriety of suing for and recovering the penalties imposed by this Act of Parliament, and that being so, the solicitor for the defendants requested a person, to whose mind it appeared that the penalties ought not to be recovered, to sue the defendants for a penalty under the Act. He had two intentions in so doing, first, that the judgment which he recovered should be an answer to any other action which might be brought against the defendants for the same cause; and, secondly, that the Home Secretary might remit the penalty which the defendants had incurred. Neither object was illegal or immoral; what was done was done for the purpose of protecting the company. It was not shown that the person who sued the defendants at the request of their solicitor knew that the other action had been commenced, but in my opinion that would be immaterial. I think the defect was brought about by the over caution of the defendant's solicitor, for, if Rolfe had instructed some other solicitor, and had sued the defendants, although he might have been bound in honour not to exact the penalty when he had obtained judgment for it, I think there would have been no covin and collusion. But the defendants' solicitor requested Rolfe to allow him (the defendants' solicitor) to bring the action, using Rolfe's name as plaintiff; but Rolfe had no control over the proceedings, and did not instruct any one to act on his behalf, but only lent his name for the purpose of the action. This shows, in my mind, that the suggested plaintiff, Rolfe, was really no plaintiff at all, but that the company were in reality both plaintiffs and defendants. Therefore, although in form there is a judgment, there is in reality no judgment whatever. If the plaintiff in this case had pleaded in reply, not that there was covin and collusion, but had pleaded a reply in which the facts were stated, it would have been shown that there was no judgment which could be held to be valid. Therefore I am of opinion that there was no judgment, and on that ground alone I am a party to affirming this decision.

COTTON, L.J.—This was a motion by the defendants by way of appeal from the decision of the Exchequer Division for a new trial on the ground of misdirection by the judge before whom the case was tried. The action was to recover a penalty under the Act 21 Geo. 3, c. 49. This Act makes the penalty a debt due to the person who sues for it. The defendants pleaded a judgment in respect of the same offence, that is, keeping open the Aquarium on Sunday the 15th of August obtained at the suit of Rolfe. The plaintiff replied that the judgment was obtained by covin and collusion, and the jury found for the plaintiff on this issue, and there was a verdict and judgment for the plaintiff. There was an application to the Exchequer Division for a new trial, but that court refused to interfere, hence the appeal to us. This

action was commenced on the 17th Aug. 1875. There was evidence at the trial, that in October the solicitor of the defendants saw Rolfe, and that at his request Rolfe authorised him to commence in the name of Rolfe an action against the company for penalties incurred for keeping open the Aquarium on the 15th Aug. and on the Sundays intervening between that day and the 20th Oct., that the solicitor of the company accordingly instructed the solicitor who appeared on the record for Rolfe, that this solicitor received no instructions in the matter from Rolfe, that on the 28th Oct. the company suffered judgment by default, that this judgment had never been enforced, and that although there was no positive agreement that the judgment should not be enforced against the company, there was an honourable understanding between Rolfe and the company that the action brought in his name was to be a protective action, and that Rolfe should not issue execution. One of the objects in allowing Rolfe to obtain judgment was to ascertain in an action in which the plaintiff was not hostile whether the Home Secretary would exercise the power given to him by a recent Act, of preventing penalties being enforced, and it was proved that till after the judgment pleaded was confessed, neither Rolfe nor the solicitor who appeared as his solicitor on the record knew of the present action. On this evidence the defendants contended that Rolfe had no intention of defeating the claim of the plaintiff in the present action, and that his intention to protect the company was not sufficient to support the reply of covin and collusion. The learned judge, in summing up, in effect, told the jury that it was not necessary for the support of this reply of covin and collusion to show that Rolfe knew of the plaintiff's action, that even though the object of the company in procuring the action to be brought was to obtain the decision of the Home Secretary, the judgment would be one obtained by covin and collusion, if in fact there was no intention to take out execution, or otherwise enforce the judgment, and if the intention was to protect the company. The jury on this direction found for the plaintiff, and I am of opinion that there was no misdirection, and that there was ample evidence to support the verdict. There was much argument before us as to the meaning of the word covin. It may be assumed that the meaning of the reply is that the judgment was obtained by an agreement between Rolfe and the defendants the company. For even if the word covin does not of itself import an agreement between two, covin and collusion do. I am also of opinion that to make an agreement covinous, there must be something in it which in the view of the law is deceit. Now, in an action for penalties the plaintiff is, ordinarily and in the absence of agreement between him and the defendant, a person independent of and adverse to the defendant, seeking to obtain a judgment as a means of enforcing for his own benefit payment of the penalty. If in such an action, though the plaintiff is apparently independent of the defendant, he has by agreement with the defendant allowed his name to be used as plaintiff, and authorised the defendant, or his solicitor, to instruct a solicitor to act for him, the nominal plaintiff, and there is an agreement, or understanding, that judgment in the action shall not be enforced, but used as a protection to the defendant against other actions,



either already brought, or which may be brought, to recover a penalty given by statute; then the action is one in which the company are in substance both plaintiffs and defendants, and this agreement or arrangement is an agreement or arrangement that the position of the parties to the action, apparently hostile, shall be friendly; that the action and judgment, which purport to be an attack on, shall in fact be a protection to the defendant, an agreement that the reality shall be different from what is represented. This, in my opinion is, even in the absence of any intent to defraud, deceit, and, in my opinion, though the agreement or arrangement be not legally binding, the judgment confessed or obtained under it will have been obtained by covin and collusion, and cannot be relied on by the defendant in answer to an action in respect of the same matter brought by any other person, and the learned judge so directed the jury. It was urged upon us that, to support the reply of covin and collusion, it was necessary that the agreement should be intended to deprive or defraud the plaintiff in the present action of his claim, that Rolfe had no such intention, and that neither he nor his solicitor knew of the present action till after judgment was confessed in Rolfe's action. But it was stated by the solicitor of the defendants that the object of the action commenced in Rolfe's name was to protect the defendants, that is, to defeat the claim of any person who might endeavour to obtain judgment for penalties for keeping open the aquarium on any Sunday covered by Rolfe's action, and, if so, in law the parties to the agreement must be considered to have intended to defeat the claim of the plaintiff as one of the general body against whose claims Rolfe's action was intended to protect the defendants. It was strongly pressed in support of the appeal that the object of Rolfe's action was to obtain a judgment on which the decision of the Home Secretary could be taken as to the course which he would adopt, and that this was disregarded by Cleasby, B. In my opinion he was right in so doing. It is unnecessary to consider whether the intention to apply to the Home Secretary, as if Rolfe were an independent plaintiff, seeking to enforce payment of the penalties, while in fact he was, as plaintiff in the action, a mere name used by the company, by means of which name the company had obtained a judgment for their own protection, was not of itself an argument against the validity of that judgment. But the circumstance that one of the objects was to apply to and obtain the decision of the Home Secretary does not, in my opinion, make the judgment less covinous and collusive if it was obtained in an action in which there was not any real plaintiff, and under an arrangement that it should be used, not to recover penalties from the defendants, but to protect the defendants from the claims of others who might probably sue. I may add that the decision might, independently of the grounds to which I have already referred, be supported on the ground that in substance there was no judgment, the plaintiff on the record having been under the circumstances the defendant under another name. In my opinion the appeal fails, and must be dismissed with costs.

THESSER, L.J.—I also am of opinion that the judgment of the court below ought to be affirmed. The defendants plead in bar to an action to recover

a penalty, a judgment in favour of a third party for the same penalty. That judgment was obtained in an action which was commenced at the request of the defendants' solicitor while the plaintiff's action was pending, and was carried through to judgment by the intervention of a solicitor employed by the defendants, and without the interference, in any way, of the nominal plaintiff. It was an action not brought for the purpose of giving the person named as plaintiff the fruits of it, or indeed any benefit whatever from it, but immediately for the protection of the defendants from any action brought, or to be brought against them in respect of the penalties which were claimed in it, and mediately for the purpose of taking the Home Secretary's opinion upon the point whether he would remit such penalties. Apart from any question upon the pleadings, is it possible that a judgment so obtained, and in such a suit, can bar the plaintiff's action? Was the action in which it was obtained in substance anything more than one in which the defendants were the real plaintiffs as well as the nominal and real defendants? I think not, and if it was not, then the mere statement of the character of the action is a sufficient argument against the judgment obtained in it operating as a bar to the present action. But the plaintiff has, in his reply to the statement of defence, impeached the judgment upon the special ground of covin and collusion. The argument, therefore, before us has been addressed to the question whether the facts of the case establish that the judgment is so impeachable. In dealing with this question, I assume that Rolfe, when he assented to an action being brought in his name, was unaware of the fact that the present action had been commenced. I assume, too, that the jury have negatived fraud in the sense of there having been a wicked mind and intent on the part of Rolfe and the defendants, or either of them, in instituting, or assenting to the institution of the proceedings which led to the judgment. I think, nevertheless that they were legally guilty both of covin and collusion. Although the word "covin" is sometimes, and especially by old writers, used in the sense of a trick or contrivance devised by one person alone, I think that in a case like the present, when it is used in conjunction with the word "collusion," it does import a trick or contrivance planned by both the parties to the transaction which is alleged to be tainted by it. I go further, and take it to mean a trick or contrivance which must be proved to be—using the language in Co. Litt. 357 (b)—"to the defrauding and prejudice of another." Even if we assume all this, the contention of the defendants still appears to me to be inadmissible. If Rolfe had known of and intended to defeat the plaintiff's *bonâ fide* action by permitting a sham action to be brought in his own name, it is clear that he would have been a party to a trick or contrivance for defrauding the plaintiff. Prejudicing a *bonâ fide* action for a statutory penalty by the secret contrivance of a sham one can be nothing less than defrauding. Indeed, it is hardly disputed on the part of the defendants that, under such circumstances, the allegation of covin and collusion would be established. But, if so, surely the intention to prejudice or defraud a class of persons, including the plaintiff, must equally establish the allegation, although the plaintiff was not known to form one of the class

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intended to be prejudiced or defrauded. There is legislative authority for this view;—the stat. 4 Hen. 7, which was passed for the purpose of preventing proceedings taken in good faith to recover penalties being defeated by sham protective actions, made punishable, under the name of covin and collusion, such actions, not only when brought for the purpose of defeating *bonâ fide* proceedings already taken—in other words, prejudicing a particular individual—but also of defeating such proceedings, although not yet commenced—in other words, of prejudicing an individual not yet identified and known. The statute also provided that such covin and collusion might be averred in answer to any plea setting up a recovery in a covinous and collusive action in bar to *bonâ fide* proceedings. I would only add that, although, as has been suggested, the motive of the defendants and Rolfe in endeavouring to obtain the decision of the Home Secretary as to the remission of penalties may have been good, and the end, the keeping the Aquarium open on Sundays, may have been a desirable one, it appears to me impossible to hold with reason that the co-existence of such motives or such an end, with motives, ends, and acts which, standing by themselves, constitute covin and collusion, can make this case any the less one of covin and collusion, or in any way remove or lessen the legal consequences which covin and collusion entail.

*Appeal dismissed.*

Solicitors for defendants, *Benham and Tindell.*

Solicitors for plaintiffs, *Bridges, Sawtell, Heywood, and Co.*

March 6 and 7, and April 9.

(Before BRETT, COTTON, and THESIGER, L.JJ.)

REUTER, HUFELAND, AND CO. v. SALA AND CO. (a)  
Sale of goods—Divisible contract—Shipment  
“per vessel or vessels”—Rescission.

*Plaintiffs contracted to sell to defendants “about 25 tons (more or less) Penang black pepper, Oct. and Nov. shipment, from Penang to London, per sailing vessel or vessels . . . the name of the vessel or vessels, marks, &c., to be declared to the buyer in writing within sixty days from date of bill of lading.” Plaintiffs within the contract time declared 25 tons of pepper shipped in one vessel, of which 20 tons were properly shipped and declared, but 5 tons were shipped in Dec., and defendants in consequence refused to accept the whole quantity. Subsequently plaintiffs declared 5 tons of Nov. shipment in substitution for the 5 tons shipped in Dec., but this declaration was made more than sixty days after date of bill of lading, and defendants refused to accept it. On the vessel arriving in England, plaintiffs as a performance of their contract, tendered the 20 tons properly shipped and declared, and the 5 tons properly shipped but declared after the contract time had elapsed. Defendants refused to accept any of the pepper so tendered, and plaintiffs claimed damages for such refusal.*

*Held, per Cotton and Thesiger, L.JJ. (Brett, L.J. dissenting), that the contract time for declaration was an essential condition; that the contract was not divisible; and that defendants therefore were entitled to reject the whole 25 tons.*

*Brandt v. Lawrence discussed and distinguished.*

(a) Reported by W. AFFLETON, Esq., Barrister-at-Law.

*Per Brett, L.J.: The defendants were bound to take delivery of the 20 tons, as the contract was divisible, and the incurable failure of plaintiffs to deliver the 5 tons according to the contract was a breach as to part only of the consideration, which could be compensated in damages.*

APPEAL from a decision of Lord Coleridge, C.J.

The action was to recover damages for loss alleged to have been sustained through the defendants' refusal to take delivery of 25 tons of pepper under a contract of sale made between the plaintiffs and defendants.

At the trial, before Lord Coleridge, C.J. and a special jury, the learned judge ordered judgment to be entered for defendants.

The plaintiffs appealed.

The facts of the case and the arguments in the Court of Appeal fully appear in the judgments (*post*).

*Benjamin, Q.C. and Pollard for plaintiffs.*

*Watkin Williams, Q.C. and J. C. Mathew for defendants.*

The following cases were cited and referred to during the arguments:

*Boswell v. Kilborn*, 14 Moore P. C. O. S. 309;  
*Shand v. Boswell*, 36 L. T. Rep. N. S. 857; L. Rep. 2 App. Cas. 455; 46 L. J. 561, Q. B.;  
*Roper v. Johnson*, 28 L. T. Rep. N. S. 296; L. Rep. 8 C. P. 167; 42 L. J. 65, C. P.;  
*Graves v. Legg*, 2 H. & N. 213; 36 L. J. 316, Ex.;  
*Simpson v. Crippin*, L. Rep. 8 Q. B. 14; 42 L. J. 28, Q. B.;  
*Brandt v. Lawrence*, L. Rep. 1 Q. B. 344; 46 L. J. 237, Q. B.

*Cur. adv. vult.*

April 9.—The following judgments were delivered:

BRETT, L.J.—In this case the facts which I consider material are that a contract of purchase and sale was entered into between the plaintiffs and defendants on the 29th Dec. 1876. By it the plaintiffs sold to the defendants about 25 tons, more or less, Penang black pepper, October and November shipment from Penang to London, per sailing vessel or vessels, at 4½d. per pound. The name of the vessel or vessels, marks, and full particulars to be declared to the buyer in writing within sixty days from date of bill of lading; but, should the vessel or vessels which may apply to this contract be lost before declaration, this contract to be cancelled as far as regards such lost vessel, &c. Should the vessel or vessels and the pepper, or any portion thereof, be lost, this contract to be cancelled for the whole or such portion, &c. Prompt three months from final day of landing; deposit 20l. per cent., and difference on presentation of weight notes; no discount. In fulfilment of this contract the plaintiffs, on the 22nd Jan., within sixty days of the dates of three respective bills of lading of pepper, shipped on board a vessel called the *Borga*, declared in one declaration three distinct parcels of pepper, all on board the *Borga*, thus: S.B.; B. 285 bags, bill of lading dated 29th Nov.; C. 110 bags, bill of lading, dated the 29th Nov.; F. 105, bill of lading, dated the 11th Dec. Two of the parcels, which amounted to 20 tons, were shipped and declared in accordance with the contract, but the third parcel, although declared within due time after date of bill of lading, did not fulfil the contract, because it was not a November shipment. The plaintiffs were asked whether this declaration,

which both parties called a tender, was final, and answered that it was. On the 27th Jan. the plaintiffs asked whether the defendants would accept the December shipment named in the declaration of the 22nd Jan. No definite answer was given, but on the 2nd Feb. the defendants refused the whole, on the ground that a part was not a November shipment. It is somewhat difficult to appreciate the legal effect of this refusal. I know of no legal obligation to accept or reject a declaration which is an act to be done solely by the seller, nor of any legal effect to be given to an alleged refusal to accept a declaration. The highest effect which can be given to this refusal at this time is that it is a notice by the defendant that he does not accept the declaration as good for 25 tons. On the 5th Feb. the defendants wrote to substitute for the December shipment a November shipment, which was also on board the *Borga*. The date of the bill of lading of this lot was the 29th Nov.—that is to say, they offered a Nov. shipment. But they made the offer or declaration more than sixty days after the date of the bill of lading. This was refused by the defendants. The *Borga* arrived in June. The plaintiffs tendered three parcels of Penang pepper, all of November shipment, and amounting in all to 25 tons, being the two parcels of November shipments declared on the 22nd Jan., and the one parcel offered or declared on the 2nd Feb., but which last was not declared within sixty days of the date of the bill of lading relating to it. The defendants refused to accept any part, on the ground, by reference to their former letter as to the declaration, that they would not receive a part if offered, because the whole had not been declared according to contract. Upon this state of facts it is obvious that the declaration of 20 tons, per *Borga*, made on the 22nd Jan. was a different declaration of 20 tons, unless the declaration of so much was rendered nugatory by the wrong declaration of the other 5 tons, the December shipment; and it is equally obvious that after the 28th Jan. the plaintiffs could not make a valid declaration of any November shipment. So that on the arrival of the ship in June the plaintiffs could only tender as well shipped, and also well declared, 20 tons, and could not by any contrivance tender as well shipped, and also well declared, the other 5 tons. The plaintiffs did tender 25 tons. If the defendants had refused on the ground of having 25 tons offered to them, whereof they were only bound to take 20 tons, so that they had left it open to be said that if the 20 tons had been offered to them they might have accepted them, then the tender of the 25 tons must have been bad; but the defendants did not take that point. They refused in terms which amounted to saying that they would not take the 25 tons, nor the 20 tons if offered, because they could not have 25 tons shipped and also declared according to contract. This refusal seems to me to have absolved the plaintiffs from the necessity of tendering separately the 20 tons, and to oblige us to treat the case of liability as if the plaintiffs had tendered the 20 tons at the time when they tendered the 25 tons. The question is whether, if the plaintiffs had tendered the 20 tons only, not being able to tender according to contract any 5 tons to make up the 25 tons, the defendants could have refused to accept the 20 tons. That raises, first, the question, What is the proper con-

struction of the contract? In *Jonasshon v. Young* (4 B. & S. 296) an action was brought for not accepting coals. The contract was that the plaintiffs would sell and deliver to the defendant as many coals, equal to a former sample cargo, as a steamer called the *Great Northern* could fetch in nine months, proceeding to and from Sunderland, from and to London, backwards and forwards, in successive voyages, the steamer to be sent by the defendants, and the plaintiffs to ship the coals at 5s. 9d. per ton, payments at the beginning of each month for the preceding month's shipments, less 2½ per cent. discount. The defendants pleaded that on the first voyage the plaintiffs shipped a cargo not equal to sample. To this plea there was a demurrer. The failure of the first cargo was therefore admitted. It was impossible that the plaintiffs could by any subsequent deliveries satisfy the contract if it was one and indivisible; but the court held that the plea was bad, because the breach by the plaintiff went only to part of the consideration. Now, the consideration for the whole of the defendants' undertaking—which was of course the undertaking to accept and to pay for all (which the plaintiffs were to deliver—was that the plaintiffs undertook to deliver all, and to deliver a cargo each time that the defendants should send the steamer. The judgment is that the failure to deliver the first cargo according to the contract, though an incurable failure, did not absolve the defendants from the duty of accepting the subsequent cargoes, because the failure as to the first cargo was only a breach of a part of the consideration moving from the plaintiffs. Apply that case to the question raised is this. Here the whole consideration for the defendants' promise to accept the pepper was the plaintiff's promise to deliver the whole 25 tons. The plaintiffs were ready and willing to deliver 20 tons, but failed by an incurable failure to be able to deliver the other 5 tons. The case cited answers that the failure of the plaintiffs is a breach only of part of the consideration, and the defendants are not absolved from the duty of accepting the 20 tons. In *Simpson v. Crippin* (L. Rep. 8 Q. B. 14) the action was for non-delivery of coal. The defendants agreed to supply the plaintiffs with from 6000 to 8000 tons of coal, to be delivered into defendant's waggons, at plaintiff's collieries, in equal monthly quantities during the period of twelve months, from 1st July, at 5s. 6d. per ton; terms, cash monthly, 2½ per cent. discount. The plaintiffs failed to send waggons according to the contract in the first month. That was an incurable failure. Their part of the whole contract never could afterwards be fulfilled. The judge told the jury that, as the plaintiffs did not intend to break the contract month by month, and only broke it for the first month's delivery, that did not justify the defendants in point of law in cancelling the contract. "It cannot be denied," says Blackburn, J., "that the plaintiffs were bound in every month to send waggons capable of carrying at least 500 tons, and that by failing to perform this term they have committed a breach of the contract, and the question is whether by this breach the contract was determined. The defendants contend that the sending of a sufficient number of waggons by the plaintiffs to receive the coal was a condition precedent to the continuance of the contract. No sufficient reason has been urged why damages would not be a com-

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compensation for the breach by the plaintiffs, and why the defendants should be at liberty to annul the contract. Apply the case to the present. The point taken on the behalf of the defendants is that, by reason of the incurable breach as to the five tons, the plaintiffs are entitled to rescind the contract as to the twenty tons. The answer is, no sufficient reason has been shown why damages would not be a compensation for the breach by the plaintiffs as to the five tons. In *Brandt v. Laurence* (L. Rep. 1 Q. B. Div. 344) the action was for non-acceptance of oats. By the contract the defendant bought of the plaintiff 4500 quarters of Russian oats, at 28s. per quarter delivered 304lbs., including freight and insurance, to London; shipment by steamer or steamers during February; payment by cash on receipt of and in exchange for shipping documents, less interest at one-fifth per cent. for the unexpired portion of three months from date of bill of lading. In fulfilment the plaintiff tendered 11,392 quarters, per *Winsland*. The defendant, for a given reason, refused to accept them. The plaintiff afterwards tendered the balance of quantity brought by a ship called the *Oxford*, but brought too late. At the time of action brought, therefore, the plaintiff had tendered in good time a part of the oats, but had never tendered, and never could tender, the balance within the terms of the contract, if treated as one and indivisible. It was argued for the defendant that the contract was an entire contract for the delivery of 4500 quarters of oats within a specified time. It could not be split into parts. If the whole was not shipped in time the defendant was entitled to reject the part which was in time. The Q. B. Div. thought that this was not so, because the contract says "Shipment by steamer or steamers." In the Court of Appeal Mellish, L.J., said, "I think the legal inference is that it was intended that the shipment should be made (which might mean might be made) in different parcels, and that the purchaser was bound to accept them as they came, if they were in time;" and, again, "was the purchaser bound to accept that part of the goods which was shipped in time? I am of opinion that he was, because the contract says that the shipment is to be made by steamer or steamers." That judgment was rested solely on the construction of the contract. No reliance was placed on any power of election by the seller to send by two ships instead of one. As the case stood it was the same as if he had only shipped a portion by one ship and had never shipped the other portion by any ship. The late shipment was no shipment according to the contract. Apply that case to the present. The contention here is that the defendant was not bound to accept the twenty tons, because there was no shipment and declaration of five tons according to contract. The question is, was the defendant the purchaser bound to accept that part of the goods which was shipped and declared in time? The answer according to the judges in the Queen's Bench and in error in the case cited is that he was, because the contract says that the shipment is to be, i.e., may be, in sailing vessel or vessels. Mellish, L.J. cited in that case the case of *Simpson v. Crippin* (sup.). It is obvious to my mind that he considered the case before him to be governed by that case, and that case was in its turn in terms founded on *Jonassohn v. Young* (sup.). The chief use of

authoritative cases is to enable us to deduce from them, if we can, a general principle applicable to succeeding similar though not identical cases. It seems to me that the general principle to be deduced from these cases is that, where in a mercantile contract of purchase and sale of goods to be delivered, the terms of the contract allow the delivery to be by successive deliveries, the failure of the seller or buyer to fulfil his part in any one or more of those deliveries does not absolve the other party from the duty of tendering or accepting, in the case of other subsequent deliveries, although the contract was for the purchase and sale of a specified quantity of goods, and although the failure of the party suing as to one or more deliveries was incurable in the sense that he never could fulfil his undertaking to accept or deliver the whole of the specified quantity. The reasons given are that such a breach by the party suing is a breach of only a part of the consideration moving from him; that such a breach can be compensated in damages, without any necessity for annulling the whole contract; that the true construction of such contracts is that it is not a condition precedent to the obligation to tender or accept a part that the other party should have been, or should be always ready and willing and able to accept or tender the whole. A consideration of the mercantile consequences of otherwise construing such contracts seems to me to fortify the one construction and to condemn the other. Suppose in the case of shipments, the seller to have by contracts made abroad provided for all the successive shipments, and to have taken up ships to proceed and call for the successive cargoes, and the first seller to him fails to fulfil his contract, and so that the first shipment fails, the purchaser under the main contract we are discussing may upon one construction suggested throw up the whole contract, although he would be amply recompensed for the partial failure, and throw the loss of all the other purchases and charters upon the seller without any compensation. So if the purchaser has made contracts and fails to take delivery of one parcel, the seller, although he might be amply compensated for the partial failure, would be entitled to ruin the buyer with regard to his forward contracts without any compensation. Again, suppose any one of the ships lost after a perfectly good shipment by several ships, either buyer or seller might at once cancel the whole contract, to the irreparable loss of the other party, although he himself might be amply compensated by a payment in damages. Or suppose a seller to send all the stipulated quantity in one ship, and a jettison to have become inevitable on the voyage, he is to have the whole of the remainder of the cargo left on his hands without compensation, although the buyer might easily be compensated for the short delivery. These considerations show that the rule of construction adopted by the courts is as sound on mercantile as it is on legal considerations; and all the considerations, both mercantile and legal, apply as much and as fully to the present contract as to those cited. The question of the time or mode of payment has nothing to do with the reasoning for or against either view. Moreover, it is most important, in my opinion, that the construction of mercantile contracts should be broad and large, and should not depend on refined logical deductions, or on

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variations either in the terms or the conditions of each particular contract. The contract, for instance, now before us differs as to the period and conditions of payment from that in *Brandt v. Lawrence*, but it differs very little as to the terms of payment from the other cases cited. That difference as to the period of payment makes no difference in the reasons given for the decisions in those cases in which the stipulation as to the payment was not noticed, and in *Brandt v. Lawrence* it is not even reported. I am of opinion that the plaintiff is entitled to recover in respect of 20 tons, leaving the defendant to a cross action in respect of 5 tons.

COTTON, L.J.—This was an action on a contract dated the 29th Dec. 1876, whereby the defendant agreed to buy from the plaintiff 25 tons of pepper, more or less, of October or November shipment, from Penang to London, per sailing vessel or vessels, marks and other particulars to be declared within sixty days from the date of the bill of lading. On the 22nd Jan. 1877 the plaintiffs, by a letter addressed to the defendants, declared 25 tons of pepper, shipped in various parcels on board the *Borga*. Of these 25 tons, 5 had in fact been shipped in December, and were therefore not pepper which according to the contract the defendants were bound to take; and on the 30th Jan. the defendants declined to take the 25 tons. Afterwards, but after the expiration of the time within which the pepper was under the contract to be declared, the plaintiffs declared other 5 tons of pepper, shipped in November, on board the same vessel, in substitution for the 5 tons previously declared, but which were not shipped till December, and to which the defendants had a right to object. The vessel arrived in this country in June, and the defendants refused to take the pepper. Hence the present action, and Lord Coleridge, C.J. decided in favour of the defendants that they were not bound to take the 25 tons of pepper, or any part thereof. The plaintiffs have appealed to this court. The first point urged by the appellants was that the defendants, before the expiration of the time within which under the contract the plaintiffs were to declare the 25 tons, had by their conduct either waived the condition as to time or induced the plaintiffs to believe that the condition would not be insisted on until it was too late for them to declare other 5 tons in substitution for that part of the 25 tons which were shipped in December, and therefore not in accordance with the contract. In my opinion this contention cannot be supported. It was for the plaintiffs to declare 25 tons of pepper of the quality, and shipped at the time, stipulated by the contract, and to do so within a limited time. The defendants were indeed asked whether they insisted on the objection that 5 tons were not of October or November shipment, and did not answer till the 30th Jan. But there is really nothing to support the contention that this delay, if any, was intended to mislead the plaintiffs, and in the absence of evidence from which such a conclusion could be arrived at we cannot release the plaintiffs from the stipulation as to time. It was urged that the rules of courts of equity are now to be regarded in all courts, and that equity enforced contracts though the time fixed therein for completion had passed. This was in cases of contracts such, *exempli gratia*, as purchases and sales of land, where, unless a contrary intention could be

collected from the contract, the court presumed that time was not an essential condition. To apply this to mercantile contracts would be dangerous and unreasonable. We must, therefore, hold that the time within which the pepper was to be declared was an essential condition of the contract, and in such a case the decisions in equity on which reliance is placed do not apply. But then it was urged that the contract was divisible, and that the defendants were bound to take the 20 tons—that is to say that, although 5 tons was a difference which could not be covered by the words “more or less,” under this contract the defendants would be bound to take and pay for any substantial portion of the 25 tons which the plaintiff might be ready and willing to deliver to them; and in support of this contention reliance was placed on the words “per sailing vessel or vessels,” and it was argued that this showed that the contract was divisible. In my opinion it has not this effect. These words do indeed show that the 25 tons might be delivered in several parcels, and possibly might arrive in England at different times. But this is very different from the contention that the defendants, having stipulated for 25 tons, would be bound to take a small portion—say, 5 tons—when the plaintiffs were unable or unwilling to supply the balance of the stipulated quantity. The contract in this case was in December, after the pepper must, in order to comply with the condition of the contract, have been shipped, and I think that the reference in the contract to “vessel or vessels” may well have been intended to obviate any difficulty arising from the circumstance of 25 tons of the required quality of pepper not having been shipped in one vessel. But that is to enable the plaintiff to require the defendants to take and pay for the pepper; there must be the 25 tons, though in different vessels. But it is urged that the decision in *Brandt v. Lawrence* (sup.) has given a judicial interpretation to the words “per vessel or vessels” in a contract which would otherwise be entire and indivisible. I cannot consider that case of *Brandt v. Lawrence* as laying down a general rule of construction, but merely as deciding that the contract in that case, having regard to these words “vessel or vessels,” was divisible. The contract is not stated at length in the report, but we have been furnished with a copy of it. There the contract was entered into before the shipment was under the contract to be made, and payment was to be made in cash on receipt of or in exchange for shipping documents. In that case the seller shipped in a vessel a portion of the oats, and tendered it to the buyer with a view to the supply of the entire quantity, and the whole of the oats in that vessel were oats which complied with the conditions of the contract as to quality and time of shipment, and the seller had therefore under the contract a right to ask for the price in cash for this part of the entire quantity in exchange for the bill of lading. This is, I think, a substantial difference between the contracts in the two cases, and sufficient to prevent the construction put upon the contract in that case affording authority for a decision in favour of the plaintiffs on the present contract. But there is also a difference in the circumstances under which the plaintiffs in this action make their claim, for in the present case the plaintiffs have not severed or

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separated the 25 tons of pepper, which is the subject of the contract, in the only way contemplated by the contract, namely, by shipping it in different vessels, but shipped in one vessel 25 tons, of which they contend the defendants are bound to take the whole. I am of opinion that the decision of Lord Coleridge was correct, and must be affirmed.

**THESSIGER, L.J.**—This is an action brought by the plaintiffs as sellers against the defendants as buyers for the non-acceptance of about 25 tons of black pepper, shipped from Penang to London. The defendants refused to accept any portion of this pepper, while the plaintiffs have contended in this court that the defendants were either bound to accept and take delivery of the whole or at least were bound to take delivery of a portion amounting to about 20 out of 25 tons. The contract between the parties was made on the 29th Dec. 1876, and was as follows. [His Lordship here read the contract.] On the 19th Jan. 1877, the plaintiffs, purporting to act in pursuance of the contract, declared by a vessel called the *Borga* 500 tons of black Penang pepper, which would be equal in weight to about 25 tons in three parcels, the subject of separate bills of lading, viz., 285 and 110 bags under bills of lading dated the 29th Nov. 1876, and 105 bags under a bill of lading dated 11th Dec. 1876. In answer to the declaration, the defendants by letter requested information as to the date of shipment of the pepper. On the 22nd they repeated the request, and on the 24th Jan., having in the meanwhile received no information as to the date of shipment, the defendants asked whether the declaration, or, as they called it, tender of the 19th Jan. was final or not, and were answered on the same day that it was. On the 25th and 26th Jan. the defendants again inquired as to the date when the whole of the pepper was shipped, and on the 27th Jan. the following letters passed between Messrs. Moon, Bower, and Co., acting for the plaintiffs, and the defendants:—"From Moon, Bower, and Co. to Messrs. J. Sala and Co. Jan. 27. We have received the following in reply to your memo. of yesterday's date: 'We beg to acknowledge receipt of your memo. of yesterday's date, and are at a loss to know what you want. We have already furnished you with dates of bills of lading, and which in declaration is always considered sufficient.'" "London, 27th Jan. 1877.—From J. Sala and Co., 108, Fenchurch-street, to Messrs. Moon, Bower, and Co. Pepper cont. 29th Dec. 1876.—We have your memo. of this day. By furnishing us with dates of bills of lading you only fulfil one part of your contract, but the most important for us is the date of shipment, which, according to the contract, ought to have been made at the latest during November. We want, then, to know if you tender the said 500 bags as being all shipped during November." Upon the same day an interview took place between the parties, with the object, so far as the plaintiffs were concerned, of learning whether the defendants would accept the declaration, but nothing definite passed. In point of fact, the shipment of the 105 bags under the bill of lading of the 9th Dec. 1876 had not been made until the month of December, and on the 30th Jan. 1877 the defendants wrote to the effect that they did not accept the declaration, as it was not for the full quantity according to the contract

terms. Upon the 31st Jan. the plaintiffs, through Messrs. Moon, Bower, and Co., proposed by letter an arbitration, to decide whether their tender or declaration constituted a fair delivery according to the contract, and in answer to that letter the defendants on the 2nd Feb. wrote as follows:—"We have your memo. of 31st ultimo. If the pepper you tender is all of November shipment at latest there is nothing to arbitrate upon, and the contract would be in order so far. If any portion of what you have tendered is not November shipment at latest, we reject said tender entirely, and refuse to arbitrate, as the contract has not been fulfilled by you." On the 5th Feb. the plaintiffs substituted for the declaration of 105 bags per *Borga*, under bill of lading of 11th Dec. 1876, a similar number of bags by the same vessel, under a bill of lading of 29th Nov. 1876; but, this declaration being made more than sixty days after the date of the bill of lading to which it referred, the defendants on the same day wrote as follows:—"We have your memo. of this day, and do not admit your tender. If even other reasons did not exist, as you will find by previous correspondence, your tender aforesaid would be out of date." Some correspondence then passed between the parties, upon which, coupled with what passed before and at the interview of the 27th Jan., the plaintiffs found a contention that either the stipulation as to time of declaration was waived, or that the defendants by their conduct had misled the plaintiffs into a belief that the breach of the stipulation would not be relied on, and were estopped from setting up such breach. It does not seem to me that this issue, which would be one peculiarly suitable for a jury, was really intended to be tried, or indeed was tried when the parties dispensed with a jury and took the case before Lord Coleridge alone, and it is not mentioned in his judgment. But, assuming it to be open to the plaintiffs at all, I am of opinion that the evidence wholly fails to support their contention. I gather from the evidence that, down to the time that the declaration was finally rejected, both the parties were standing upon their strict rights, and that the plaintiffs had due warning from the defendants that they at least were doing so, and I can see no ground for the imputation that the defendants wrongfully induced in the plaintiffs the belief that time was waived, or would be, or did anything which could be construed into a waiver or its equivalent. I revert again to the evidence. On the 2nd June the arrival of the *Borga* was advised by letter as follows:—"Memorandum. London, 2nd June 1877. From Moon, Bower, and Co. to Messrs J. Sala and Co. We beg to advise the arrival of the *Borga* from Penang, in which vessel you are interested, as per contract dated 29th Dec." To that letter the defendants, on the 7th June, sent the following answer:—"London, 7th June 1877. *Borga*. We have your memo. of the 2nd inst., advising arrival of above vessel. By our previous memorandums, which we now confirm, you will find that we rejected your tender of pepper by this vessel." On the 26th June samples of the pepper which was included in the declaration of the 19th Jan. as altered by that of the 5th Feb., and all of which was a November shipment, were tendered. The defendants rejected the whole of these samples, and this action was then brought. I have already stated my opinion that there was no waiver of



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the time within which the declaration was to be made, and no conduct of the defendants estopping them from setting up the breach of the stipulation in regard to time, and it follows that the declaration not being in time as regards 5 tons, the plaintiffs cannot maintain their action for the non-acceptance of the whole 25 tons. The argument before us, however, was mainly directed to the question whether the plaintiffs can maintain their action in respect of the 20 tons. I am of opinion that they cannot do so. The subject of the contract is the sale of a specific quantity of a given article, with a margin for a moderate excess or diminution of that quantity, under the words "about" and "more or less." The rule applicable to such a contract, if it were not qualified by other provisions, would be that, subject to the moderate margin, the sellers cannot call upon the buyers to accept any greater or less quantity of the article bargained for than the specified quantity. In the present case, if the 5 tons shipped or declared too late be excluded, the diminution in quantity is clearly beyond the margin. But the contract also provides that the shipment is to be "per sailing vessel or vessels," and that the name of the vessel or vessels, &c., is to be declared within sixty days of the bill of lading. Founding themselves upon these provisions, the plaintiffs contend that they were entitled to call upon the defendants to accept delivery of any substantial portion of the pepper, whatever might be their position or declared intention as regards the remainder, and they rely upon the decision in *Brandt v. Lawrence* (L. Rep. 1 Q. B. Div. 344) in support of that view. The defendants, on the other hand, contend that they were not bound to accept anything less than the whole of the pepper, subject to a moderate margin, except in the case of loss of vessel, or of vessel or pepper, especially provided for by the contract, or at least that under the circumstances of this case they were not so bound. I do not accede to the defendants' contention so far as it rests upon the provisions of the contract relating to the loss of vessel, or of vessel and pepper, for those provisions are, in my opinion, inserted *alio intuitu*. I think they were intended to protect the sellers from any action for non-delivery caused by the happening of the contingency provided for. But I am of opinion that the defendants' contention is otherwise well founded. *Brandt v. Lawrence* (*sup.*) was a case where Russian oats were sold under a contract by which the shipment was to be by steamer or steamers, in a particular month, conditionally upon ice at loading port not preventing it, in which event shipment was to be made immediately after the opening of the navigation. Payment was to be made in respect of any shipment by cash, and on receipt of or in exchange for shipping documents. Under this contract a portion of the oats, together with other oats, the subject of another contract, was shipped, in consequence of ice, after the specified month, but immediately after the navigation was opened, and was refused by the defendants on the ground that the shipment had been made too late. At the time of this refusal the sellers were acting in strict accordance with their contract, and there was nothing to indicate that the contract would not be performed by them in its entirety. Afterwards and beyond the time allowed by the contract the remainder of the oats were shipped, and

were also—but in this case rightly—refused. In an action brought by the sellers for non-acceptance of both parcels of oats, the facts were proved as above stated, and, a verdict having been found for the plaintiffs in respect of the first shipment, a motion for a new trial was refused both in the Queen's Bench Division and on appeal to this court. But in the present case the facts are very different. In the first place the declaration of the pepper named but one ship, and the pepper tendered did in fact arrive by one ship. In the second place there has not been at any time either a declaration or a tender of the 20 tons of pepper which the plaintiffs contend that the defendants are bound to accept, apart from the 5 tons, which upon this branch of the case they admit that the defendants were not bound to accept. The matter seems to stand thus: If the declaration of the 19th Jan. be relied upon, then the plaintiffs indicated by that declaration their intention of calling upon the defendants to accept under the contract of the 29th Dec. 1876, 25 tons of pepper, 5 tons of which were not of October or November shipment. If the declaration of the 5th Feb. be relied upon as severing those 5 tons from the remainder and cancelling the previous declaration made of them, then it is clear that it at the same time added another 5 tons, which the defendants were equally not bound to accept, inasmuch as the sixty days within which the declaration was to be made had expired; and even if these 5 tons had not been added the declaration of the 20 tons as a separate parcel would seem only to date from that day, and would therefore also be too late. But the plaintiffs endeavour to displace these positions by the argument that as the pepper tendered was shipped under three separate bills of lading, and was so declared, the declaration and tender, although never one in fact may be treated as separable in law, and consequently that the defendants were bound to accept the 20 tons, which upon this hypothesis were properly declared and tendered. I cannot assent to this argument. In mercantile contracts like the present the making within a given time of a declaration or declarations upon which the buyers may act is an essential feature. And, further, although the sellers have an option to ship the article contracted to be sold either by one or more vessels, and the provision in the contract to that effect may give, as according to *Brandt v. Lawrence* (*sup.*) it does give, the sellers a right to call upon the buyers to accept any portion of the quantity contracted to be sold which has been shipped and declared in accordance with the contract, and as a step towards its entire performance, it does not appear to me by any means to follow that the quantity named in the contract is not still of the essence of the contract, and, if it be so, the case is in this respect distinguishable from *Simpson v. Crippin* (L. Rep. 8 Q. B. 14), and cases of that class, where each delivery of coal was really like a delivery under a separate contract to be paid for separately, and in respect of the non-delivery of which the parties might well be assumed to have contemplated a payment in damages rather than as a rescission of the whole contract. But however this may be, the present contract ought and must, in my opinion, at least involve this consequence, viz., that when the sellers elect to ship by the vessel the whole quantity contracted to be sold and declare their



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election to the buyers—still more when they follow up their declaration and election by tendering the whole quantity pursuant to their declaration, they cannot, after it is discovered that as to a portion of the quantity shipped it was not shipped in accordance with the terms of the contract, and that the buyers are not bound to accept that portion, turn round and call upon them to accept the remaining portion of the quantity shipped, which, although physically separable and the subject of distinct bills of lading, yet has always been treated by the sellers as part of an entire whole, which the buyers, by the declaration, were told to treat, and, by the tender, were called upon to accept as one entire whole. The matter may be made more plain by reversing the position of the parties. Suppose a declaration, such as was made in this case, on the 19th Jan., and that the fact had been that all the three parcels had been shipped in accordance with the terms of the contract. Suppose also that, under such circumstances, the defendants, either at the time of declaration, or when the pepper was tendered, had expressed their willingness to take the 20 tons, but had absolutely refused to take the five; the plaintiffs might clearly have said: "We make this declaration or tender as a whole, and will only deliver the pepper comprised in it as a whole." If that be not so, where would the defendants' right of separation cease? They might, of course, take only one of the three parcels, and it is difficult to see on what logical or legal principle they might not demand to have some bags out of the one parcel and say, "We will pay for the non-acceptance of the remainder in damages." This would reduce the matter to a practical absurdity. But on the other hand, if the seller's rights would under the circumstances supposed, be such as I have suggested, viz., the right to have the pepper accepted as a whole, and the consequent right of treating the contract as at an end if the buyers refused to accept it as a whole, surely the converse proposition must hold, viz., that when the shipment comprised in one declaration is in part good and in part bad, and, although the good and bad parts are separable, yet the sellers adhere to the declaration as a whole and tender the shipment as a whole, the buyers must have a right to reject unconditionally both the declaration and the whole of the goods tendered under it; and further, that the defendants would not be bound to accept the part of the shipment which in itself complied with the terms of the contract if after the declaration and tender, and after it was apparent that the sellers' contract could not be performed in its entirety by delivery of the whole of the goods contracted to be sold, the sellers separated the good portion of the shipment from the bad, and made a fresh tender of the former for acceptance. Looking at the case from this point of view it is really untouched by either the contract cases to which I have referred, or by the decisions in *Brandt v. Lawrence (sup.)*, and upon the grounds mentioned I arrive at the conclusion that the plaintiffs cannot maintain their action against the defendants in respect of any portion of the pepper which was the subject of their contract, and that the judgment of Lord Coleridge should therefore be affirmed.

*Judgment affirmed.*

Solicitor for plaintiffs, *John Rae*.

Solicitors for defendants, *Hollams, Son, and Coward*.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

*Saturday, April 5.*

(Before FRY, J.)

Re THE METROPOLITAN DISTRICT RAILWAY COMPANY AND COSH. (a)

*Lands Clauses Consolidation Act 1845—Power of railway company to grant building rights over the crown of their tunnel—Meaning of "land."*

*A railway company, having acquired land under their special Acts (which contained no provision as to the sale of superfluous lands, but with which special Acts the Lands Clauses Consolidation Act, 1845, was incorporated), excavated the land to the surface, constructed their line in the excavation, and then covered it over with an arch and girders, and replaced the soil.*

*Held, that they had no power to grant building rights over, or building leases upon, the crown of the tunnel so formed.*

*The meaning of "land" defined as used in the Lands Clauses Consolidation Act, 1845.*

*SUMMONS under the Vendors and Purchasers Act, 1874.*

On the 18th July 1878 the Metropolitan District Railway Company offered for sale by auction some pieces of land described in the particulars of sale as freehold land suitable for building, and R. L. Cosh purchased lots 4 and 7. Lot 4 was described in the particulars as a "very important and highly valuable freehold building site adjoining the District Railway Station, and on the south side of Hammersmith Broadway, having a total frontage of 101ft. with an acreage depth for building purposes of 115ft., but, with the land at the extreme point, of 135ft., being 58ft. 9in., as coloured pink on the plan, and 36ft. 6in. in frontage, as coloured blue on the plan; having already the surface or ground line constructed and consolidated over the railway for the erection of a splendid range of business premises." The railway company reserved the 6ft. margin of land in rear of the plot coloured blue as shown in the plan, and the particulars stated that the plans, sections, and elevations for the erection of any building over the area coloured blue must be submitted to and approved by the company, as it was over the railway tunnel.

The 22nd, 23rd, and 24th conditions of sale were as follows:

22. The following clause must be inserted in the conveyance of the land coloured blue, and of any other land lying over or abutting upon the company's railway works. The company, their successors and assigns, reserve to themselves at all times hereafter the line of railway of the said company and their tunnels, and other railway works lying under or adjoining the same lands, and the substratum or soil under or beneath such reserved railways and works, together with all rights and privileges under the company's Acts of Parliament, or any Acts incorporated therewith, and reserve also in particular power to the said company, their successors and assigns, for them, and their engineers, surveyors, workmen, contractors, and agents at all times to enter (either with or without engines, machinery, building

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

materials, and other articles and things) into and upon so much of the said lands so conveyed and the buildings thereon erected as are abutting on or over the same railway or works, to satisfy themselves by inspection that the conditions imposed on the purchaser, both as to the construction and use of such buildings are adhered to, and to make and execute such works as may be necessary for renewing, repairing, or altering the said line of railway and works, and for securing the uninterrupted user of the said railway and works, the said company, their successors and assigns, making reasonable compensation to the purchaser, his heirs and assigns, for all injury caused by the exercise of any of such powers, the amount of such compensation to be settled, in case of difference, by two arbitrators (one to be appointed by either party in difference), or their umpire in the usual manner. And the purchaser shall for himself, his heirs and assigns, covenant with the said company, their successors and assigns, that no building or erection whatsoever shall be raised or constructed upon the said land coloured blue, or any part thereof, or on other land over the company's railway, until the designs for the same, and the materials and mode of construction thereof, have been submitted to and approved (in writing) by the said company, their successors and assigns, who shall approve the same, if in their judgment they are suitable, both as to arrangement of walls and distribution of weights to the girders which have been placed across the railway to carry such buildings; and it shall be provided and expressly agreed that such buildings or erections on the said land coloured blue, or on any other land over the company's railway, shall not in any case have more than three storeys, and shall not exceed 40ft. in height from the pavement line to the parapet line, and the weight on each floor, including the weight of the floor itself, shall not in the erection or subsequent use thereof exceed 2cwt. per square foot, and it shall also be specially provided that no windows or other openings shall be made in any building erected on any of the land sold overlooking the railway station of the said company without the special leave of the company.

23. The new buildings which are to be erected on the land coloured pink adjoining the railway and station will not be restricted in height, but the designs for the same and the materials and mode of construction thereof must be submitted to and approved by the company, so far as they abutt on or affect the retaining walls of the company, and the new buildings must be so designed as not to depend for support on the said retaining wall of the company.

24. Except with regard to the said land coloured blue, the company shall have the power of repurchasing any building which may stand upon the retaining wall of the company's railway, and removing the same, paying to the owner such a sum as shall be fixed by two valuers (one to be appointed by the company, and the other by the owner), or, if they cannot agree, such a sum as shall be fixed by an umpire to be appointed by the said arbitrators, and the provisions for arbitrations contained in the Lands Clauses Consolidation Act, 1845, shall be applicable to such arbitration.

The company had acquired the land for the construction of this part of their line under the statutes 38 & 39 Vict. c. cxxviii., and 40 & 41 Vict. c. cccxxiii., with which the Lands Clauses Consolidation Act 1845 was incorporated. The special Acts contained no provision with regard to the sale of superfluous land.

The company, after acquiring the land, cleared the surface, and then made an excavation which they afterwards covered in so as to restore the surface. The piece of lot 4, coloured blue, was part of the surface thus restored.

The purchaser took out a summons under the Vendors and Purchasers Act, 1874, asking for a direction that the railway company had no right or title to sell lot 4, and that the contract for sale with respect to it might be rescinded, and the company ordered to repay the deposit paid by the purchaser with interest.

The summons was adjourned into court.

*Glasse, Q.C.* and *Sefton W. Strickland* for the purchaser.

*J. Pearson, Q.C.* and *Samuel Roberts* for the vendors, the company.

The following cases were cited or referred to in the argument:

*Pinchin v. London and Blackwall Railway Company*, 23 L. T. Rep. O. S. 307; 24 L. T. Rep. O. S. 125, 196; 1 K. & J. 34; 5 De G. M. & G. 851; *Ramsden v. Manchester South Junction and Altrincham Railway Company*, 1 Exch. 723; *Great Western Railway Company v. May*, 31 L. T. Rep. N. S. 137; L. Rep. 7 E. & L. App. 283; *Mulliner v. The Midland Railway Company*, 40 L. T. Rep. N. S. 121.

FRY, J.—The question which arises before me in this case is as to the power of the Metropolitan District Railway Company to sell a certain lot, described as lot 4 in the particulars of sale, which are now before me. That lot consisted, as to part, of land in the ordinary sense of that word. It also consisted, in part, of what the vendors described as land, and what their counsel has described as land, which appears to me not to be land, in the ordinary sense of the word, at all. It was a right to build a house of a particular defined description over the roof of an arch. It appears that this lot was sold subject to certain special conditions with regard to that portion of the lot. The building was to be approved by the railway company, and certain rights were reserved by the railway company in respect of their tunnel underneath that space. Now the question turns upon whether or no these lands are superfluous lands, because it appears that in the Acts constituting the Metropolitan District Railway Company, or, at least, the Act under which this land was taken by them, and is now sold by them, there are no special provisions; and it becomes, therefore, important to consider what are the words of the Lands Clauses Consolidation Act which give the power of selling what are commonly called superfluous lands; and they are these: "With respect to lands acquired by the promoters of the undertaking under the provisions of this or the special Act or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows." Then comes a series of provisions, under one of which this sale took place. Now the history of the piece of land in question seems to be this: It was taken for the purpose of constructing the railway, and the land was excavated to the surface. I am taking the statement from the learned counsel who appear for the railway company. After the railway was constructed, the line was arched over, and across the summit of that arch, girders have been placed, and soil has also been placed. The piece of blue land is a portion of the summit of that arch with the railway beneath it. The question is whether that summit of the arch is superfluous land. Now in the first place, in my opinion, it is not separated from the land below it in any way, that is, according to the ordinary meaning of the word "land." It is no more land than the roof of a house is land. If I sold the roof of my house, I certainly should not sell that as land, if I reserved the house, and everything below the house, which is what takes place in this case. It is said that this is superfluous land, because there is no reason

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why superfluous land should not be separated from land required by a horizontal line, as well as by a lateral or a vertical line. But it appears to me that, according to the ordinary meaning of the word "land," it is land in respect of which you have a right from the centre of the soil to the heaven above, and that, in describing what is superfluous and what is not superfluous, the ordinary distinction of land by lateral boundaries must be followed. Now I think considerable light is thrown upon that by other language in the Lands Clauses Consolidation Act, with regard to land required for the purposes of the railway, because both with regard to land taken by agreement and land taken otherwise than by agreement, the only lands which they could take are such lands as should be required for the purposes of the Act. Now, in the case of a tunnel, it is required to take the land in the ordinary sense from the very centre of the earth to the heaven above. They cannot take less than that. That seems to me to be the result of the decisions. That shows that the whole of the land, in the ordinary sense, is land required for the purposes of the Act, although a portion of it only is occupied by the tunnel, and by parity of reasoning it seems to me to follow that they cannot say that any land above or below the land actually used for the purposes of the railway, is not land required for the purposes of the Act. I therefore think, however convenient it may be to the railway company to sell or to grant building rights over, or building leases upon, the crown or roof of their tunnel; that they have no such right under the statutory powers with which they are invested. But it does appear to me also that the case of *Mulliner v. The Midland Railway Company*, to which I have been referred, is a strong decision corroborating the conclusion to which I have come on the case. I think it is very difficult to draw any distinction between the decision of the Master of the Rolls on the first two questions which he dealt with in that case, and the case now before me. But, independently of that decision, it does appear to me to be reasonably plain that this crown or roof of the tunnel is not superfluous land within the meaning of the Act; that, therefore, the vendors can make no title, and that I must make a declaration accordingly. In this case there was a fair point for discussion, and each party must pay his own costs. The deposit must be returned to the purchaser with interest at 4 per cent.

Solicitors for the purchaser, *Dawson, Bryan, and Dawson*.

Solicitors for the vendors, *Baxters and Co*.

#### COMMON PLEAS DIVISION.

Friday, Feb. 28.

(Before Lord COLERIDGE, C.J. and DENMAN, J.)

FINCH v. BONING. (a)

APPEAL FROM INFERIOR COURT.

*Tender—To clerk in solicitor's office—"No instructions."*

*A. went to the office of a solicitor, and tendered the amount of the composition on a debt owing to the solicitor to one of his clerks, who informed A. that his principal was out, and that he (the clerk) had received no instructions, and could not accept the amount tendered.*

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

*Held, per Lord Coleridge, C.J. (distinguishing Bingham v. Allport, 1 Nev. & M. 398), that there had been a good tender by A. of the amount of the composition; per Denman, J. (following Bingham v. Allport) that the tender was bad.*

#### SPECIAL CASE.

1. This was an action brought by the plaintiff, a solicitor, in the Southwark County Court, to recover 15l. 6s. 10d., the amount of a bill of costs.

2. The defence was a discharge by a resolution of the defendant's creditors, under sect. 125 of the Bankruptcy Act 1869 (32 & 33 Vict. c. 71), and a tender of the amount of the composition on the said debt before action brought, but that the plaintiff had refused to accept the same. The defendant paid into court the amount of the composition.

3. In support of the above defence a witness was called, who stated that he was the accountant engaged by the defendant in the proceedings for liquidation by composition, and that he and the defendant's solicitor (since deceased) went to the offices of the plaintiff, and there tendered the amount of the composition to one of the plaintiff's clerks, who informed him that the plaintiff was out, and that he (the clerk) had received no instructions, and refused to accept the amount tendered.

4. On the part of the plaintiff it was denied that any such tender was ever made at all; and witnesses, consisting of the clerks then in the plaintiff's service, were called in support of such denial.

The judge, however, was of opinion that the matters stated in the third paragraph were proved, and gave judgment for the defendant, with costs.

The question for the opinion of the court is whether the said judgment for the defendant was right, or whether the same should be reversed and entered for the plaintiff, with costs of suit.

*J. Holmes Poulter* for the plaintiff.—There was not a good tender of the amount of the composition here. In *Bingham v. Allport* (1 Nev. & M. 398) a tender made at an attorney's office to his clerk, who said that he had no authority from his principal to receive the money or to give a discharge for the debt owing, was held insufficient. *Wilmot v. Smith* (1 M. & M. 238) is distinguishable on the ground that there was there no disclaimer of authority at the time. The tender was refused in that case on the ground that it was insufficient, which was a ground upon which the principal would have refused it himself. *Barrett v. Deere* (1 M. & M. 200) is distinguishable on the same ground, that there was no disclaimer of authority at the time, and also on the ground that it was the case of a merchant's office, where the course of business is different to that of a solicitor's. [Lord COLERIDGE, C.J.—In *Mofat v. Parsons* (5 Taunt. 307), Mansfield, C.J. says, "A tender to a managing clerk would suffice." In an *Anonymous* case (1 Esp. 349), where money was delivered to a servant, who took it to her master, and returned, saying he would not receive it, Lord Kenyon, J. said that "in the common transactions of life this kind of intervention of servants must be allowed," and ruled that there was evidence from which the jury might infer a tender.] That case proceeds on the assumption that the money was taken to the master. Here the clerk told the person who made the tender that his master was

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out, and that he (the clerk) had no instructions. In *Watson v. Hetherington* (1 C. & K. 36) Parke, B. said that there must be an authority, either express or implied, in the clerk to receive the money, otherwise the tender is bad. Here there is no express authority. What circumstances are there in the case from which an authority can be implied? He also cited

*Kirton v. Braithwaite*, 1 M. & W. 310.

*Melheimer* for the defendant.—The clerk did not disclaim his authority, but only his instructions in the particular matter. That was not sufficient to make the tender bad.

LORD COLERIDGE, C.J.—I am of opinion that the judgment of the County Court judge was right, and should be affirmed. The principle appears to me to be that a good tender of money owing may be made to an individual other than the creditor, if he be someone who has authority, either direct or implied, from the course of practice, to receive money tendered in payment of such creditor. If that is so, as soon as you depart from the principle that the money owing must be tendered to the creditor personally, the question in each case must be whether the person to whom the money was tendered represented the creditor. Now, who in an attorney's office does represent the attorney? I find that Parke, B. says, in *Watson v. Hetherington* (*ubi sup.*), that anyone who is at a solicitor's office, carrying on the business of the office, may be considered to represent the solicitor. In that case the tender was held bad, because the attorney had written to say that the tender must be made to himself, and the defendant's agent went to the office and made the tender to a person who to his knowledge was not authorised to receive it. In *Moffat v. Parsons* (*ubi sup.*) and the other cases the same principle is acted upon that a tender made at a place of business to a person apparently in authority there is good. No doubt there is a counter-principle that, if at the time the tender is made the authority is disclaimed, the tender is made at the peril of the person who makes it, and will be bad if there was in fact no authority. That is what *Bingham v. Allport* (*ubi sup.*) decided, and I agree with that decision. But here the County Court judge has decided that the tender was good, and cannot, therefore, be taken to have found, and certainly has not directly found, that the clerk had no authority to receive this money. It appears that the clerk said that he had no instructions. If that is sufficient to make a tender bad, no tender could ever be made in any merchant's or solicitor's office, where there was considerable business going on. But I am of opinion that the fact that a clerk engaged in carrying on the business of an office says to a person who tenders him money that he has no instructions, and really has none in the particular matter, will not suffice to make the tender bad. He may have authority, although he has no instructions; and I take it that the County Court judge has found in this case that the clerk had authority. I therefore think that the judgment should be affirmed.

DENMAN, J.—I am not by any means sure that I am right in my view of this case, but I am unable to distinguish it from that of *Bingham v. Allport* (*ubi sup.*). The principle appears to me to be that the tender must be made either to the person to whom the money is owing, or to someone having authority to receive it. In *Bingham*

*v. Allport* the words that the clerk used were, that he had no authority from his principal to receive the money. The judge told the jury that if they thought the clerk had disclaimed all authority to receive the money the tender would be insufficient. Here the clerk said that his master was out, and that he had received no instructions. That appears to me to mean the same thing. My Lord, however, has been able to distinguish the words, and the case is not one in which we should give leave to appeal. There will, therefore, be judgment for the defendant.

*Judgment for the defendant.*

Solicitor for the plaintiff, *Finch*.

Solicitors for the defendant, *Hoppe and Boyle*.

March 6 and 7.

(Before Lord COLERIDGE, C.J. and DENMAN, J.)

STEVENSON v. WATSON. (a)

*Arbitrator*—Person in position of, not liable for want of care or skill—Building contract—Architect—"Knowingly or negligently" certifying for insufficient amount—Not equivalent to fraudulently.

An action will not lie against an architect for not using due care and skill in ascertaining the amounts to be paid by a builder's employer to the builder under a contract which provides that the builder is to be paid on the certificate of the architect, that all matters of dispute are to be left to the architect's decision, that he may order any additions to or deductions from the contract, and that the amount of such additions or deductions shall be ascertained by him at a certain fixed rate; the functions of the architect under the contract being not merely clerical, but requiring the exercise of a judgment or opinion.

An allegation that the architect "knowingly or negligently" certified for a much less sum than was due does not disclose a cause of action, as it does not amount to a charge of fraud.

The architect is not bound, upon the application of one of the parties, to reconsider his certificate, or to give reasons for it.

STATEMENT OF CLAIM.

1. The plaintiff is a builder, who carried on business in partnership with Field Weston at Nottingham.

2. The defendant is an architect carrying on business in Nottingham.

3. Early in the year 1874 the Nottingham Temperance Hall Company (Limited), since named the Nottingham Albert Hall Company (Limited), and herein referred to as the company, proposed to build a temperance hall, and employed the defendant as architect to prepare, and he accordingly prepared plans, drawings, specifications, general conditions of contract, and a bill of the quantities of the artificers' work required to be done in the erection and completion of the proposed hall. Thereupon the defendant was employed by the company as architect to carry out the works, and to be the architect under the contract proposed to be entered into by the company with the contractors for the works.

4. Early in the month of April 1874 the company advertised for tenders for the execution of the works, and directed applications with reference

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

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thereto to be made to the defendant; and, after examining the plans, drawings, and specifications, and bills of quantities of the proposed works at the office of the defendant in Nottingham, the plaintiff and the said Field Weston tendered for the execution of the works, and their tender was accepted by the company.

5. On or about the 16th April 1874 the defendant requested the plaintiff and the said Field Weston to come to his office in Nottingham to execute the contract for the works, and accordingly on that day the plaintiff and the said Field Weston signed the contract for the works at the office of the defendant. Their signature thereto was witnessed by the defendant.

6. The said contract was dated the 16th April 1874, and was made between the plaintiff and the said Field Weston of the one part and the company of the other part, and is as follows:

The said Richard Stevenson and Field Weston agree to erect and build for the said company, upon a certain piece of land situate in North Circus-street, in the town of Nottingham, the temperance hall, according to the drawings, general conditions of contract, and bills of quantities, now produced and signed by the parties hereto, and intended to form parts of the agreement, and shall and will finish and complete the said temperance hall in such manner and of such materials, and within such time as is provided by the said general conditions of contract and bills of quantities, and according to the said drawings; and, further, that they, the said Richard Stevenson and Field Weston, will well and truly observe and perform all and every the said conditions and stipulations contained in the said general conditions of contract on the part of the contractors required to be observed and performed; and in consideration thereof the said company to pay unto the said Richard Stevenson and Field Weston the sum of 13,560*l.*, in the manner set forth in the said general conditions of contract, and in other respects to perform and keep the conditions and stipulations of the said general conditions of contract, so far as the same on their part is or ought to be performed and kept.

7. The said general conditions of contract referred to in the said contract, so far as they were material to this case, were as follows:

The general conditions of contract for artificers' works required to be done in the erection and completion of a new hall for the Nottingham Temperance Hall Company (Limited), Nottingham. Fothergill Watson, architect, Clinton-street, Nottingham, Jan. 1874.—The architect is at all times to have access to the works, which are to be entirely under his control and his clerk of the works. The architect may order any additions to or deductions from the contract without in any way vitiating the contract, and the amount of such additions to or deductions from the contract shall be ascertained by the architect in the same manner as the quantities have been measured and at the same rate as they have been priced at.

The contractor and the directors will be bound to leave all questions or matters of dispute which may arise during the progress of the works or in the settlement of the account to the architect, whose decision shall be final and binding upon all parties.

The contractor will be paid on the certificate of the architect.

8. The said bill of quantities contains (amongst others) the following stipulations:

Note.—These quantities will, with the drawings and general conditions, form the basis of the contract. Should there be more or less measure than is here given, there will respectively be an addition to or a deduction from the contract.

All measurements to be made in the same manner as the quantities have been taken, and all additions and deductions to be priced out at the same rate by the architect.

9. The plaintiff, for greater certainty, begs

leave to refer to the contract, general conditions of contract, and the bill of quantities.

10. The said contract was signed by the plaintiff and the said Field Weston in the belief and expectation, as the defendant well knew, that the defendant would use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff and the said Field Weston under the said contract.

11. Thereupon the plaintiff and the said Field Weston proceeded with the execution of the works, and the defendant acted as the architect of the works, and undertook the duties of the architect under the contract.

12. The defendant from time to time during the progress of the works ordered additions to and deductions from the contract.

13. There were errors in the bill of quantities, and there was in fact more measure in certain descriptions of the works than was given in the bill of quantities.

14. The defendant from time to time during the progress of the works by his certificates certified that certain sums of money were payable to the plaintiff and the said Field Weston in respect of the works executed by them, and gave the same to them, and the said sums, amounting to 10,000*l.*, were paid by the company upon the said certificates.

15. The plaintiff, after the completion of the works, sent to the defendant accounts in respect of the works executed, showing, as the fact was, that after adding to the contract the amount of the additions ordered by the defendant, and deducting the amount of the deductions ordered by the defendant, and making the stipulated additions in respect of the said errors in the bill of quantities, and giving the company credit for the said sum of 10,000*l.* paid by them as aforesaid, there remained a balance of 1616*l.* 6*s.* 7*d.* unpaid in respect of the works executed, and for which they were entitled to have the defendant's certificate.

16. The defendant, without calling upon the plaintiff or the said Field Weston for any explanation of the said accounts, and without any communication with them on the subject thereof, made and sent to the plaintiff and to the company his certificate, certifying that the net balance due to the plaintiff, over and above the amounts which he had previously certified, was 251*l.* 14*s.* 4*d.*

17. The defendant did not use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff under the said contract, but, in ascertaining the net balance due to the plaintiff, neglected and refused to ascertain, and did not ascertain, the amount of the said additions to and deductions from the contract in the same manner as the quantities had been measured, and at the same rate as they had been priced out, or that there was more measure in the said descriptions of works than was given in the bill of quantities by making measurements in the same manner as the quantities had been taken, and neglected and refused to price out, and did not price out the excess at the same rate, and make the stipulated additions to the contract in respect thereof, according to the terms of the contract, nor did he use due care and skill to ascertain, in the manner provided by the contract, what was, in fact, the net balance payable to the plaintiff by the company in respect of the works

executed, for which the defendant was entitled to his certificate; but the defendant, knowingly or negligently, certified as aforesaid for a much less sum than was, in fact, the net balance payable to the plaintiff in respect of the works executed.

18. Upon the receipt of the said certificate the plaintiff requested the defendant to inform him of the data upon which the same was based, but he refused to furnish the plaintiff with them, or to give him any information on the subject. The plaintiff thereupon requested the defendant to reconsider the said certificate, and offered to point out to him the said errors in the bill of quantities, and to give him any explanation he might require of the said accounts; but the defendant refused to reconsider the said certificate, and to allow the plaintiff to point out to him the said errors in the bill of quantities, or to explain the said account, or to hear any objection whatever on the part of the plaintiff to the said certificate.

19. By reason of the premises the plaintiff is unable to obtain payment from the company of the said balance, and has been deprived of and has wholly lost the same and the use thereof from the time when he was entitled to the certificate of the defendant for the amount thereof.

20. After the making of the said contract the plaintiff and the said Field Weston dissolved partnership, and the causes of action, which are the subject of this action, became and are vested in the plaintiff alone.

The plaintiff claims:

1. Damages 1364*l.* 12*s.* 3*d.*, and interest on that sum, at the rate of 5 per cent. per annum, from the 10th Jan. 1878, until payment or judgment.

2. Such further or other relief as the nature of this case may require.

Demurrer, on the ground that the statement of claim showed that the defendant was in the position of an arbitrator, and that he acted and declared his decision, and the claim did not allege fraud or *mala fides*, and therefore showed no cause of action, and on other grounds sufficient to sustain the demurrer.

*Wills, Q.C. (Graham with him) for the defendant.*—No action can be brought for want of skill or care against a person occupying the position of the defendant in this case, a position which is analogous to that of an arbitrator:

*Pappa v. Rose*, 25 L. T. Rep. N. S. 466; L. Rep. 7 C. P. 525;

*Thariss Sulphur and Copper Company (Limited) v. Loftus*, L. Rep. 8 C. P. 1; 27 L. T. Rep. N. S. 549.

In that case Brett, J. says: "The case of *Pappa v. Rose* decides that a person who undertakes to give a decision between two parties as to any matter, though he may not be an arbitrator in the strict sense of the word, as not being bound to exercise all the judicial functions for the purpose of deciding the matter in dispute that an arbitrator in the strict sense of the term would have to exercise, nevertheless is not liable to an action for want of skill. It appears to me that the reasoning employed in that case is equally applicable to an action for want of care, and that if an arbitrator in the strict sense of the word is not liable for want of care, it follows that a person who has undertaken to decide a dispute between two parties is also not liable." The allegation here is that the defendant undertook to settle any disputes that should arise between the plaintiff and the party with whom he had contracted, and

that he, without calling upon the parties for an explanation or communicating with them, certified for an amount less than that to which the plaintiff was entitled. [DENMAN, J.—It seems to amount to an allegation that the arbitrator negligently misconstrued the contract.] Yes, which might be alleged against any arbitrator. [Lord COLERIDGE, C.J.—Their case must be: granted that the defendant's decision is binding, he has not come to any decision.] Then there is no cause of action. The arbitrator is not a party to the contract. [DENMAN, J.—I suppose you would admit his liability in a case of fraud.] Even in such a case his liability is very doubtful. [DENMAN, J.—There are numerous dicta to the effect that he would be liable in such a case.] There seems to be only one, which is in 2 Wils. 148, and is referred to in Baron Watson's book on Arbitrators, 3rd ed., p. 112, where the following passage occurs: "It has been said that an arbitrator is liable to an action if he misconduct himself; but I cannot find any case in which such an action has been brought." The principle of the two cases already referred to is conclusive to show that there is no such duty on the arbitrator as is alleged in the statement of claim. There is no duty to use either skill or care. The parties have taken him for better or worse. [Lord COLERIDGE, C.J.—The position of an architect as an arbitrator is a very peculiar one, and may be very different from that of an average stater or fruit broker. The architect may have a direct interest in reducing the builder's bill.] That would apply also to cases in which the engineer of a company acts as arbitrator. In *Ranger v. The Great Western Railway Company and others* (5 H. of L. Cas. 72, 89) Lord Cranworth, C. says: "The respondents stipulated that their engineer for the time being, whoever he might be, should be the person to decide disputes pending the progress of the works, and the appellant, by assenting to that stipulation, put it out of his power to object on the ground of what has been called the undifferency of the person by whose decision he agreed to be bound." It would be most disastrous if in every case of this kind, where one of the parties were dissatisfied with the result, an action could be brought against the arbitrator. It is submitted that even in a case of dishonesty such an action cannot be brought. No instance of it is to be found; and it would be against public policy that such an action should under any circumstances be allowed. It is the same principle as that which prevents an action being brought against an unjust judge. But it is unnecessary to contend that here, because there is no allegation of dishonesty. The duty can only arise here by contract. If there was any contract between the parties, it would be a term of it that the arbitrator should use due skill. But the cases that have been cited show that the arbitrator is not bound to use any skill; and, consequently, that there is no contract with the arbitrator. In *Scott v. The Corporation of Liverpool* (4 De G. & J. 334, 362) Lord Chelmsford, C. says: "Suppose the contractors had chosen to agree that they would be paid for their work not a specified sum, nor upon measure and value, but such an amount as the company's engineer might fix, can there be a doubt that such a contract (though a very imprudent one) would be binding, and that the contractor would be bound to submit entirely to the

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discretion or even the caprice of the person whom he had thus clothed with this arbitrary authority? What is there more in this case?" In that case an employer had power to put an end to the contract if the contractor should not, according to the determination of the employer's engineer, exercise such due diligence as would enable the works to be completed within the stipulated time; and the contractor was to be paid such sum for the work done as the engineer should determine. Further on (p. 368) Lord Chelmsford says: "Where the contract provides for the determination of the claims and liabilities themselves of the contractor, by the judgment of some particular person, this would be incorrectly called a provision for submission to arbitration, as no dispute can exist in such a case, everything being dependent upon the decision of the individual named, and till he has spoken no rights can arise which can be enforced either at law or in equity." In *Wadsworth v. Smith* (L. Rep. 6, Q. B. 332) Cockburn, J. says: "If persons will make agreements which put them in the power of others, and operate harshly against them, it is their own fault, and they cannot expect to obtain any assistance from the court; and I wish to express no opinion as to whether the architects were or were not justified in certifying against the plaintiff in the manner it is alleged that they did. . . . I am by no means disposed to say that this amounts to a submission to arbitration, although it is certainly wider and different from many of the ordinary clauses as to the certificate of architects which have occurred in cases under building contracts, and which have been determined to be binding on the builder, and not to be clauses of arbitration." The eighteenth paragraph of the statement of claim alleges that the defendant refused to furnish the plaintiff with any information on the subject of his certificate, or to reconsider it, or to hear the plaintiff's objections to it. The highest that that amounts to is that he refused to adjudicate upon a dispute that had arisen; and even if it can be said that those words do amount to such an allegation, no action would lie for his refusal to act.

*Cave, Q.C. for the plaintiff.*—1. The defendant was not an arbitrator or quasi-arbitrator. 2. If he was, misconduct as arbitrator is sufficiently stated. The contract in this case is a very peculiar one. In the first part of the claim the only alleged duty is to measure up quantities. Then the 17th paragraph alleges that he did that so negligently that he did not ascertain that there was more measure in the said description of works than was given in the bill of quantities. Up to that part of the claim there is no duty as arbitrator to be exercised. Then, in the 18th paragraph, his measurement is objected to. That is a dispute as to which he is to decide, and we allege that he refuses to hear us. In *Pappa v. Rose* (*ubi sup.*), cited by the other side, the broker only undertook to give his opinion as to the quality of the raisins. Keating, J. said in that case, "I am clearly of opinion that the defendant was in the position of a quasi-arbitrator, and so was protected against an action for an error in judgment." *Leeds v. Burrows* (12 East, 1) shows that a valuer is not an arbitrator. The defendant here was a valuer. The builder, relying entirely upon the defendant's care, skill, and professional knowledge as architect, appointed him his agent.

[Lord COLERIDGE, C.J.—You say that there was here no arbitration, and that the defendant was the plaintiff's agent. But how was he an agent?] The plaintiff appoints a man to measure up quantities for him. The plaintiff and the plaintiff's employer agree to appoint the same man, and he is agent for both parties. How can it make any difference that the same man is appointed by both parties? If there were two valuers, one employed by the builder's employer and one by the builder, they would be bound to bring ordinary skill to bear, according to the principle of *Jenkins v. Betham* (15 C. B. 168) and *Story v. Richardson* (6 Bing. N. C. 123). The defendant is not alleged to be a quasi-arbitrator, at all events, up to paragraph 17 of the claim. No judgment is required to be exercised by him, as he is only to measure up quantities. He does not therefore come within the cases cited on the other side. But if he was a quasi-arbitrator, then it is alleged at the end of paragraph 17 of the claim alternatively that he "knowingly or negligently" certified for a less sum than was due. The Judicature Acts allow alternative pleading. In *Pappa v. Rose* (*ubi sup.*) Blackburn, J. says, "I do not stop to inquire whether the defendant stood in the position of an arbitrator or not; but he was bound to exercise his judgment impartially between the two contracting parties." And Mellor, J., "The contracting parties agree to be bound by the opinion of Mr. Rose, such as it is, he exercising his judgment honestly, and there is no suggestion that he did not do so." Supposing that the plaintiff would fail at the trial on "negligently," he would not fail on "knowingly," and that he would fail on one of two alternative claims is not ground of demurrer. In *Ludbrook v. Barrett* (36 L. T. Rep. N. S. 616) Grove, J. held, on demurrer, that an action would lie by a builder against an architect who fraudulently, and, in collusion with the builder's employer, refused to certify, if the architect had an interest in the building contract. If there is no remedy against the architect the builder has no remedy at all. *Clarke v. Watson* (11 L. T. Rep. N. S. 679) shows that there is no remedy against the employer in such a case. The architect's certificate cannot be set aside and another valuer appointed, as this is not an arbitration within the terms of the Common Law Procedure Act (17 & 18 Vict. c. 125) s. 12: *Collins v. Collins* (26 Beav. 306). Then paragraph 18 shows a breach of the duty to be impartial, when he did come to exercise the functions of a quasi-arbitrator. There was a consideration moving from the builder here, because it was necessary that he should consent to the defendant being the architect before the defendant could earn his commission.

*Wills, Q.C. in reply.*—[Lord COLERIDGE, C.J.—Mr. Cave's argument is that the defendant here was not an arbitrator, but an agent for the plaintiff, either for the consideration of being employed as architect, or as a voluntary agent undertaking to perform a duty to do certain things which he did not do.] By paragraph 9 of the contract the architect may order any additions to or deductions from the contract. How can a man determine such a question without exercising a judgment or an opinion? If he does, then he is in the same position as the broker in *Pappa v. Rose*. He has to decide what are extras and what are not. What the builder relies on is not any supposed



contract that the architect will use due care and skill in certifying, but upon his confidence in the particular architect agreed upon. In *Clarke v. Watson* (*ubi sup.*), cited by the other side, Erle, C.J. says, "This is an attempt to take away from the defendants the protection afforded by the opinion of their surveyor, and to substitute a jury in its place." If I had known of the case of *Ludbrook v. Barrett* (36 L. T. Rep. N. S. 616) before Grove, J., I would not have troubled your Lordships with the remarks that I made as to an action not lying against the architect, even where there was fraud. I should have reserved them for the Court of Appeal. But here there is no allegation of fraud. [DENMAN, J.—Mr. Cave says that "knowingly" amounts to an allegation of fraud.] If they mean to allege fraud it must be distinctly alleged. In *Pappa v. Rose* (*ubi sup.*) the court did not treat the broker as an arbitrator. It was thrown out by Blackburn, J. that possibly an action might have laid against him if he had refused to look at the raisins; but that was not as arbitrator, but because he had undertaken as broker to look at them. No such action has ever been heard of as an action against an arbitrator for refusing to act.

LORD COLERIDGE, C.J.—This is a case of considerable importance. There is no doubt that in some sense this is an action of first impression; but I should have been of opinion that it was maintainable if it could have been made out that the defendant had undertaken to do certain things; that, though not a party to the contract, he had been aware that under it he was to perform certain duties, requiring no judgment and no exercise of opinion; and that, having assented to this, he refused to perform those duties, and thereby prevented the plaintiff from obtaining payment for his work. I should have held in such a case that an action would lie, because none of the cases cited would have governed the facts of such a case, and it would therefore have been a new action, unconcluded by authority, and for which, in my judgment, there are very good legal grounds. But this is not such an action. This is really an action for that which has been attempted again and again to be made the subject of an action, viz., the unskilful and negligent performance of a duty for which the exercise of judgment or opinion is requisite. And that being so, this case is governed by the cases that have been cited, which I fully agree with and am bound by. Now, this is an action by a builder, employed under a contract, the material parts of which are set out in the statement of claim, against the architect, whose powers and duties are set out in the general conditions of contract as follows: "The architect is at all times to have access to the works, which are to be entirely under his control and that of his clerk of the works. The architect may order any additions to or deductions from the contract without in any way vitiating the contract, and the amount of such additions to or deductions from the contract shall be ascertained by the architect in the same manner as the 'quantities' have been measured, and at the same rate as they have been priced at. The contractor and the directors will be bound to leave all questions or matters of dispute which may arise during the progress of the works or in the settlement of the account to the architect, whose decisions shall be final and binding upon all parties. The con-

tractor will be paid on the certificate of the architect." The stipulation in the bill of quantities is: "Note.—These quantities will, with drawings and general conditions, form the basis of the contract. Should there be more or less measure than is here given, there will respectively be an addition to or a deduction from the contract. All measurements to be made in the same manner as the quantities have been taken, and all additions and deductions to be priced out at the same rate by the architect." That is really the whole of the contract that is material. The work appears to have been done, and the architect during the progress of it ordered additions to and deductions from the contract. There seems to have been more work than the plaintiff thought he would have to do. After the completion of the work the plaintiff sent, not to his employer, but to the defendant (a fact which is material) accounts in respect of the work executed, showing a balance of 1616*l.* 16*s.* 7*d.*, for which he was entitled to have the defendant's certificate. Then he says that, without calling on him, the defendant sends his certificate, showing 251*l.* 14*s.* 4*d.* to be due instead of 1616*l.* 6*s.* 7*d.* Then the statement of claim continues: "The defendant did not use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff under the said contracts, but, in ascertaining the net balance due to the plaintiff, neglected and refused to ascertain, and did not ascertain, the amount of the said additions to and deductions from the contract in the same manner as the quantities had been measured, and at the same rate as they had been priced out, or that there was more measure in the said description of works than was given in the bill of quantities by making measurements in the same manner as the quantities had been taken, and neglected and refused to price out, and did not price out, the excess at the same rate, and make the stipulated addition to the contract in respect thereof according to the terms of the contract; nor did he use due care and skill to ascertain in the manner provided by the contract what was in fact the net balance payable to the plaintiff by the company in respect of the works executed for which the defendant was entitled to his certificate but the defendant, knowingly or negligently, certified as aforesaid for a much less sum than was in fact the net balance payable to the plaintiff in respect of the works executed." Now, it is said that that is a statement of a cause of action of this limited kind, that the duty cast on the defendant was of a purely clerical or ministerial kind, that he had only to make some purely arithmetical calculations, that he had no judgment to exercise or opinion to form, and that he refused to make those calculations. I have said already that if that was the true construction of the statement of claim in this case I should have been of opinion that an action would lie without any allegation of fraud, as to which I agree with Mr. Wills that "knowingly" does not mean fraudulently. But I do not think that that is the true construction of the statement of claim. When the duty is looked at by the light of the contract and the bill of quantities as set out in the claim, it will be seen plainly that the duty is not of that purely ministerial character. It is manifest upon looking at the contract and the bill of quantities, that there is a great deal more to be done than the mere exercise of ministerial

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functions. The quality of the work, the question whether this, that, or the other comes within the bill of quantities, are questions for the determination of the architect. Before the figures can be arrived at by the architect there must be a knowledge of the work done, a skilled judgment exercised and his professional understanding brought to bear upon it. It appears to me to be plain, when we look at the contract and bill of quantities, which are to be taken as part of the statement of claim, that, although the result is one of figures, before that can be arrived at there must be an exercise of skill and professional judgment. I think that the true view of the contract is that presented by Mr. Wills, that before the plaintiff can recover anything from his employer there must be a certificate by the architect as to what is due. Now, if I am right in my view of the contract, it follows from what I have said that this action will not lie on the decided cases. As to the cases where fraud is alleged, they stand on a different footing. Not only the case of *Ludbrook v. Barratt* (36 L. T. Rep. N. S. 616), in the Common Pleas, which was against the architect, but the case of *Batterbury v. Vyse* (2 H. & C. 42), in the Exchequer, which was against the builder's employer, must be overruled by the Court of Appeal before the court can decide in favour of that part of Mr. Wills' argument, which went to show that this action would not lie if fraud had been alleged. Those cases seem to me to be founded on the plainest sense and justice. But they are not this case, which is not one of fraud or collusion. I think this case is within the authority of the cases cited, which decided that where the exercise of a judgment or opinion on the part of a third person is necessary between two persons, such as a buyer and seller, and in the opinion of the seller that judgment has been exercised wrongly or improperly, or ignorantly or negligently, an action will not lie against the person put in that position for the wrong, improper, ignorant, or negligent exercise of his judgment. I will not go into the principles upon which that proposition rests; I bow to the cases decided not only in courts of co-ordinate jurisdiction, but also in the Exchequer Chamber, and will only say that I assent to the reasoning of those decisions. So much as to the seventeenth paragraph of the claim. Then the eighteenth paragraph alleges that "upon receipt of the said certificate the plaintiff requested the defendant to inform him of the data upon which the same was based, but he refused to furnish the plaintiff with them, or to give him any information on the subject. The plaintiff thereupon requested the defendant to reconsider the said certificate, and offered to point out to him the said errors in the bill of quantities, and to give him any explanation he might require of the said accounts; but the defendant refused to reconsider the said certificate and to allow the plaintiff to point out to him the said errors in the bill of quantities, or to explain the said accounts, or to hear any objection whatever on the part of the plaintiff to the said certificate." Now, it appears to me that what is stated there is no ground of action at all. Here again *mala fides* or collusion is not stated or even suggested. A person in the position of the defendant is not bound to give reasons; he has been taken for better or worse, and the person who has so taken him cannot object to his refusing to

state his reasons or to reconsider his decision. I at first thought that this was an action against the architect for not arriving at any decision; but when I come to look at the words of the claim I do not gather that any such dispute has arisen between the parties as calls for the decision of the architect. So that, if I am right in supposing that he is the arbitrator between the parties, and could, if he declined to decide, be forced to take upon himself the duty of deciding after a reasonable inquiry, I do not think that arises here, for no sort of dispute has on the facts before us so arisen. I think the demurrer should be allowed.

DENMAN, J.—I am of the same opinion. In this case the plaintiff is a builder, who enters into a contract to erect a large building with a company; and the defendant is an architect, who is to do certain acts, without which the plaintiff would not be entitled to the money for his work. Now, there is here no direct contract between the plaintiff and the defendant: the defendant is not a party to the contract between the plaintiff and the company. But it is contended that he is in a sense a party to it, and that must be put in one of two ways—either by necessary implication as being named in it, or that by undertaking the duties under it he has bound himself to both the parties to it. Now, I can quite conceive that by acting under a contract in which he is named he might be bound to both parties. But then the question arises, to what duty has he bound himself? It appears to me that he undertakes no more than that he will honestly perform his duty. Supposing this statement of claim had alleged that the defendant fraudulently or in collusion with the plaintiff's employer had certified for a wrong amount, and so injured the plaintiff, I have no doubt that such an action would lie. But the question is, What duty did he here undertake? Now, I do not hold that he is an arbitrator; but I think that his duties are very analogous to those of an arbitrator, and quite as much so as were those of the defendant's, either in the case of *Pappa v. Rose* (*ubi sup.*) or in the case of *Tharsis Sulphur and Copper Company (Limited) v. Loftus*. Mr. Cave says that he is not an arbitrator at all, but rather an appraiser or valuer, who had to do mere clerk's work, not requiring the exercise of any skill or judgment. So to decide would be to leave out all one's experience in arbitrations on building contracts, and one knows that very skilled architects will be called by dozens on both sides, honestly differing as to the proper mode of reckoning up measurements. Therefore, I do not think it can be said that this is a mere mistake of measurement. On the contrary, I think it is a matter of judgment, of very nice discretion, requiring the exercise of very important functions of a quasi-judicial character. That being so, the cases of *Pappa v. Rose* and *Tharsis Sulphur and Copper Company (Limited) v. Loftus* seem to me to apply. The only duty that can be charged against the defendant is that he is to act honestly between the parties; if he does not, an action will lie; if he does the parties are bound. The 17th paragraph contains the words "knowingly or negligently," and it is said that that covers an allegation of fraud. It would be a very bad precedent if such words were allowed to include a charge of corruptly certifying for a less sum than was due. It would have been very easy to have said "fraudulently, maliciously, and corruptly." It only remains to consider the

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18th paragraph, which alleges that the defendant refused to give the plaintiff the data upon which his certificate was founded or to reconsider it. In answer to that, it appears to me that the defendant would have done very wrong indeed if he had, without a dispute having arisen, on the application of one of the parties only, re-opened his certificate. No dispute had arisen between the parties. The only dispute was between the plaintiff and the defendant; and the defendant had no right, on the application of the plaintiff, who was only one of the parties to the contract, to re-open the decision that he had already given. Therefore, I think that on the 18th paragraph of the claim there is even less ground for an action shown than on the 17th.

*Demurrer allowed, with costs.*

Leave to amend on payment of costs.

Solicitors for the plaintiff, *Field, Roscoe, and Co.*, agents for *Richards and Woodward*, Nottingham.

Solicitors for the defendant, *Taylor, Hoare, and Taylor*, agents for *Maples and M'Craith*, Nottingham.

EXCHEQUER DIVISION.

Dec. 19, 20, and 21, 1878, and Jan. 28, 1879.

(Before POLLOCK, B.)

HILL (Kt.) AND OTHERS v. THE MANAGERS OF THE METROPOLITAN ASYLUM DISTRICT. (a)

*Nuisance—Metropolitan Asylum District—Erection of smallpox hospital—Injury to adjoining property—Liability of Managers of Asylum District—Poor Law and Local Government Boards—Metropolitan Poor Act 1867 (30 & 31 Vict. c. 6)—Injunction.*

The defendants were a body duly constituted and incorporated by the name of "The Managers of the Metropolitan Asylum District" under and by virtue of the Metropolitan Poor Act 1867 (30 & 31 Vict. c. 6), pursuant to an order of the Poor Law Board, dated the 15th May 1867, whereby certain unions and parishes within the metropolis, as defined by the Metropolitan Local Management Act 1855 (18 & 19 Vict. c. 120), including the parish of Hampstead, were "combined into a district termed 'the Metropolitan Asylum District,' for the reception and relief of the poor in the said district infected with or suffering from . . . smallpox . . . to be under a board of management to be constituted for the said district," and in the execution of their duties as such managers, the defendants, under the authority of the said Act of 1867, and with the sanction and by direction of the Poor Law Board, purchased in 1868 a plot of land at Hampstead for hospital purposes, in the north-western district, and thereon by the like direction erected, on a sudden outburst of smallpox in the metropolis, temporary buildings which they opened and used as a smallpox hospital from Dec. 1870 to July 1872. In 1874, by direction of the Local Government Board, who had been substituted for the Poor Law Board, the defendants erected on the site of the said temporary buildings, and in lieu thereof, permanent and substantial buildings specially designed and fitted up by them for the reception of patients suffering from contagious or infectious diseases, and in March 1876 opened the same as

a hospital for smallpox patients, from which time to the present large numbers of persons suffering from smallpox had been brought from all parts of the metropolis to, and been received and detained and many still were at, the said hospital, with the consent and by the authority of the defendants.

The plaintiffs, severally owners and occupiers of houses and lands adjoining the hospital, brought an action against the defendants in which they claimed damages in respect of injuries sustained by them from the erection and maintenance of the hospital, which the plaintiffs alleged was a nuisance to the neighbourhood in general, and to the plaintiffs in particular, owing to the probable spread of disease by infection, to the effect of the dead-houses, and to the bringing to and from the hospital of the patients in ambulances, and to the visiting of the patients by their relatives; and they claimed also an injunction to restrain the defendants from using their said lands and buildings as a hospital for smallpox or any other infectious or contagious disease; the defendants, on the other hand, denying that the hospital was a nuisance or a source of danger, and contending that, if it were, they were justified and protected from liability in what they had done by having acted *bonâ fide* in the execution of duties imposed upon them by the Legislature and in obedience to the orders of the Local Government Board.

The jury having found that the hospital was a nuisance occasioning damage to the plaintiffs *per se*, and also by reason of the patients coming to and going from the hospital; and secondly, that, assuming the defendants were legally entitled to erect and carry on the hospital, they had not done so with all proper care and skill with reference to the rights of the plaintiffs, it was, after argument on further consideration,

Held, by Pollock, B., that on the above findings of the jury, and it not having been shown or found that the intention of the Legislature could not have been carried out without necessarily creating a nuisance, it could not be taken that the creation of a nuisance was impliedly, though not in express words, authorised by the statute, and the plaintiffs were therefore entitled to have the verdict entered for them with costs, and also to an injunction restraining the defendants from carrying on the hospital so as to be a nuisance to the plaintiffs or any of them; but, following the course adopted in *The Attorney-General v. Colney Hatch Asylum* (*ubi infra*), the issue of the injunction would be suspended for three months, with liberty to either side to apply.

Held, also, that an authority amounting to a discretion was vested in the managers of the asylum district, and the Legislature could not have intended to make them mere irresponsible instruments to carry out the orders and directions of the Poor Law and Local Government Boards; which orders and directions must be taken with reference to the statutory powers conferred upon those bodies respectively, and cannot be so dealt with as to vary the provisions of the statute, or to enlarge or cut down the responsibility arising out of anything done by the board or the managers. *Hawley v. Steele* (37 L. T. Rep. N. S. 625; L. Rep. 6 Ch. Div. 521; 46 L. J. 782, Ch.) distinguished.

This was an action by the three plaintiffs, Sir Rowland Hill, knight, Alfred Downing Fripp, and William Lund, severally owners and occupiers of

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

certain dwelling-houses and lands in the parish of Hampstead, in the county of Middlesex, against the defendants for an alleged nuisance, created and caused by the defendants, in the erection and maintenance by them of the Hampstead Smallpox Hospital upon land belonging to the defendants, situated in the said parish of Hampstead, adjoining the said houses and lands of the plaintiffs, in which action the plaintiffs claimed damages for the injuries sustained by them from the said nuisance, and also an injunction to restrain the defendants from using their said land and the buildings thereon as a hospital for smallpox or scarlet fever or typhus fever, or any other infectious or contagious disease.

The case, on the part of the plaintiffs, as it appeared from their statement of claim, was, that in 1868 the defendants were owners in fee simple, by purchase in that year, of a plot of land at Hampstead, and that prior to 1868 the plaintiff Hill had been and then was owner in fee and occupier of a dwelling-house and several acres of land adjoining the land of the defendants, the principal entrance to which latter land, at which all the hospital patients afterwards entered, being at the end of a short *cul de sac*, forming a private road the property of the defendants, one side of which was bounded by the plaintiff Hill's property, and the entrance to whose said house was on the high road adjoining the point where the said *cul de sac* leaves the high road. That the plaintiff Lund had been, prior to 1868, and still was the owner, in fee of many acres of land and houses built thereon adjoining the said land of the defendants, and had, previously to 1868, let many of the said houses for different terms, and laid out and dedicated to the public divers roads over the said land, and past his said houses, and had from time to time relet divers of the said houses during the times of the occurrences after mentioned, occupying as his own dwelling-house one of the said houses on the said land, the entrance to which was on the high road, out of which the before-mentioned *cul de sac* turned at a short distance from the turning; and on the date of the defendants' said purchase, and at the time they first began to use the said land as a hospital for infectious diseases, the plaintiff Lund had entered into building agreements for erecting additional houses on the said land, which houses were then in course of erection. That in 1870 the plaintiff Fripp took a lease of the house and land a few yards from the said land of the defendants, and had since occupied the same as a residence and place for carrying on his profession as an artist, and in 1871 built at great cost a studio for that purpose, the sole entrance to the said house and studio being in the high road closely adjoining the said *cul de sac*, he being at the time he took the said lease unaware that the defendants were about to use their said land for the purpose of a smallpox hospital: (paragraphs 1, 4.)

Between Dec. 1869 and Dec. 1870 the defendants erected on the said land temporary buildings, which in the last-mentioned month they opened and continued to use as a hospital for smallpox patients up to the 20th July 1872 (paragraph 5), during which time large numbers of persons suffering from smallpox were, at the instance and invitation, and with the consent of, the defendants, brought from all parts of the metropolis to the hospital, and there received and detained

by the authority of the defendants (paragraph 6); and that during 1876 the defendants commenced, and were still continuing, to erect permanent administrative buildings, with the purpose of using their said land and buildings as a hospital for smallpox, scarlet fever and typhus fever patients and persons suffering from other infectious and contagious diseases (paragraph 7); and that in March 1876 they again opened the buildings for the reception of smallpox patients, from which time to the present large numbers of persons suffering from smallpox had been, at the instance, &c., of the defendants, brought to, and by the authority and invitation of the defendants had been and still were detained at, the said hospital (paragraph 8). Further, that during the time of such use of their land by the defendants, noxious vapours and matters dangerous to health had escaped from the said hospital on to the said lands of the plaintiffs, and rendered their houses and lands unhealthy, and prevented the plaintiffs and their families and tenants from occupying and enjoying the same with safety to their health, putting them to great expense in protecting themselves from illness, and otherwise interfering with their due use and enjoyment of their said houses and lands; and that patients and persons who had been in contact with patients, such patients and persons giving off germs of disease and being liable to spread infection, had, partly with the knowledge and consent and partly by the negligence of the defendants, from time to time got from the defendants' lands on to the lands of the plaintiffs, thereby rendering the lands and houses of the plaintiffs unsafe for occupation, and endangering the health of the plaintiffs, their families and tenants, and preventing their free use and enjoyment of their said houses and lands; and that during the said time a disagreeable and unwholesome smell spread from the said hospital to the lands and houses of the plaintiffs, and seriously interfered with their enjoyment of the said houses and lands: (paragraphs 9, 10, and 11.)

It was further alleged that, in consequence and as the natural result, foreseen by the defendants, of their said use of their land and buildings for a hospital, large numbers of persons suffering or recently suffering from smallpox, and of persons recently in contact with or shut up in vehicles or in the said building with persons suffering from smallpox, all such persons being in a state to spread infection and giving off into the air unwholesome vapours and germs of disease, had, on foot and in cabs, &c., frequented and passed over the said high road and up and down the said *cul de sac*, and over the said roads of the plaintiff Lund, and cabs, &c., in which smallpox patients had been conveyed, and being in a state to spread disease, had frequented the said roads, &c., the whole to the great danger of persons frequenting the said roads, &c., which had thereby become dangerous and unsafe for persons to walk or drive in; and noxious and infected air and germs of disease had spread into the houses and gardens at the sides of the said high road and other roads and *cul de sac*, and in particular into the houses and lands of the plaintiffs and their tenants: (paragraph 12.)

The plaintiffs alleged also that persons suffering from smallpox and spreading infection and the germs of the disease in the air around had, at the invitation and with the consent of the defendants, walked and been conveyed to the hospital

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along the said highway and roads, &c., thereby rendering the said roads, &c., dangerous, and spreading infection into the houses and gardens on each side; and that persons bringing patients to the hospital, and thereby themselves becoming liable to spread infection, had, at the invitation, &c. of the defendants, come along the said roads, &c., to the hospital, and by their orders and consent returned from the said hospital along the said roads and *cul de sac*, whereby the dangers, inconveniences, and injuries to persons in the said roads and *cul de sac*, and in particular to the plaintiffs and their property, had been increased; and that friends visiting the patients and others entering the hospital, and the nurses and other servants of the defendants in the hospital, and who respectively were thereby liable to spread infection, and patients who had recovered but were still liable to spread infection, had, with the defendants' consent, gone out of the hospital along the said *cul de sac* and roads, thus further increasing the dangers, &c., to persons generally, and in particular to the plaintiffs and their property: (paragraphs 13, 14, and 15.)

By reason of the above-mentioned facts the plaintiffs had been prevented from having safe and undisturbed ingress and egress for themselves, their families, visitors, and tenants, to and from their said lands and houses, and persons whom they desired to see for personal and professional reasons had been prevented from coming to them, and the said lands and houses had been rendered unhealthy and unfit for habitation, and filled with noxious air and germs of disease; and by reason of such danger and inconvenience the enjoyment by the plaintiffs and their tenants of their said land and houses had been seriously interfered with, and the value of the said property greatly diminished: (paragraphs 16 and 17.)

That such dangers, inconveniences, injuries, and losses, and each of them, were partly the necessary consequences of the use of the said land and buildings of the said defendants as a smallpox hospital, and had been greatly increased by the negligent and improper manner in which the said hospital had been and was conducted by the defendants, and the absence of rules for the protection of persons living in the neighbourhood from infection, and the want of strictness in enforcing such rules: (paragraph 18.)

The plaintiffs severally claimed damages for the injuries sustained by them respectively from the said nuisance, viz., Sir Rowland Hill, 4000*l.*; Alfred D. Fripp, 2000*l.*; and William Lund, 25,000*l.*; and also an injunction to restrain the defendants from using their land and buildings as a hospital for smallpox, or any other infectious or contagious disease, and also such other relief in the premises as the circumstances of the case might require.

The case on the part of the defendants, as set forth in their statement of defence, was that they were a body of persons incorporated under and by virtue of the Metropolitan Poor Act 1867 (30 & 31 Vict. c. 6) pursuant to an order of the Poor Law Board issued on the 15th May 1867, directing that the several unions and parishes set forth in the schedule thereunto annexed, being all wholly or for the greater part thereof respectively included within the metropolis as defined by the Metropolitan Management Act 1855, should be combined into a district, to be termed "The Metropolitan Asylum District," for the reception

and relief of the classes of poor persons, chargeable to some union and parish in the said district respectively, who might be infected with or suffering from fever or the disease of smallpox, or might be insane, to be under a board of management to be constituted for the said district and to consist of sixty members, forty-five of whom were to be elected by the guardians of the several unions and parishes comprised in the district, and fifteen to be nominated by the Poor Law Board.

That the parish of Hampstead was within such district, and the defendants, having been duly appointed, entered upon their duties as imposed by the Metropolitan Poor Act 1867, and, having resolved to provide three fever and smallpox hospitals, two of which were to be to the north and one to the south of the river Thames, appointed in Aug. 1867 a committee of their body to report upon the matter who, afterwards reported that sites he purchased for hospital purposes in the north-east district, in the north-west district, as near as might be found convenient to the Regent's Park, and in the southern district; and the committee subsequently, in Jan. 1868, reported that the most eligible site in the north-western district was the land in question, and the defendants authorised the committee to enter into a contract for the purchase of the said land for hospital purposes at a certain price, subject to the approval of the Poor Law Board, and subsequently, with the sanction and under direction of the said board, the purchase was completed; and the defendants, having purchased also sites at Homerton for the north-east and at Stockwell for the south-east district, employed architects to prepare proper plans for the erection of permanent hospitals on the said three sites; and in Feb. 1869, by direction of the Poor Law Board, they postponed the erection of a permanent hospital at Hampstead, but proceeded with the erection of permanent buildings at Homerton and Stockwell; and the Poor Law Board also directed that in the event of a sudden outbreak of fever the defendants should erect temporary buildings on the site at Hampstead.

That in Nov. 1869, a sudden outbreak of relapsing fever occurring in the metropolis, the defendants, by direction of the Poor Law Board, and for the purpose of providing accommodation for the poor of the north-western district suffering therefrom, erected the temporary buildings referred to in paragraph 5 of the statement of claim; and that until June 1870, when such temporary hospital was closed, a great number of fever patients were to the knowledge of the plaintiffs received therein. That in Nov. 1870 a sudden outbreak of smallpox occurred in the metropolis and, the smallpox and other hospitals being crowded with patients, it became necessary to provide immediate accommodation for the large number of poor persons suffering from the epidemic; and the defendants being directed by the Poor Law Board to utilise the temporary hospital at Hampstead for the reception of smallpox patients, and to erect additional temporary buildings for the like purpose, and being solicited by several boards of guardians of the metropolis to open the said hospital for smallpox patients, they did, as alleged in paragraph 5 of the statement of claim, open and use the said buildings as a small-pox hospital, and early in 1871, the epidemic still continuing, an addi-

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tion was made by them to their said premises at Hampstead by the erection, with the sanction of the Poor Law Board, of further temporary buildings for the accommodation of patients; the defendants also said that their acts referred to in paragraph 6 of the statement of claim were done by them *bonâ fide* in the exercise of their duties as managers of the said hospital, pursuant to the powers conferred upon them by the Metropolitan Poor Act 1867, and by the said order of the 15th May 1867, and pursuant to and in order to comply with divers orders and directions of the Poor Law Board.

That after July 1872 the said buildings were not further used as a smallpox hospital, but the defendants were specially directed by the Local Government Board, who had been substituted for the Poor Law Board, to keep the said buildings in readiness to meet any future outbreak of smallpox; and in 1874 they were directed by the Local Government Board to replace the aforesaid temporary buildings by buildings of a permanent and substantial character, to be specially designed for the reception of patients suffering from contagious or infectious disease. One permanent building was (as stated in paragraph 7 of the statement of claim) erected, but it was erected pursuant to the direction aforesaid, and after a select committee of the House of Commons, appointed to inquire into and report upon the action of the Metropolitan Asylum's Board in respect of the establishment of a fever and smallpox hospital at Hampstead, had, upon evidence taken by them, including the evidence of the plaintiffs by themselves or their agents on their behalf, reported (*inter alia*) that on the whole there was no reason why this particular district (meaning Hampstead) should claim the interference of Parliament for the removal from it of an inconvenience to which it had been subject by reason of the due execution of a wise and beneficent law.

The defendants also alleged that the plaintiffs were, during the time of the erection of the temporary and also of the said permanent buildings, well aware that they were being erected for the express purpose of being used for the reception of persons suffering from contagious or infectious disease, and were also aware of the alleged directions of the Local Government Board, and from time to time saw the said several buildings being erected; that the defendants have incurred great expense in the erection thereof, and in making the same suitable and fitted for the purpose of receiving such patients, and they submitted that under those circumstances the plaintiffs were not entitled to the relief by injunction claimed by them. The defendants admitted the opening of their buildings in Nov. 1876 for the reception of smallpox patients as stated in paragraph 8 of the claim, there being then a sudden increase in the number of poor persons affected by the disease in the metropolis, for whose provision and reception the defendants, pursuant to their duty in that behalf and to the directions of the Local Government Board, made provision in the buildings aforesaid; and they said that all the acts of the defendants referred to in the said paragraph 8 were done by them *bonâ fide* in the exercise of their duties as managers of the said hospital, pursuant to the powers conferred upon them by the Metropolitan Poor Act 1867 and by the order of 15th May 1867, and pursuant to and in order to comply with

divers orders and directions of the Poor Law Board and the Local Government Board respectively. But they did not admit any of the statements contained in paragraph 9 and the subsequent paragraphs of the statement of claim.

That in the management of the said hospital, during the times mentioned in the statement of claim, they acted *bonâ fide* in the execution of their duties, and in many things under the direction of the Poor Law and Local Government Boards, by whom rules were from time to time issued for such management, and they craved leave to refer to all orders and directions of the said boards respectively.

That the alleged causes of action of the plaintiffs did not arise from any default or wrongful act of the defendants entitling the plaintiffs to recover damages from the defendants, but arose from the exercise by the defendants and the Poor Law and Local Government Boards of the powers vested in them respectively by the Metropolitan Poor Act 1867 and other Acts of Parliament incorporated therewith.

And further, that the alleged causes of action arose from the existence of the smallpox hospital, and not from any neglect or default of the defendants in the conduct or management thereof; that the said smallpox hospital at Hampstead was erected for the public benefit, and at the time of the alleged causes of action was not a nuisance, and any damage which might have resulted therefrom to the plaintiffs did not afford ground of relief either by injunction or otherwise.

At the trial of the action before Pollock, B., and a special jury, at the Michaelmas sittings for Middlesex at Westminster, on the 18th Nov. last, and several following days, evidence was adduced on the part of the plaintiffs in support of their case as hereinbefore stated, and showing the number of patients received into the hospital during the time in question; and numerous medical witnesses were called who stated that in their opinion the existence of the asylum, as carried on by the defendants, was a source of danger to the neighbourhood generally, and to the plaintiffs in particular, owing to the probable spread of the disease by infection, to the effect of the dead-house; and also to the bringing of the patients to and from the asylum in ambulances, and to the visiting of the patients by their friends, &c. Evidence was also given of patients being allowed to walk in the asylum grounds so near to the fence separating such grounds from the plaintiffs' property as to endanger the safety of the latter; of the existence of bad smells from the dead-house; and of the wife of one of the plaintiffs having, shortly after noticing the smell, been attacked by smallpox, but it appeared that about the same time she had examined an empty ambulance standing in the high road, wherein a smallpox patient had been conveyed. On the other hand the defendants, who contended that they were protected from liability by the statute under which they had acted, adduced a large body of medical and other evidence showing that no danger was occasioned to the plaintiffs by the asylum, and that it was built and carried on with all possible care and skill, and so as to avoid any evil consequences.

In summing up the case, the learned Baron told the jury that the question as regarded the alleged nuisance was, whether the defendants had so used their land as materially to interfere with the



comfort and enjoyment of the plaintiffs in the use and occupation of their houses and lands, and that, in order to constitute a nuisance, there must be a sensible and real damage done to the property or persons alleged to be injured, something which did in a sensible degree affect the legal rights of the owners. It was (he told the jury) admitted that there might be some things which were inconvenient, and which disturbed the owner of land in his occupation of it, and which might undeniably depreciate its value, and which yet might be no nuisance. That in the present case the Legislature had conferred powers on the defendants and the Local Government Board to do certain things, but gave them no power to make compensation for injuries that might thereby accrue to other persons. In the case of railways powers were given to the companies to compensate owners for land taken, but none for the whistling or noise of the engines, because private interests must yield to the public good. They must treat this case as one between two individuals. If they found that the hospital was *de facto* a nuisance, it would be no excuse that the defendants did what they did in a fit and proper place, because the Legislature did not say what was a fit and proper place.

The learned judge then left five questions to the jury, which questions, together with the answers thereto, are fully set forth in the judgment; the finding of the jury being in substance, first, that the existence of the hospital was a nuisance and caused danger to the plaintiffs *per se*, and also by reason of the patients coming to and going from the hospital; and secondly, that there had been negligence in the management of the hospital, proper and reasonable care and skill with reference to the rights of the plaintiffs not having been exercised, and particularly in not disinfecting the ambulances before leaving the hospital. The defendants contended that they had acted under their statutory powers, and that, notwithstanding the above finding of the jury, they were entitled to judgment. The learned Baron, however, reserved his decision as to entering the judgment until the points of law involved in the case had been more fully argued before him on further consideration; and now

*Herschell*, Q.C. (with whom were *Bompas*, Q.C. and *Finlay*) moved to enter judgment for the plaintiffs, and argued that there was nothing in the statutory power given by the Metropolitan Poor Act 1867, that allowed the Metropolitan Asylum Board to create a nuisance, or enabled the Poor Law Board to direct them to do so. No Act of Parliament could do that. Proper care should have been taken as to the choice of the site and the access to the hospital, neither of which things had been done here. The erection of a hospital on this spot was not contemplated by the Legislature in the Act of Parliament in question, and, whether it were or not, certainly not so as to be a nuisance and a danger to the inhabitants of the neighbourhood, as the medical testimony clearly proved it to be. The defendants' contention, if it be right, would enable them to kill a considerable number of persons outside the hospital for the sake of the patients within it, and would render all the land and houses in the vicinity practically of no value. The finding of the jury was in accordance with the evidence and was right.

The *Attorney-General* (Sir J. Holker, Q.C.) with whom were *Willis*, Q.C., *Anderson*, and *Proudfoot*, for the defendants, *contra*, argued that the defendants were protected by the Metropolitan Poor Act 1867, and were merely in all they had done the servants and agents of the Poor Law and Local Government Boards. It had not been proved that there was any infection of the air, or that the health of any one had actually suffered. The germ theory of disease could not be supported, and no effluvia or anything else dangerous to health had been sent from the hospital on to premises of the plaintiffs so as to constitute a trespass. The plaintiffs had had the full enjoyment of their houses and lands, and no rights of theirs had been disturbed or interfered with in any way by the defendants; and, even if they had been, the defendants were protected from liability by having acted under the authority of the Act of Parliament and in obedience to the orders of the Poor Law and Local Government Boards.

The following cases and authorities were cited, relied on, and distinguished respectively, by counsel on each side, during the argument:

- The Attorney-General v. The Corporation of Leeds*, 22 L. T. Rep. N. S. 330; L. Rep. 5 Ch. App. 583; 39 L. J. 711, Ch.;  
*Clowes v. The Staffordshire Potteries Waterworks Company* (on appeal before the Lord Justices), 27 L. T. Rep. N. S. 521; L. Rep. 8 Ch. App. 125; 42 L. J. 107, Ch.;  
*The Attorney-General v. The Directors of Colney Hatch Lunatic Asylum*, 19 L. T. Rep. N. S. 708; L. Rep. 4 Ch. App. 147; 38 L. J. 265, Ch.;  
*The Caledonian Railway Company v. Ogilvie*, 2 Macq. H. L. Cas. 229;  
*The Attorney-General v. The Hackney Local Board*, 33 L. T. Rep. N. S. 244; L. Rep. 20 Eq. Cas. 626; 44 L. J. 545, Ch.;  
*The Attorney-General v. The Gas Light and Coke Company*, 37 L. T. Rep. N. S. 746; L. Rep. 7 Ch. Div. 1; 47 L. J. 534, Ch.;  
*Reg. v. Pease*, 4 B. & Ad. 30; 2 L. J. N. S. 26, Mag. Cas.;  
*Vaughan v. The Taff Vale Railway Company* (in the Exch. Cham.), 2 L. T. Rep. N. S. 394; 5 H. & N. 679; 29 L. J. 247, Ex.;  
*The Hammersmith and City Railway Company v. Brand* (in the H. of L.), 21 L. T. Rep. N. S. 238; L. Rep. 4 E. & I. App. 171; 38 L. J. 265, Q. B.;  
*Brown and others v. The Mayor, &c. of New York* (American), 3 Barbour's Sup. Ct. Rep. 254;  
*Geddis v. The Proprietors of the Bann Reservoir* (in the H. of L.), L. Rep. 3 App. Cas. 430;  
*Soltan v. De Held*, 2 Sim. Rep. N. S. 133; 21 L. J. 153, Ch.;  
*Hawley v. Steele*, 37 L. T. Rep. N. S. 625; L. Rep. 6 Ch. Div. 521; 46 L. J. 782, Ch.;  
*Boulton v. Crowther*, 2 B. & C. 703; 2 L. J. 139, K. B.; 4 Dowl. & Ry. 195;  
*Reg. v. The Poor Law Board; Re The Newport Union*, 6 A. & E. 54;  
*Reg. v. The Proprietors of the Bradford Navigation*, 33 L. J. 191, Q. B.; 6 B. & S. 601;  
*The Metropolis Local Management Act 1855* (18 & 19 Vict. c. 120);  
*The Metropolitan Poor Act 1867* (30 & 31 Vict. c. 6).

*Cur. adv. vult.*

Jan. 28, 1879.—*POLLOCK*, B.—This action was brought to recover damages in respect of, and to obtain an injunction against the recurrence of, what the plaintiffs alleged to be a nuisance affecting their rights, by the erection and maintenance of an asylum consisting of several buildings, which were erected and maintained for the reception and treatment of paupers suffering from smallpox. The rights of the three plaintiffs, who occupy land and houses adjoining the land and buildings



occupied by the defendants, were independent and differed in their character. For the purpose of this judgment it will be sufficient to refer to them as set forth in the statement of claim. At the opening of the case it was arranged by counsel that, in the event of a verdict passing for the plaintiffs, the amount of the damages should be referred to an arbitrator; and before the case had proceeded far it was further arranged that the question to be tried should be limited to this, viz., whether the asylum was a nuisance occasioning damage to the plaintiffs, either *per se*, or by reason of the patients coming to or going from the asylum; and, further, assuming that the defendants were entitled to erect and carry on the asylum, did they do so with all proper and reasonable care and skill with reference to the rights of the plaintiffs? The plaintiffs proved that between Dec. 1870 and July 1872 there were 7352 patients admitted into the asylum, of whom 1379 died, and that there were for a considerable period as many as 560 patients under treatment at the same time. They also adduced evidence to show that, during this period, the proportion of small-pox cases in the neighbourhood of the hospital was far larger than in other parts of the parish, and they called a number of medical witnesses who stated that, in their opinion, the existence of the asylum as carried on by the defendants was a source of danger to the neighbourhood in general and to the plaintiffs in particular, owing to the probable spread of the disease by infection, to the effect of the dead-house, and also to the bringing to and from the asylum of the patients in ambulances, and the visiting of the patients by their relatives in cases where death was apprehended. With regard to the plaintiff Sir Rowland Hill, some evidence was also given that patients within the grounds of the asylum were allowed to walk so near to the fence which separated the asylum grounds from those belonging to Sir Rowland Hill, as to interfere with the safety of the latter. With regard to the plaintiff Fripp, he deposed to having perceived when in his own house a bad smell from the dead-house, whereby his family and others were compelled to leave, and that on a particular day in 1871 the smell was specially noticed by himself and his wife, and shortly afterwards she sickened and was attacked by smallpox. He also stated, however, that about the same period Mrs. Fripp had examined an empty ambulance standing in the high road, wherein a patient, suffering from smallpox, had been conveyed. The defendants called a great number of witnesses, consisting of those who had the superintendence and personal management of the asylum, and also medical men, who stated that in their opinion no danger to or disturbance of the rights of the plaintiffs was occasioned by the asylum, and that it was built and carried on with all possible care and skill so as to avoid any evil consequences. At the end of the case on both sides, I left to the jury five questions, which, with the answers to them, were as follows: First, was the hospital a nuisance, occasioning damage to the plaintiffs, or either and which of them, either *per se*, or, secondly, by reason of the patients coming to or going from the hospital? To which the jury answered that "It was a nuisance and caused damage to each of the plaintiffs *per se*, and also by reason of the patients coming to and going from the hospital." Thirdly,

assuming that the defendants were by law entitled to erect and carry on a hospital, did they do so with all proper and reasonable care and skill with reference to the rights of the plaintiffs? To which the jury answered "No." Fourthly, assuming that the defendants were by law entitled to erect and carry on *this* hospital, did they do so with all proper and reasonable care and skill with reference to the rights of the plaintiffs? To which the jury answered "No." Fifthly, did the defendants use proper care and skill with respect to the ambulances? To which the jury answered, "No, we consider that the ambulances ought to have been disinfected before leaving the hospital." For the purpose of this judgment, I must assume that the answers thus given are supported in point of fact by the evidence which was laid before the jury; and, further, that the direction given to them was sufficient in point of law, any objection upon either of these heads being available only upon motion before the divisional court. At the further argument of the case, which took place before me during the last Michaelmas sittings, the learned counsel for the plaintiffs contended that the plaintiffs were entitled to have the verdict and judgment entered for them, and also to an injunction, and that the answers of the jury to the first two questions were sufficient to show that a legal cause of action had been established. The learned counsel for the defendants, on the other hand, denied this, and, with respect to the answer to the first two questions, asserted that no case had been made out, for the following reasons: First, they argued that, even were it admitted that the building and carrying on of the hospital were a nuisance, and one which was not authorised and protected by law, yet the defendants were not liable, because in all that they did they had acted simply in obedience to the Local Government Board, whose orders they were bound to obey; and the position of the defendants was likened to that of a constable executing a warrant and officers carrying out the orders of their Government. Secondly, it was argued, on broader and more intelligible grounds, that the defendants were not liable, because in all that they did they acted *bonâ fide* in the execution of a duty cast upon the Local Government Board, and themselves by a statute which required certain things to be done for the public welfare. Now, before I consider whether either of the points contended for by the defendants can be supported, it is necessary to examine what is the exact position, both with relation to the Local Government Board, and also to the members of the public whose property and rights may be affected by their acts. The statute, by which the defendants are incorporated, and under which they seek to exercise the powers and do the acts complained of, is the Metropolitan Poor Act 1867 (30 & 31 Vict. c. 6). But this statute is only in continuation of a course of legislation, commencing with the Poor Law Act of 1834 (4 & 5 Will. 4 c. 76), whereby a Poor Law Board was first established, and power given to such board, amongst other things, by sects. 23 and 25, to direct overseers and guardians to build, hire, enlarge, or alter workhouses according to such plans and in such manner as the board shall deem most proper. Similar powers will also be found in the Poor Law Act of 1844 (7 & 8 Vict. c. 101), s. 43, whereby the Poor Law Board is authorised to order district boards to

"purchase, hire, or build, and to fit up and furnish buildings for asylums or schools." The Act of 1867 is limited to the metropolis, and provides, by sect. 5, for the establishment of asylums for the reception and relief of "sick insane, or infirm paupers" chargeable in the metropolitan unions. This is carried out in sects. 6, 7, and 8 by the formation of asylum districts, and the constitution of a body of managers for the asylum of each district, and by directing that "for each district there shall be an asylum or asylums as the Poor Law Board from time to time by order direct." By sect. 15 "The Poor Law Board may from time to time by order direct the managers to purchase or hire, or to build and (in either case) to fit up a building or buildings for the asylum, of such nature and size and according to such plan and in such manner as the Poor Law Board think fit, and the managers shall carry such directions into execution." And by sect. 16, "The managers shall have the like powers as are for the time being vested in guardians of unions in the metropolis relative to the purchase or hiring of land or buildings." The following sections are also material: Sect. 20 enacts that "The managers shall from time to time provide for the asylum necessary fixtures, furniture, and conveniences, and such as the Poor Law Board from time to time by order direct." By sect. 21, "The mode of admission into the asylum shall be such as the Poor Law Board from time to time by order direct." Sect. 22, "The managers shall have the like powers as guardians for the relief, maintenance, and management of the inmates of the asylum, and shall from time to time provide such medicines, appliances, and requisites for the medical and surgical care and treatment of the inmates, and cause the same to be furnished and used according to such rules as the Poor Law Board from time to time by order direct." Sect. 51 provides that "The provisions of the Act 5 & 6 Will. 4, c. 69, to "facilitate the conveyance of workhouses and other property of parishes, and of incorporations or unions of parishes in England and Wales" relative to the acquisition of sites or buildings for workhouses, and of all Acts extending or amending the same, shall apply to lands and buildings required to be purchased, hired, or otherwise acquired for any of the purposes of this Act, and shall have effect as if managers under this Act were guardians, and as if an asylum or dispensary were a workhouse." Sect. 53 enacts that "So much of the Lands Clauses Act as relates to the purchase of lands otherwise than by agreement shall not be put in force except for the purchase of lands for the purpose of enlarging a workhouse, hospital, or school existing at the passing of this Act, and then not without a previous order of the Poor Law Board directing such purchase." By the Local Government Board Act of 1871 (34 & 35 Vict. c. 70) the powers and duties vested in the Poor Law Board are transferred to the Local Government Board which was established by that Act. It will be seen from these provisions that the scope and intention of the Act is to create and carry on within the metropolis asylums for the "sick, insane, or infirm," by district managers under the direction and control of the Poor Law Board, much in the same way as workhouses, asylums, and schools have been carried on by the guardians and district boards; and it is observable that the

only reference to smallpox is contained in sect. 69, which provides for the repayment out of the common poor fund of certain expenses, including those incurred "for the maintenance of patients in any asylum specially provided under the Act for patients suffering from fever or smallpox." It is under this Act that the defendants were appointed and have acted, and it is under the provisions contained in it, and under the orders of the Local Government Board made in pursuance of it, which were given in evidence at the trial, that the defendants seek to shelter themselves, on the ground that they acted only as the innocent agents of a public board, and in pursuance of their orders carried out what they have done, and therefore are irresponsible. I am unable, upon what seems to me to be a fair construction of the statute and a proper appreciation of its meaning, to arrive at that conclusion. Upon comparing sects. 15 and 16 it is clear that, whereas the former empowers the Poor Law Board to direct the managers to purchase, hire, or build buildings for the asylum, by the latter section the managers alone have the power similar to that vested in guardians of unions or parishes of the metropolis relative to the purchase of lands. So far as I can gather, the policy and provisions of the Poor Law Acts (beginning with the 59 Geo. 3, c. 12, s. 8, and continued and enlarged by the 5 & 6 Will. 4, c. 69, ss. 4 and 5, and the 6 Vict. c. 57, s. 16) have been that, formerly, churchwardens and overseers, and now guardians, should be the persons to acquire and hold lands or buildings required for workhouses, hospitals or other like places, although since the establishment of the Poor Law Board the guardians must exercise their rights under the control of the Poor Law Commissioners. It would appear from these and the other sections of the Act of 1867, that, although the intent is clear that the Poor Law Board are to have, so far as is possible, the ultimate control and to give their sanction to all that is done, yet the managers are the body who have power, subject to the orders of the Poor Law Board, to take and hold land; and it is they who, subject to such orders, are to purchase, hire or build, and to fit up the asylum, to provide the fixtures, conveniences and medicines, and, moreover, they are to have the like powers as guardians for the relief, maintenance, and management of the inmates, and in the appointment, control, and payment of officers. All these provisions appear to show that the asylum managers have authority and power vested in them amounting to a discretion, and that it could not have been the intention of the Legislature to make them mere irresponsible instruments to carry out the orders and directions of the Poor Law Board. It is quite true that each act that was done by the defendants with reference to the promotion of the asylum, and in particular the purchase of the land whereon it was built (which was authorised by an order, dated Feb. 13, 1868), was done by the express directions of the Local Government Board; but these directions must be taken with reference to the statutory powers and duty which are conferred upon those bodies respectively, and cannot be so dealt with as to vary the provisions of the Act or to enlarge or out down the responsibilities which arise out of anything done by the board or the managers, whose acts must be dealt with as referable to the

legal right that is vested in them. The first point made by the defendants is, so far as I can find, wholly new; and, were it tenable, would lead to very serious consequences as affecting the rights of property; for it amounts to this, that a body of managers constituted for the purpose of carrying out a public object under the direction and supervision of a public department, may do acts which are admitted to be a nuisance and injurious to the owner of neighbouring property, and are also admitted to be unauthorised by law, but yet are not to be liable because they did the acts by the mandate of the department under which they act. In dealing with a contention so novel in character and so serious in its consequences, it will be well to examine shortly the only principle and authorities which are said to be analogous. The immunity of ministerial officers for acts committed by them has long been established, and is founded upon the clearest principles of reason and justice, namely, that the officer of a court is bound to obey the writ of a court acting within its jurisdiction, and has no means of ascertaining whether it proceeds upon a valid judgment or not. Moreover, he is punishable if he does not so obey, and it would be unjust that a man should be punished if he does not do a thing, and be liable to an action if he does do it. This was clearly pointed out by Willes C.J. in the case of *Moravia v. Sloper* (Willes Rep. 30), and in the judgment of the Court of Queen's Bench in the case of *Andrews v. Morris* (1 Q. B. 3; 10 L. J. N. S. 225, Q. B.). In the present case, whether the defendants were bound to obey the orders of the Local Government Board would depend upon the question whether those orders were legal or not, and therefore to say that the defendants were bound to obey such orders is to beg the question. The exemption from liability of officers carrying out Government orders has always been rested upon the ground that their conduct, under such circumstances is an act of state for which, on grounds of public policy, they cannot be made liable. In the present case, assuming that the Local Government Board were not authorised by the Act of 1867 to do the act of which the plaintiffs complain, the defendants were bound to inquire into their legal position, and were also bound to take care that they so exercised their rights as not injuriously to affect the rights of others, and they are in this respect in the same position as all other persons are by whose wrongful acts a nuisance is created. The second ground upon which the defendants rested their case involves a much more important question, namely, whether the defendants are protected in doing what they did by the provisions of the Act of 1867. That there are no provisions in that Act requiring them to build the very hospital, and on the very site, and to carry it on in the very manner in which it was carried on, was admitted. Had this been so, the case would have come within the well-known rule that, if the Legislature authorises the doing of a particular thing, it cannot be wrongful—a rule which is continually acted upon where the construction of roads, railways, canals, or other public works has been authorised by Act of Parliament. But it was said that, looking at the purview and legal intent of the Act, and the fact that it was passed with the view of obviating, or, at least, lessening a great public danger, the statute must be construed in a liberal spirit, and so

as not unduly to place difficulties in the way of those to whom its execution is entrusted. With regard to this last argument, if it is meant that this statute is to receive a construction different from that which would be put upon a statute authorising the carrying out of an agreement or public work, I see the greatest difficulty in giving effect to it, for there could not be a more dangerous doctrine, or one more contrary to the true rules of construction, than that which required or allowed a judge to give a different effect to the same words, wider or narrower, in proportion as he might think that the general object of the Act in which they were found was of great or small public importance. The principle which governs these cases is, as was stated by Lord Blackburn (then Blackburn, J.), in delivering the joint opinion of all the judges who heard the argument in the case of *The Mersey Docks Trustees v. Gibbs*, in the House of Lords (14 L. T. Rep. N. S. 678; L. Rep. 1 E. & L. App. 112; 35 L. J. 225, Ex.), namely, "that the action is not wrongful, not because it is for a public purpose, but because it is authorised by the Legislature." Moreover, when stress is laid upon the general prevalence of small-pox in the metropolis, and the desirability of removing patients suffering from it to the hospital, it must be remembered that there is nothing in the general scope of the Act, or in any particular provisions of it, that points specifically to small-pox; the class for the reception and relief of whom the Act professes to provide asylums is the "sick, insane, or infirm, or other class or classes of the poor," &c. There is another consideration which also affects the question at issue. The dispute here is not between the Asylum Board and any person or body of persons with whom any relation is established by the statute. It is not as though the persons complaining of the acts of the board were officers of the asylum or patients, in which case it might fairly be said that, if there were two ways of carrying out the intention of the statute, or the orders of the Local Government Board, it must be assumed that a discretion was vested in the Asylum Board to do that which seemed to them best under all circumstances, though not best for some particular person or persons. Here the plaintiffs are strangers to the defendants, and to the whole matter over which the defendants have control; their rights are simply those of owners and occupiers of land, and they assert that they have suffered damage by reason of the defendants acquiring land adjoining, and so using it as to create an actionable nuisance. To meet this, therefore, the defendants must certainly make out a clear case of right; for, if the defendants could at any place and in any manner carry out the requirements of the Act without creating a nuisance, it cannot be supposed that the Legislature armed them with an option so to perform their duty as to create or not to create a nuisance affecting the rights of others, as it might seem to the gentlemen of the Local Government Board fitting and proper with reference to the internal advantage or economy of the asylum. If the principle were once admitted, it is difficult to see where any line could be drawn. A statute justifying the defendants in creating a nuisance to neighbours would seem, by parity of reasoning, to justify the diminution of light or air, and this, although the statute contains no provisions compensating those who

might be injured by its operation. The real question, therefore, seems to come to this: Looking at that which was done by the defendants, and which the jury have found to be a nuisance injurious to the rights of the plaintiffs, can it be truly said that the doing of it was, in substance and impliedly, though not in express words, authorised by the statute? Now, no evidence was tendered by the defendants to show, nor was there any finding of the jury, that the defendants could not have carried out what the Legislature intended them to carry out without necessarily creating a nuisance. It is clear from the facts proved that no such conclusion could have been arrived at; for, although to build and carry on the hospital where and in the manner in which it was built and carried on, and with its large number of patients, may have been the most proper and convenient mode of complying with the intentions and provisions of the Act, in so far as the patients, the officers, medical staff, and nurses were concerned, and the least expense to the ratepayers, it cannot be affirmed that, if several small hospitals had been built instead of one large one, or if a larger area around the hospital had been obtained, that which has been found to be a nuisance might not have been avoided. Hitherto I have dealt with the case apart from authority. Several cases were, however, cited in the course of the argument, and so far as these offer any assistance they appear to me to support the view which I have taken. In some of them the nuisance complained of was considered to have been expressly authorised by the Legislature. Thus in the case of the *King v. Pease* (*ubi sup.*), where a company was empowered to make a railway according to the deposited plans, and to use locomotives thereon, and the jury found that the engines used were of the best construction known, and that the defendants used due care and diligence in the using of them, the court held that, inasmuch as an unqualified power was given to use the engines on the particular railway, the defendants were not liable to be indicted for a nuisance, and that it must be presumed that the Legislature intended that those of the public who used an adjacent highway should sustain some inconvenience for the sake of the greater good to be obtained by those who used the railway. The same principle was followed in the case of *Vaughan v. The Taff Vale Railway Company* (*ubi sup.*) in the Court of Exchequer, and by the House of Lords in a Scotch case, *The Caledonian Railway Company v. Ogilvie* (*ubi sup.*), and *The Hammer-smith Railway Company v. Brand* (*ubi sup.*). Where a nuisance is not shown to be the absolutely necessary consequence of what is authorised to be done by the statute, the courts have been slow to admit of any argument by which it has been contended that the creation of a nuisance must be taken to be implied. This appears from what was said in the case of *Reg. v. The Bradford Navigation* (*ubi sup.*), and by the judgment of the Court of Appeal in the case of the *Attorney-General v. The Colney Hatch Lunatic Asylum* (*ubi sup.*), and in the case of *Cloves v. The Staffordshire Potteries Waterworks Company* (*ubi sup.*), where Mellish, L.J. dwells much upon the absence of any compensation clause, as indicating that the Legislature could never have intended to justify an injury to a private right. I agree also with what was said by Fry, J. in the case of *The Attorney-General v. The*

*Gas Light and Coke Company* (*ubi sup.*), that the full burden of proof in such a case rests entirely upon those who say that they cannot, without creating a nuisance, do a thing which they are bound to do. Whether the proposition be so framed as to assert that the Legislature never intended the act complained of to be done, or to say that those to whom the Legislature has entrusted the carrying out of a public work could do so without doing that particular act, the result is the same. In *Geddis v. The Proprietors of the Bann Reservoirs* (*ubi sup.*) Lord Blackburn says, "I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although that does occasion damage to anyone. But an action does lie for doing that which the Legislature has authorised, if it be done negligently; and I think that, if by a reasonable exercise of the powers either given by statute to the promoters or which they have at common law, the damage could be prevented, it is within the rule of 'negligence' not to make such a reasonable exercise of their powers." I do not think that it will be found that any of the cases (I do not now cite them) are in conflict with that view of the law. My attention was particularly called by the learned Attorney-General for the defendants to the judgment of the Master of the Rolls in the case of *Hawley v. Steele* (*ubi sup.*), declining to grant an injunction on motion to restrain a general in Her Majesty's army, and the officers under his command, from causing or permitting rifle practice on a common in close proximity to the plaintiff's house, which, as he alleged, was a serious nuisance, and occasioned damage to his property. The principle upon which this injunction was refused has no doubt a material bearing upon the present case, and I in no way differ from what was there stated by the Master of the Rolls. But I cannot follow the course of the argument by which it is submitted that any true analogy exists between the case of lands vested in the Secretary of State for War "for the purpose of the defence of the realm," and a power given to acquire or build an asylum for sick paupers. In the first case it would be extremely difficult to contemplate the user of land for military purposes which does not carry with it the right to fire guns. In the present case I cannot, upon the materials presented to me, draw the inference that an asylum for sick paupers, including those suffering from smallpox, cannot be maintained without the creation of a nuisance. I have thus far dealt with the answers given by the jury to the first two questions. The remaining findings, assuming the legal right of the defendants to erect and carry on the asylum, would raise the question whether the defendants in so doing used all proper and reasonable care and skill with reference to the rights of the plaintiffs. Here, again, I must assume that the jury received a proper direction, and that the findings were not contrary to the evidence adduced; and the only question that remains is, whether that evidence disclosed any legal cause of action? As to this, the counsel for the defendants argued that the evidence for the plaintiffs was too general in its character, and that, although it might establish that some nuisance existed, yet it was not shown that the plaintiffs had sustained any special damage in consequence

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of it. I cannot think that either of these contentions is established. As to the first of them: some of the plaintiffs' witnesses spoke fairly to the creation by the asylum of a nuisance, not merely affecting the comfort but endangering the healths of the plaintiffs, as to which in their evidence it would be impossible to see to what extent it arose necessarily from the existence of the asylum or from its being carried on in a manner more injurious to the plaintiffs than it might have been. This would and must have been a matter of inference for the jury. Upon the second point the plaintiffs would be entitled to a verdict, and to at least nominal damages, if the jury should think the nuisance created by the defendants rendered the enjoyment of life or property unsafe, although no special damage was proved. The result of the conclusion at which I have arrived, is that the plaintiffs are entitled to have the verdict entered for them, and also to judgment with costs. With respect to the injunction which is sought, I propose to adopt the course which was followed in the case of *The Attorney-General v. The Colney Hatch Lunatic Asylum* (ubi sup.). I therefore grant an injunction to restrain the defendants, their servants or agents, from carrying on the asylum so as to be a nuisance to all or any of the plaintiffs, and I suspend the issue of it for three months, with liberty to either side to apply.

*Judgment for the plaintiffs with costs; injunction suspended for three months; liberty to either side to apply.*

Solicitors for the plaintiffs, *Bischoff, Bompas, Bischoff, and Co.*

Solicitors for the defendants, *Few and Co.*

### Judicial Committee of the Privy Council.

Feb. 18, 19, 20, and March 28.

(Present: The Right Hons. Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and Sir ROBERT COLLIER.)

THE BANK OF NEW SOUTH WALES v. OWSTON. (a)  
ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

*Malicious prosecution—Authority of bank manager—Evidence—Misdirection—Practice—Appealable amount—Interest on judgment.*

*An authority in an agent to arrest offenders, and to institute criminal proceedings, can only be implied where the duties which he has to perform cannot be efficiently discharged for the benefit of his employer unless he has power promptly to apprehend offenders on the spot.*

*W., the acting manager of the appellants, commenced criminal proceedings against the respondent, a merchant at Sydney, on a charge of stealing a bill of exchange, which proved to be groundless. In an action for malicious prosecution brought by the respondent against the bank,*

*Held (reversing the judgment of the court below), that such proceedings not being in the ordinary routine of banking business, and the evidence not showing any case of emergency, the judge misdirected the jury in telling them that such authority was to be inferred from W.'s position*

*alone; and, in the absence of direct evidence of such authority, the bank was not liable.*

*When interest on the amount of a verdict is given, and included in the judgment, such interest must be taken into account in considering whether the amount at issue reaches the limit allowed for an appeal.*

THIS was an appeal from a judgment of the Supreme Court of New South Wales (Hargrave and Manning, JJ., Martin, C.J., dissenting), discharging a rule nisi to set aside a verdict for the respondent for 500*l.* and costs, and to enter a nonsuit, or for a new trial, in an action brought by him against the appellants, the New South Wales Bank, for malicious prosecution under circumstances which appear fully in the judgment of their Lordships.

*Benjamin Q.C. and Arbuthnot (J. C. Mathew with them) appeared for the appellants.*

*J. D. Wood (McIntyre Q.C. with him) for the respondent, took the preliminary objection that by the Order in Council of 13th Nov. 1850, the Supreme Court of New South Wales had no power to grant leave to appeal, except in cases in which judgment had been given in respect of any sum or matter at issue above the amount or value of 500*l.*, without obtaining special leave from the Privy Council, which had not been done in this case.*

On this point their LORDSHIPS gave judgment as follows:—In this case an objection has been made to the leave granted by the Supreme Court of New South Wales to appeal to Her Majesty on the ground that the sum involved is below the appealable amount. By the Order in Council of the 13th Nov. 1850, which regulates appeals from the Supreme Court of New South Wales, an appeal is given from any final judgment, decree, order, or sentence of the Supreme Court, subject to certain regulations and limitations, the first being that such judgment, decree, order, or sentence shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of 500*l.* sterling. In the present case the action was for malicious prosecution, and the damages were laid at 5000*l.* On the trial the jury found a verdict for the plaintiff, with 500*l.* damages. A rule nisi was applied for to set aside that verdict, which was granted, but upon argument discharged by the court. The rule was discharged on the 12th March 1877, and on the 13th the judgment was entered. The judgment so signed was as follows: "Judgment after verdict for the plaintiff, damages 500*l.*; interest on the above amount from the date of verdict, 15th May 1876, to date, 33*l.* 1*s.* 11*d.*; taxed costs, 317*l.* 12*s.* 10*d.*" It is plain from previous decisions of this tribunal that the costs may not be added to the amount recovered in estimating the appealable sum; and it is now contended at the bar that interest on the sum awarded by the verdict ought not to be added. Their Lordships, however, think that interest under the laws existing in New South Wales is to be considered in estimating the amount. Interest on a verdict is given by the statute (24 Vict. No. 8), the first section of which enacts that—"Every plaintiff who shall hereafter obtain a verdict in an action in the Supreme Court, upon which he shall hereafter obtain judgment, shall be entitled to interest at the rate of 8*l.* per cent. per annum on the

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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amount of such verdict from the time of obtaining such verdict until the time of entering up judgment thereon, and the amount of such interest shall be included in the judgment." The interest therefore is payable upon the amount of the verdict from the time of obtaining it until the time of entering up the judgment. It is to be included in the judgment, and forms part of it. What, then, is the sum "in issue," to use the words of the statute, in the present appeal? The verdict is only a step towards the judgment. The sum cannot be recovered upon the verdict, but is recovered in execution upon the judgment. The foundation of the judgment is the verdict, and the rule that was obtained to set aside that verdict must be understood as involving the whole sum which the verdict would carry, and which would be included in the judgment. That sum is not the original sum only, but, by virtue of the statute, that sum and interest. A similar question was before this tribunal in certain appeals from India (*Gooroo-persad Khoond v. Juggutichunder* (8 Moo. Ind. Ap. 166.)) The part which is material is at page 168: "Where the appeal is from the whole decree, and the decree has given an amount, including interest up to the date of the decree, which exceeds Rs. 10,000, it is clear that the matter which is in dispute in the appeal must exceed the sum of Rs. 10,000; for the question to be tried upon the appeal must be whether the decree is or is not right; that is to say, whether the decree has or has not properly ordered payment of a sum exceeding Rs. 10,000. Where, therefore, at the date of the judgment the sum which is recoverable under the decree of the Sudder Court is an amount exceeding Rs. 10,000, there, in their Lordships' judgment, the case clearly falls within the terms of the Order in Council." In the same judgment their Lordships state that they "must not, of course, be understood to intimate that the Sudder Courts ought to give leave to appeal in cases in which the specified amount of Rs. 10,000 can only be reached by the addition of interest subsequent to the decree." Here their Lordships think that the sum involved in the judgment appealed from does exceed, for the reasons they have stated, the sum of 500*l.*, and are therefore of opinion that the appeal ought to proceed.

The appeal was then heard upon the merits.

For the appellants it was contended that the verdict was against the weight of the evidence, there being no evidence that the prosecution had been directed by the bank. It cannot be contended that it is within the general authority of the manager of a bank to institute a criminal prosecution, and there was no evidence of implied authority, or any ratification of his act. The learned judge misdirected the jury. The following cases were cited:

*Mackay v. The Chartered Bank of New Brunswick*, 30 L. T. Rep. N. S. 180; L. Rep. 5 P. C. 394;  
*Eastern Counties Railway Company v. Broom*, 6 Ex. 314; 20 L. J. 196, Ex.;  
*Roe v. The Birkenhead, &c. Railway Company*, 7 Ex. 36;  
*Goff v. Great Northern Railway Company*, 3 L. T. Rep. N. S. 850; 3 E. & E. 672;  
*Poulton v. London and South-Western Railway Company*, 17 L. T. Rep. N. S. 11; L. Rep. 2 Q. B. 534;  
*Walker v. South-Eastern Railway Company*, 23 L. T. Rep. N. S. 14; L. Rep. 5 C. P. 640;

*Edwards v. London and North-Western Railway Company*, 22 L. T. Rep. N. S. 656; L. Rep. 5 C. P. 445;  
*Allen v. London and South-Western Railway Company*, 23 L. T. Rep. N. S. 612; L. Rep. 6 Q. B. 65;  
*Moore v. Metropolitan Railway Company*, 25 L. T. Rep. N. S. 951; L. Rep. 8 Q. B. 36;  
*Green v. General Omnibus Company*, 2 L. T. Rep. N. S. 95; 7 C. B. N. S. 290;  
*Bolingbroke v. Swindon Local Board*, 30 L. T. Rep. N. S. 723; L. Rep. 9 C. P. 575;

For the respondents it was argued that the manager must be taken to have authority to institute such proceedings. The appellants were incorporated by an Act of Parliament, giving them very wide powers, which of necessity must be exercised by some one on their behalf. It was for them to show that these powers were not vested in the general manager. It is unnecessary to go through all the cases cited on the other side, but the case of *The Eastern Counties Railway Company v. Brown* (*ubi sup.*), which is an authority against the respondent, was distinguished in the case of *Giles v. The Taff Vale Railway Company* (2 E. & B. 822; 23 L. J. 43 Q. B.) The direction of the learned judge at the trial was right.

*Benjamin*, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

*March 28.*—Their LORDSHIPS gave judgment as follows:—This is an action for a malicious prosecution brought against the Bank of New South Wales, an incorporated company. The circumstances leading to the prosecution, which it is now admitted was groundless, are the following: In March 1876 a bill at thirty days sight for 1500*l.* was drawn by Messrs. Morgan, Connor, and Glyde, a firm trading at Adelaide in South Australia, upon the plaintiff Mr. Owston, a merchant trading at Sydney under the firm of Owston and Co. The bill was drawn against a consignment of wheat shipped on board the *Sea Gull*, and was sent with the shipping documents by the Adelaide branch of the defendants bank to the head bank at Sydney. On Saturday the 18th March, the bank left the bill with the plaintiff for acceptance. He wrote his name upon it, but it was not called for until the morning of Tuesday the 21st. Meanwhile, on the afternoon of Monday the 20th, the plaintiff had received the following telegram from the drawers: "*Sea Gull* put back leaky;" and on the same afternoon he telegraphed in reply, "Do you wish us to accept draft, or will you instruct extension of sixty days?" On the morning of Tuesday the 21st, about eleven o'clock, a clerk from the bank called for the bill, and the plaintiff showed him the telegrams. He did not give the bill to him, but sent a clerk to the bank to explain the matter, and it was arranged that the bank should wait until one o'clock for the return of the bill. About that hour, and before the plaintiff had received an answer to his telegram, he returned the bill to the bank, having previously cancelled his acceptance. In the afternoon of the same day the following telegram from Adelaide reached the plaintiff:—"Bank instructed extend draft to sixty days." A telegram to the same effect was received by the bank. The bill, when returned to the bank by the plaintiff, was sent on the same afternoon by Hobbs, one of its clerks, to Messrs. Allen, Bowden, and Allen, who are notaries, and also solicitors of the bank, to be presented by



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them for noting, and what took place with respect to this presentment produced the misunderstandings which led to the prosecution complained of. On the following day, Wednesday the 22nd, a clerk of Messrs. Allen and Bowden, a lad called Muir, brought the bill to the plaintiff for acceptance. The plaintiff's evidence is to the effect that he understood the lad to be one of the bank clerks, and having in his mind the telegrams as to the alteration of the days of sight, he inquired of him how the bank wished the acceptance to be. The clerk said he knew nothing about that. The plaintiff then told him that he would accept the bill, and send it round to the bank, and it was left with him. Shortly afterwards Bishop, another clerk of Messrs. Allen and Bowden, came for the bill, and demanded to have it returned. According to the plaintiff's evidence he was not aware that Bishop was other than a bank clerk. He says that he again inquired how the bill was to be accepted, and told Bishop he would accept and send the bill to the bank. He says Bishop behaved in a violent manner and declared that he should treat what he had said as a refusal to return the bill. The plaintiff's account of these conversations is contradicted, but for the purpose of this general statement may be assumed to be correct. The plaintiff in fact soon after sent the bill to the bank, accepted, having first made it payable at sixty days sight, and it appears to have reached the bank about one o'clock. Unfortunately the fact of the return of the bill was not communicated by the bank to Messrs. Allen and Bowden, as it ought to have been, and they remained under the impression that the plaintiff was still keeping it in his possession. Another interview took place between Bishop and the plaintiff; they met in the street. The plaintiff declined to have anything to say to Bishop, and unfortunately did not tell him what would have prevented further trouble—that the bill had been sent to the bank. Bishop said, on parting, that he would go for the police. A consultation was held in Messrs. Allen and Bowden's office, and apparently on the assumption that the plaintiff was improperly withholding the bill, and that they as notaries were responsible to the bank for its return, it was resolved to take criminal proceedings. Bishop and Muir then went to the police magistrate and applied for a warrant to apprehend the plaintiff on the charge of stealing the bill. The magistrate refused to grant a warrant, but issued a summons to the plaintiff to appear on the next day to answer a charge of feloniously stealing a bill of exchange of the value of 1500*l.*, the property of the bank. The information was laid by Muir. As soon as he was served with the summons, the plaintiff went to the bank, and after inquiring for the general manager, who was engaged, saw Mr. Wilkinson, the acting manager, and complained to him of the course which had been taken. There is great conflict of testimony as to what occurred at this interview, but an explanation then took place, and there seems no doubt that after the interview it was resolved not to press the charge. Application was made by the solicitors to the magistrate to be allowed to withdraw it, which was refused, and upon the case being called on the next morning, the plaintiff being present in obedience to the summons, no evidence was offered in support of the charge, and the case was dismissed. The plaintiff then brought the present action

against the bank. On the trial Manning, J. properly held that the prosecution was without reasonable cause, and it was found by the jury to have been commenced from improper motives, and was therefore malicious. No question now arises on this part of the case. The two questions which were mainly contested at the trial and argued at their Lordships' bar are: (1) whether the proceedings of Messrs. Allen and Bowden were authorised by Wilkinson on behalf of the bank; and (2) if they were, whether the bank was responsible for Wilkinson's acts. At the trial the jury specially found the first question in the affirmative. Upon the second question, the learned judge told the jury, according to his own statement of his direction, "that it was to be inferred from Mr. Wilkinson's position as manager that he had sufficient power under the circumstances for directing a prosecution," and the verdict passed in accordance with this ruling. A rule nisi to enter a nonsuit or for a new trial was granted on the following grounds: 1. That the special finding of the jury (that Mr. Wilkinson authorised the prosecution) was against evidence, and had no evidence to support it. 2. That the judge was in error in directing the jury that the acts of Mr. Wilkinson, the acting manager, were, as regards the prosecution, the acts of the bank for which the bank was responsible. 3. That there was no evidence that the prosecution was in fact or in law a prosecution by the bank. This rule, after an argument before Martin, C.J., Hargreave and Manning, JJ., was discharged. The court was unanimous in refusing to disturb the finding of the jury as to Wilkinson having authorised the proceedings; but on the question of the correctness of the ruling of Manning, J., as to the responsibility of the bank for his acts, which that learned judge and Hargreave, J., sustained, the Chief Justice dissented from his colleagues. One point argued in the court below was that the bank, being a corporation, could not in any case be liable to an action of this kind. The Chief Justice (the other judges taking the opposite view) held the law to be so, to use his own words, "on the plain ground that malice being a state of mind, cannot be attributed to a corporation which has no mind," and he relied on the judgment of Alderson, B., in *Stevens v. The Midland Counties Railway Company and Lander* (10 Ex. 352) which, as reported, no doubt supports this view. The learned counsel for the appellant acknowledged that, after recent decisions, he could not support this broad proposition, and confined his argument to the two questions above indicated. Upon the first of these questions their Lordships cannot say that there is not some evidence to support the finding of the jury; and that finding having been sustained by the judgment of the court below, they intimated to the learned counsel at the close of the argument for the appellants that they should not feel justified in sending the case to a new trial upon this point, if it stood alone. The point remaining for consideration, viz., the liability of the bank for the acts of Wilkinson, is of more general importance. The first question which arises on this point is whether the direction of the learned judge to the jury to the effect that it was to be inferred from Wilkinson's position that he had authority to direct the prosecution—thus practically withdrawing the question from the jury—was correct, and their Lordships



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think that upon the evidence given at the trial it was not. No proof was offered by the plaintiff of the position, duties, and powers of the acting manager; but the defendants examined him, and also the general manager, who gave evidence on the question of his authority. Before considering the effect of this evidence, it will be convenient to refer to the series of authorities cited at the bar. They all related to the liability of railway companies for wrongful arrests by their servants. In each of the two earliest cases, *The Eastern Counties Railway Company v. Broom* (6 Ex. 314), and *Roe v. The Birkenhead, &c., Railway Company* (7 Ex. 36), the plaintiff, who had been arrested at a station for refusal to pay the fare demanded, brought an action for false imprisonment. In both the question arose as to the authority of the officers at the station to make the arrest, and in both it was held there was not sufficient evidence of such authority to go to the jury. The decision in the first of these cases, upon the insufficiency of the evidence for the consideration of the jury, is scarcely consistent with later authorities. In the last of them, Parke, B. thought there was no proof that the servant "had ever received any general authority from the company to arrest any person who did not pay his fare, nor was there any evidence of any course of dealing to show that, as a servant of the company, he was authorised to make any arrest on their behalf." In the later cases a more particular inquiry was made into the character of the employment of the officer, whose acts were in question, and the nature of the duties entrusted to him. In *Goff v. The Great Northern Railway Company* (3 El. & El. 672; 3 L. T. Rep. N. S. 850) the plaintiff had been arrested for travelling on the line without a proper ticket by an inspector of the company acting under the direction of the superintendent of the station. By the Railway Clauses Act (10 Vict. c. 20), s. 8, a penalty is imposed on any person travelling on a railway without having paid his fare, with intent to defraud, and power is given to all officers and servants on behalf of the company to apprehend such persons. There was evidence that the superintendent was the person in supreme authority at the station, and the jury having found for the plaintiff, the court refused to set aside the verdict, on the ground that there was no evidence for their consideration. Blackburn, J., in delivering the judgment of the court, observes: "The court thought that, as from the nature of the case the question whether a particular passenger should be arrested or not must be made without delay, and as the case may not be of unfrequent occurrence, it was a reasonable inference that in the conduct of their business the company should have on the spot officers with authority to determine, without the delay attending on convening the directors, whether a person accused of this offence should be apprehended." And the court held there was evidence for the jury that the persons who apprehended the plaintiff had such authority, observing that it was difficult to see why the company paid the police if the inspector of their police was not to act for them to this extent. This case turns therefore on the considerations that the summary power of apprehension given for the protection of the company could only be exercised (practically) on the spot, and instantly, and that the officers who acted were the fittest and indeed the only representatives of

the company on the spot who could exercise it, and upon these considerations it was held that the jury might infer the necessary authority. In the later case of *Edwards v. London and North-Western Railway Company* (L. Rep. 5 C. P. 445; 22 L. T. Rep. N. S. 656), it was held that there was no evidence of the officer who had made the arrest having such authority. There a foreman porter who had the superintendence of the station yard in the absence of the station-master, gave the plaintiff into custody on a charge of stealing timber which the foreman porter suspected to be the property of the company. The timber was in a van at the station. It did not appear that any timber was in the special charge of the foreman. The plaintiff was well known, and in fact a gate-man in the service of the company. It was held that there was no evidence of implied authority arising from the foreman's position to give into custody persons whom he might suspect to have stolen the company's goods. The apprehension in this case was not in pursuance of any special duty entrusted to the servant, to enforce laws or bye-laws. The court recognised the distinction that in the case of such a duty, authority might under certain circumstances be presumed, but held that the general authority sought to be inferred from the position of the foreman could not be so presumed. Other decisions adopt this distinction. In *Moore v. Metropolitan Railway Company* (L. Rep., 8 Q. B. 36; 25 L. T. Rep. N. S. 951), the facts of the case were held to bring it within the authority of *Goff v. The Great Western Railway Company*. The case of *Poulton v. The South-Western Railway Company* (L. Rep. 2 Q. B. 534; 17 L. T. Rep. N. S. 11) was a peculiar one. The station-master had arrested the plaintiff for non payment, not of his own fare, but that of his horse; the law giving power to detain only for the former. Although it appeared that the station-master acted in the belief that the law authorised the arrest, and that he was protecting the interests of the company, it was held that his act was not within the scope of his authority, since it could not be inferred that the company had authorised him to do an act which under no circumstances could be lawful, and which they had no power to do themselves. A question in some respects similar arose in *Allen v. The London and South-Western Railway Company* (L. Rep. 6 Q. B. 65; 23 L. T. Rep. N. S. 612). It is to be observed that although in both these cases the defendants happened to be railway companies, the questions involved in them might equally arise in the case of other masters. In the last it appeared that a clerk whose duty it was to issue tickets and put the money received in a till, which was kept under his charge, having given some money in change to the plaintiff, who objected to one of the coins, a dispute arose, and the plaintiff, it was alleged, put his hand into the till. The clerk thereupon seized the plaintiff and gave him into custody, and the next morning charged him before a magistrate with feloniously attempting to rob the till. Blackburn, J., who tried the cause, left it to the jury to say whether the clerk acted for his own ends and out of spite in consequence of the dispute, or whether he acted in furtherance, as he supposed, of the interests of his employers to protect their property. The jury found that the clerk was acting in defence of the company's property, and returned a verdict

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for the plaintiff. The court set this verdict aside and entered a nonsuit. It does not appear whether the clerk when he gave the plaintiff into custody believed or suspected that he had actually taken any money, though the finding of the jury affords an inference that he acted under that belief. The charge however was for the attempt only, and the decision assumed there had been no more than an attempt. Blackburn, J. put two cases, as supposed cases only, and his so putting them shows how little questions of this kind have been before the courts. He said he was disposed to think that if a servant in charge of money found another attempting to steal it, and could not prevent him otherwise than by taking him into custody, he might have an implied authority to arrest him, or if he had reason to believe that the money had been actually stolen, and he could get it back by taking the thief into custody, that also might be within the authority of the person in charge of it. The learned judge, however, declined to pronounce a decided opinion on these cases, and held that there was clearly no implied authority to give the plaintiff into custody for an attempt to steal which had failed. In none of the cases referred to did the question of the authority of a manager or agent entrusted with the general conduct of his master's business arise. They were all cases of particular agencies where the agents had been appointed to a special sphere of duty. The result of the decisions in all these cases is that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge could not be efficiently performed for the benefit of his employer, unless he had the power to apprehend offenders promptly on the spot; though it was suggested that possibly a like authority might be implied in the supposed cases of a servant in charge of his master's property arresting a man who he had reason to believe was attempting to steal, or had actually stolen it. In the latter of these cases it is part of the supposition that the property might be got back by the arrest, but in such a case the time, place, and opportunity of consulting the employer before acting would be material circumstances to be considered in determining the question of authority. The liability of the bank in this case must rest either on the ground of some general authority in the acting manager to prosecute on behalf of the bank, or on a particular authority so to act in cases of emergency. The duties of a bank manager would usually be to conduct banking business on behalf of his employers, and when he is found so acting, what is done by him in the way of ordinary banking transactions may be presumed, until the contrary is shown, to be within the scope of his authority; and his employers would be liable for his mistakes, and, under some circumstances, for his frauds, in the management of such business (*Mackay v. The Commercial Bank of New Brunswick*, L. Rep. 5 P. C. 394; 30 L. T. Rep. N. S. 180). But the arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and when the question of a manager's authority in such a case arises, it is essential to inquire carefully into his position and duties. These may, and in practice do, vary considerably. In the case of a chief or general manager, invested with general supervision and power of control, such an authority in certain cases

affecting the property of the bank might be presumed from his position to belong to him, at least in the absence of the directors. The same presumption might arise in the instance of a manager conducting the business of a branch bank at a distance from the head office and the board of directors. But whatever may be the case in instances of this kind, their Lordships think that such a presumption cannot properly be made from the evidence given at the trial as to the position held by Mr. Wilkinson. It appears that the board of directors held their meetings at the bank office, and the general manager, Mr. Smith, also sat there; and the clear inference from the evidence (if believed) is that the acting manager was subordinate to the general manager, and that the latter was, as he presumably would be, subject to the superior authority of the directors. Supposing this to be so (and if the facts were disputed, the opinion of the jury should have been taken upon them), their Lordships think it cannot be presumed, from his position alone, that the acting manager had general authority to prosecute on behalf of the bank, and therefore that evidence was required to show that such a power was within the scope of the duties and class of acts he was authorised to perform. The plaintiff offered no evidence whatever on this point; and the testimony of the two managers directly negatives the possession of such a power by the acting manager. Their statements at the most raise the question whether Wilkinson had authority so to act in cases of emergency, where immediate action is required, and the opportunity of arresting the offender might be lost if reference was made to the general manager or the directors. Granting that these statements afford some proof of such an authority, the further question would arise whether there is evidence that an emergency in fact occurred. An authority to be exercised only in cases of emergency, and derived from the exigency of the occasion, is evidently a limited one, and before it can arise a state of facts must exist which shows that such exigency is present, or from which it might reasonably be supposed to be present. If a general authority is proved, it is enough to show, commonly, that the agent was acting in what he did on behalf of his principal. But in the case of such a limited authority as that referred to, the question whether the emergency existed, or might reasonably have been supposed to exist, arises for decision; and that question raises issues beyond the mere fact that the agent acted on behalf of and in the supposed interest of the principal; were it otherwise, the special authority would be equivalent to a general one. What then was the situation when these unwarrantable proceedings took place? It cannot possibly be considered that it raised a case of emergency requiring immediate action by criminal proceedings against a person in the plaintiffs' position, or afforded reasonable ground for supposing that such a case had arisen. There was no necessity for immediate action, nor was immediate action in fact taken. The plaintiff was not at once given into custody, but an information was laid before a magistrate, and when he very properly refused a warrant to apprehend him, the summons complained of was taken out when there could evidently be no urgency either to obtain or serve it. It was obviously an attempt of the notaries and solicitors to recover the bill

by means which were thought by them to be more effectual for the purpose than civil proceedings would be. Their Lordships therefore think, upon facts which appear upon the evidence to be beyond dispute, that there was no necessity or apparent necessity for immediate action from which authority in the acting manager to instruct the solicitors (if he really did instruct them) to take these proceedings on behalf of the bank could be inferred. It is to be observed also that the bill in question was not under Wilkinson's special charge. He says "the matter was not in his department. It was a branch business; the general manager takes that." There being then no evidence of any emergency, the case in their Lordships' view is brought to the issue that the bank would not be liable for the acts of Wilkinson unless it could be established that he had some general authority to institute criminal proceedings. They have already said that they think such an authority cannot be inferred from his position alone as it appears upon the evidence, and that the direction of the learned judge was wrong. The verdict therefore cannot stand. In case the action should be again tried, the jury should be told, if the evidence on the point should be to the same effect as on the first trial, that the facts do not present a case of emergency, or apparent emergency, from which authority could be derived, and consequently that the bank would not be liable for the act in question unless it is proved, or can be inferred from the evidence, that general authority to prosecute offenders for stealing the bank's property connected with its business at Sydney, without consulting the general manager or the board of directors, was within the scope of Wilkinson's employment and duties, and the powers entrusted to him in relation thereto. The question whether Wilkinson in fact authorised the solicitors to prosecute the plaintiff will of course be open on the second trial. In the result their Lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court discharging the rule, and to direct that the rule be made absolute for a new trial. The respondent must pay the costs of this appeal.

Solicitors for the appellants, *Wallons, Bubb, and Walton*.

Solicitor for the respondent, *W. H. Gatty Jones*.

## Supreme Court of Judicature.

### COURT OF APPEAL.

ERRATUM.—At page 470, 2nd col., line 7, strike out the words "see 40 L. T. Rep. N. S. 445," and insert "by Jessel, M.R., who made the order asked for by the petitioner."

#### SITTINGS AT LINCOLN'S INN.

*April 25 and 26.*

(Before JAMES, BRETT, and COTTON, L.JJ.)

RALPH v. CARRICK. (a)

*Will—Construction—Life estate by implication—Gift to heir-at-law and a stranger after wife's death—"Descendants"—Parent's share.*

*A testator, who died in 1837, gave, devised, and*

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

*bequeathed the whole of his property to trustees in trust for the payment of his debts, with full power to sell all or any part of his estates, and directed them out of the moneys produced, or out of the rents, to pay the testamentary and funeral expenses and debts, and he then gave certain legacies (amongst them a legacy of 1500*l.* to his wife), and directed that after the death of his wife, and after the payment of all debts and legacies, the whole residue of his property should be divided into twelve portions, whereof three should be given to the children of his late aunt, Mrs. W., equally among them, the descendants (if any) of those who might have died being entitled to the benefit which their deceased parent would have received had he or she been then alive, and the remaining nine portions were to be given in the same manner to the children and descendants of others of the testator's aunts in the will mentioned. And should there be no children or lawful descendants of any of his aunts remaining at the time these bequests should become payable, then the portions of his residuary estate thereby devised and destined for such of them should be placed in the general residuary fund. The testator directed that the division of his residuary estate amongst his relatives should not be made till two years after his wife's death, and he directed funds to be set apart to provide for an annuity of 700*l.* payable to his wife under their marriage settlement. Some of the children of the testator's aunts were his co-heirs at law, and some of them were his next of kin, while some of the children were not his co-heirs, and some not his next of kin :*

*Held (affirming the decision of Hall, V.C.), that the testator's widow did not take an estate for life by implication in the residuary estate.*

*Held also (reversing the decision of Hall, V.C.), that the gift of the residue was not confined to the children and grandchildren of the aunts, but that all the descendants of the children of the aunts living at the time specified were entitled to take per stirpes and not per capita.*

*Sibley v. Perry (7 Ves. 522) commented upon and distinguished.*

*Ross v. Ross (20 Beav. 645) approved.*

*This was an appeal from a decision of Hall, V.C.*

The facts of the case were as follows :

By his will dated the 10th March 1837 Andrew Carrick, M.D., gave to his executors thereafter named, their heirs, executors, administrators, and assigns, the whole of his property, real and personal, within the realm of England, in trust for the payment of his just debts, with full power to sell absolutely and convert into money all or any part, or as much as they should at any time think fit and necessary, of his estates, real and personal (but subject as to his personal property to certain specific directions), or to demise or let all or any of his hereditaments; and after providing for the appointment of new trustees to act in the execution of the trusts of his will, the testator directed that they should stand possessed of the moneys produced, upon trust out of those to arise from his real estate only, or out of the rents and profits (and not out of the produce of his personalty), to pay all costs, charges, and expenses which they should be put to in or about the performance of the trusts, all his mortgage and other debts, and his funeral charges, and all the legacies

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and bequests therein contained. And after giving certain pecuniary legacies, he gave to his wife, Caroline Carrick, the sum of 1500*l.*, and also all his household furniture, wines and other liquors, carriage and horses, pictures, plate and books, except such parts thereof as were otherwise bequeathed and disposed of. He then gave various other pecuniary legacies, including certain legacies to charitable institutions, which he directed to be paid out of his personal estate, and after making provision for the payment, under certain circumstances, of other legacies out of the produce of his real estate, he directed that in the event of his death without lawful issue (which event happened), and after the death of his said wife, and after the payment of debts, legacies, and bequests, the whole rest and residue of all his remaining property, real and personal, within the realm of England, should, by his executors, trustees, or administrators, be divided into twelve equal parts or portions, whereof three such portions should be given to the children of his late aunt, Mrs. Wingate, equally among them, the descendants (if any) of those who might have died being entitled to the benefits which their deceased parent would have received had he or she been then alive; two such portions should in like manner be given to the children and descendants of his late aunt, Mrs. Bannerman; two such portions should in like manner be given to the children and descendants of his late aunt, Mrs. Monteath; one such portion to the children and descendants of his late aunt, Mrs. Cunningham; one such portion to the children and descendants of his late aunt, Mrs. Matthie; one such portion to the children and descendants of his late aunt, Mrs. Elder; one such portion to the children and descendants of his late aunt, Mrs. Finlayson; and that the remaining twelfth part or portion should be given to the children or descendants of his late maternal aunt, Mrs. Pearson; and should there be no children or lawful descendants of any of his aunts above named remaining at the time these bequests should become payable, then and in that case the portion or portions of his said residuary estate thereby devised and destined for such of them, should be placed in the general residuary fund. The testator then proceeded thus:

And seeing that a large portion of my real estate must be sold immediately after my decease for the payment of my just debts and the expenses necessary in proving this my will, and in carrying the provisions thereof into effect, and that great loss of property will unavoidably accrue from the hasty conversion of land into money in these times of great and undue depression, through that most unjust, impolitic, and swindling measure of restoring, as it is called, the current medium; or rather, as it should be called, a measure to compel debtors to pay their creditors double the amount that was due: in order, therefore, to mitigate in some degree this dreadful mischief by giving longer time for making the necessary arrangements, I hereby declare that it shall not be incumbent on my executors, trustees or administrators, to pay any of the legacies mentioned in this my will sooner than two years after my decease, neither shall the division of my residuary property amongst my relatives as above stated be made until two years after the death of my beloved wife Caroline, nor until all the other legacies and bequests in this my will, or which I may hereafter make by any codicil thereto, shall have been duly paid and discharged or provided for.

And the testator directed that the surplus of the moneys arising from the sale of his real estate,

after payment of his just debts, should be placed in the funds, or on mortgage of adequate value to provide for his wife's annuity of 700*l.* payable to her under their marriage settlement.

The testator died in June 1837, seised and possessed of considerable real and personal estate.

The testator's aunts named in the will all left children, but such children had all long since died, and many of such children had left descendants.

A suit was instituted in 1870 by James Hugh Ralph, who was a great-grandson of the testator's aunt, Mrs. Monteath, for the purpose of ascertaining the residuary estate of the testator, and securing the same for the persons entitled thereto, and for ascertaining and declaring the rights of such persons, and having, as far as might be, the estate administered, and the trusts of the will executed under the direction of the court.

The testator's widow, Caroline Carrick, died in 1872.

The plaintiff in the suit having died in 1874, the suit was revived by his widow, Frances Ann Ralph.

The chief clerk's certificate showed that the co-heirs of the testator were certain children of the aunts named in the will, and that the next of kin were certain children of the aunts. Some of the children of the testator's aunts were not co-heirs, and some were not next of kin.

On the hearing of the cause, on further consideration, the Vice-Chancellor held (as reported in 37 L. T. Rep. N. S. 112; L. Rep. 5 Ch. Div. 984) that the gift to the children of the testator's aunts and their "descendants" included children and grandchildren only, and not remoter descendants; and also that the testator's widow did not take an estate for life by implication in the residue.

From the latter part of the decision the legal personal representatives of the testator's widow appealed; and the plaintiff, who claimed, as widow of one of the great-grandchildren of one of the testator's aunts, gave notice that she should contend that the former part of the decision was wrong.

*W. Pearson, Q.C.* and *Byrne* for the appellants.

—Every gift in the will is subject to the wife's life interest. The testator declares that the division of the residue shall not be made until two years after her decease. The wife, we say, was entitled to a life estate in the whole residue by implication. The question is one purely of intention; but a general rule of construction has been established which applies both to real and to personal estate, viz: that where there is a devise of realty to the heir-at-law or a bequest of personalty to the next of kin, to take effect after the death of a person named in the will, that person takes a life estate by implication. The rule, however, goes further than that, and it is now settled that an estate for life is given by implication when some one of the persons who are to take after the decease of the person named in the will is heir-at-law or next of kin of the testator. In *Hutton v. Simpson* (2 Vern. 723) it was held that where a testator, having a wife and four daughters, devised lands to one of his daughters after the death of his wife, it was a devise to the wife for life by implication, though the daughter was only one of the co-heirs. It is true that in *Rees v. Inhabitants of Ringstead* (9 B. & C. 218, 228) Bayley, J. says that the report

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of *Hutton v. Simpson* in Vernon is in that respect at variance with that in Ch. Prec. 439, 452, and also with the account in the register book, which Bayley, J. had examined. The same rule prevails with regard to personal estate bequeathed to the next of kin after the death of a person named in the will:

*Blackwell v. Bull*, 1 Keen 176;  
*Bird v. Hunsden*, 2 Swanst. 342;  
*Cockshott v. Cockshott*, 2 Coll. 452;  
*Humphreys v. Humphreys*, 15 L. T. Rep. N. S. 557;  
 L. Rep. 4 Eq. 475;  
*Roe v. Summersett*, 5 Burr. 2808;  
*Holgate v. Jennings*, 24 Beav. 623;  
*Aspinall v. Petwin*, 1 S. & St. 544;  
*Re Betty Smith's Trusts*, L. Rep. 1 Eq. 79;  
*Cock v. Cock*, 28 L. T. Rep. N. S. 687;  
*Stevens v. Hale*, 6 L. T. Rep. N. S. 453; 2 Dr. & Sm. 22.

*Bristowe, Q.C., Dickinson, Q.C., Eddis, Q.C., G. J. Forster Cooke, H. A. Giffard, E. Ford, and J. Gerard Laking*, who appeared for the various respondents, were not called upon.

JAMES, L.J.—I am of opinion that it is impossible for us to differ from the Vice-Chancellor's conclusion as to the meaning of the will. Possibly we may say, as was said by Sir Peter Harding in *Upton v. Lord Ferrers* (5 Ves. 806) that a private person would say in this case that the testator must have intended that his wife should take for her life, but courts of law have always said that they cannot in such a case draw that inference where there is a devise of this kind. As it would be useless to give the estate to the heir-at-law after the death of the wife which he was to take immediately, the rule of construction is that the inference must be drawn that the wife after whose death the heir-at-law was to get it would take a life interest. The same principle has been applied to the case of next of kin. Where it is not a gift *simpliciter* to the person who was heir-at-law or next of kin at the date of the will, all the cases except the case before Stuart, V.C. (*Humphreys v. Humphreys*, 15 L. T. Rep. N. S. 557; L. Rep. 4 Eq. 475), which is inconsistent with the current of authority, show that the appellants' contention cannot be supported. The ultimate gift here is to a class of persons to be ascertained at the death of the person who is named, and the question is whether that person is tenant for life or not. It is impossible to apply the rule of construction, to which I have referred, to the present case. The ultimate gift here is not a gift to a person who is heir-at-law or next of kin. It must be dealt with as a gift to persons who are not in the position of heir-at-law or next of kin. It is a gift to a class of persons to be ascertained at a particular time, and in that case there is no implication that there is a gift for life to A. B. To hold that there was would be merely deciding that A. B. is to have something because the gift of it is postponed till after A. B.'s death, that being in contravention of the rule laid down. If you cannot bring the case within that rule, what can you bring it within? There is nothing in this case except that the gift is not to take place as a gift till after the death of A. B. There is a direction in the will that the estate shall not be sold for two years. That does not seem to make any difference. The gift is thus reduced to the common case of a gift to a class of persons after the death of another person, those persons not being heirs-at-law or next of kin, or not necessarily so, of the

testator. It seems to me that this is clearly a gift to a stranger after the death of another person, and we are not at liberty to draw the inference that there is an implied gift for the life of that person until after whose death the gift in remainder is postponed. I am not inclined to go through the cases which the Vice-Chancellor has gone through, and I need only say that I agree with him. I think the cases are stronger than he put them, but it is not necessary to go further than to say that the appellant has failed to bring himself within the rule which alone would entitle us to give the estate for life by implication.

BRETT, L.J.—It sometimes amazes me to think one is asked to say what was the intention of a foolish, thoughtless, and inaccurate testator. I have always been convinced that that is not the rule, and that all the court can do is to construe according to settled rules the terms of a will just as it construes the terms of any other written document. This will, if we are to imagine what was the intention of the testator, and that he had any real intention, is obviously the will of a foolish, thoughtless, and inaccurate man. If he really intended his wife to have an estate for her life, as the Vice-Chancellor points out, what on earth was more easy than for him to say it? If you suppose he had any real intention in his mind at the time, he must have deliberately refrained from expressing it, and expressed himself in the way in which he has. Now, the real question is, what, according to recognised rules, is the construction of this will? The first argument was that there was a general rule applicable to it, and that that general rule is that, in order to give an estate for life by implication, it suffices that some one of the persons to whom the property was given after the decease of the person named in the will should be the heir-at-law or next of kin. If that rule were really established as a rule of construction, then it would be applicable to this will, and we ought to decide the construction of this will according to the contention of the appellants; but to my mind not only is it not made out that that is a rule that is to be applied, but the contrary is made out, and that the authorities are against the proposition and are in favour of the converse of it. It seems to me that the case of *Aspinall v. Petwin* (1 S. & St. 544)—not the facts of the case but the exposition of the law laid down by the Master of the Rolls—is directly contrary to that proposition. And so also in *Stevens v. Hale* (2 Dr. & Sm. 22) the proposition is laid down by Kindersley, V.C., directly to the contrary. It is true, as it seems to me, that the rule laid down by Stuart, V.C. in *Humphreys v. Humphreys* (15 L. T. Rep. N. S. 557; L. Rep. 4 Eq. 475), would support the proposition if it were not that, to my mind, the authorities had decided the contrary, I should be happy to hold with him what he was inclined to hold in that case; but I think the authorities are predominant and are conclusive against that one *dictum* of his with regard to the rule he would have preferred to have established. It might have been said that the case of *Hutton v. Simpson* (2 Vern. 722) was an authority in favour of that proposition; but when that case was examined by Bayley, J. in the case of *Re v. The Inhabitants of Ringstead* (9 B. & C. 228) it seems to me that was not an authority in favour of the proposition. Now, the only question is whether there are any facts on this will which would enable us to construe

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it outside the general rule which is otherwise applicable to it. I have not heard any circumstances on this will that enable us so to do, and, therefore, I am of opinion that the decision of Hall, V.C., was strictly correct according to the technical and settled mode of construing such a will.

COTTON, L.J.—I am of opinion that upon the point now argued the Vice-Chancellor was right, and in consequence of the course the argument has taken, I think it right to say something as to the general rules that should govern us in deciding on the construction of wills, and as regards the rule applicable to gifts which it is attempted to raise by implication. Now as regards our duty when wills come before us for construction, it is obvious to say our duty is to consider the will. I say that for the purpose of calling attention to the argument that in the absence of any rule of law laid down or established by cases, we are at liberty to deal with wills in construing them as ordinary intelligent persons would do. Now there is a fallacy there. Of course we are bound to have regard to any rules which have been established by the courts for the purpose of enabling us to say what the words used by the testator do mean; and subject to that we are bound to construe the will as trained legal minds, and that differs from the mind of an ordinary person in this way, that even persons of ordinary intelligence not so trained are accustomed to jump at the conclusion as to what a person means by the words he uses by fancying he must have done what they under similar circumstances think they would have done. That is conjecture only, and conjecture on an imperfect knowledge of the circumstances of the case; because although, if the facts before them and in evidence were all the facts, they may think that they would have taken a particular course, yet it does not follow that all the facts known to the testator are in their minds or in evidence before them, or that the testator's mind was in any way constituted as regards the attention he paid to the rights and claims of the different parties dependent upon him as their minds are constituted, or that he would have acted in the same way as they. Therefore as lawyers we must construe the will, as Brett, L.J. has said, as we should construe any other document, subject to this, that in wills it is not necessary that technical words should be used for the purpose of giving effect to the intention of the testator, if we can find the declared intention which would be necessary in other instruments and other documents. Now let us see before we come to this will whether or no there is any general rule that will help us in interpreting it. As regards the attempt to raise gifts for life by implication arising by a gift to some person after the death of the person to whom there is a gift by implication for life, we have two rules. As to real estate, if there is a gift to a testator's heir-at-law after the death of A., that does give by implication a life estate to A. If there is a gift of the testator's real estate to a stranger after the death of A., that does not raise the implication. Now, for the purpose of seeing whether, if there be no rule laid down by the cases, the principle of one of those rules or of the other applies to the present case, we must consider what we conceive is the principle of the two rules. As regards an heir-at-law, if the real estate is given to him alone

there is a gift to him of that which in the absence of any gift he would take, not only after the death of the person named and to whom it is attempted to give a life estate by implication, but during the life of that person immediately after the death of the testator. That is giving to a person at a future time that which in the absence of gift he would have had then, and would have taken before. Therefore to give sense to that gift you must imply an intention to exclude him, the heir-at-law, till that future time arrives. Now, how can an heir-at-law be excluded? The heir-at-law can only be excluded from taking the estate of his ancestor by that ancestor giving it to somebody else, and therefore I am of opinion that when there is a gift to the heir-at-law alone of real estate after the death of A., that shows an intention to give a life estate to A., because in no other way can the heir-at-law be excluded, except by gift to another person, and that can have no meaning unless it is to postpone the heir-at-law, and then it is done in that way. But if the gift of that estate after the death of A. is to a stranger, that does not apply, and the stranger takes simply and entirely by the bounty of the testator, and in the absence of any gift, neither after the death of the named person, nor at any other time, will he take anything. Moreover, it is not necessary to give to the person named on whose death the gift is to arise in order to postpone the gift to the stranger, even if you gather from the other parts of the will that he is to take something. The testator can say when the gift to him is to arise without giving it in the meantime to anyone else. There is no difficulty in saying that a gift to a stranger after the death of A. raises by implication no life estate to A., but is simply a gift to the stranger after the death of A., leaving the estate in the meantime to go either to the heir-at-law, or, if the gift carries intermediate rents, carrying that over to the stranger. Then in the present case, is there any rule established by the authorities as applicable to a gift after the death of A. to B. and another person, not the heir-at-law? I mean a joint gift. I am of opinion that none of the cases establish any rule of construction applicable to such a case. Although cases have been quoted in which in a gift to a person as heir-at-law and others after the death of A. a life estate to A. has been implied, none of the judges have laid down that there is a general rule of construction, which, independently of the terms of the will, will give effect to a devise in those terms. In my opinion the way they have dealt with those cases has been by putting them on the special circumstances of the will and the expressions of the will as against there being any such general rule of construction, because otherwise the judge would have said, "I need not trouble myself to spell out the intention upon the particular expressions of the will; there is the general rule of construction not rebutted by anything in the will." That is the way in which the judges have dealt with those cases as against the existence of any general rule. I must of course except the case before Stuart V.C., in which he does lay down a general rule applicable to these cases, but in my opinion he went beyond the authorities on which he purported to rely; and that being an exception, as it is, from the general current of authorities, we cannot consider that as laying down any rule of construction which will help the appellants in



the present case. Then, that being so, within which principle does this case come? Does it come within the principle of the rule applicable to the gift to the heir-at-law after the death of A., or within the principle of the rule applicable to the gift to a stranger after the death of A.? In my opinion it comes within the principle on which the latter rule is founded, because although an heir-at-law is one of the persons to whom the gift of the real estate is made after the death of the widow, yet there are others joined with him, and those others are as regards the real estate strangers, they taking nothing except by the gift of the testator. It is not necessary to give to anybody else in order to postpone the interest he is to take under the will, and moreover the heir-at-law does not under the gift take that which, independently of gift, would come to him. The two things are different. Independently of the gift, he takes the whole real estate, but under that gift he takes only a share in it. So that, both as regards the interest given to the stranger, and as regards the modification of the interest which the heir-at-law takes, it cannot be said that this is inoperative unless you treat it as a postponement of the gift, and giving the life interest to the person after whose death the gift is to arise. This case of a gift to the heir-at-law, and others comes within the second rule, and not within the first, and that being so, we have nothing which can be called a canon or rule of construction to help us, unless there is on the face of the will an expressed intention by the testator that the widow shall have a life interest. I can see nothing in this will that can be held to show an expressed intention on the part of the testator to that effect. I should say that there was rather an indication of an intention to the contrary, because he refers to the fact that she was to have 700*l.* a year, and he provides for it by saying that the rents or income of the invested real estate should be applied in paying that 700*l.* a year, and I should say he would have gone on and directed that the balance also, after providing for that, should be paid to her if anything had been in his mind, but possibly the care of providing for his wife's annuity may have been the ground for postponing the division of his estate. That is conjecture; but to give a life estate to his widow would be a conjecture, and we are not entitled to conjecture what the testator meant to do. We can only look and see what on the face of the will he has said is to be done. The order of the Vice-Chancellor on this point must therefore be affirmed.

*Eddie*, Q.C. and *E. Ford*, for the plaintiff, who had not given notice of motion by way of cross-appeal, but had given notice under the Rules of Court 1875, Order LVIII., r. 6, that she would contend that the Vice-Chancellor's judgment was erroneous in holding that the limitation to descendants of children of the testator's aunts was confined to children of those children. [The court held that the notice was sufficient.] We say that this case does not come within the rule in *Sibley v. Perry* (7 Ves. 522), but rather within the decision in *Ross v. Ross* (20 Beav. 645). The word "descendants" is a most general expression, and is sufficient to include not only grandchildren of the aunts, but great grandchildren such as the plaintiff. There is nothing in this will to restrict the ordinary and

general meaning of the word "descendants." In *Sibley v. Perry* the words used were "issue" and "parent," while here the word "descendants" is used instead of issue. The word "descendants," coupled with "parent," might have the same meaning as "issue," but here the word "children" is used also, and the gift is to them and to the "descendants" of those who may be dead, such descendants taking their parent's share. This shows that the testator had something more than "children" in his mind. There is nothing here to indicate that "parent" was meant to be any particular parent in the series of parents. The gift over shows that the word "descendants" is used in the wider meaning. Of course the remoter issue will not take in competition with their parents, but in the place of deceased parents *per stirpes*:

*Gibson v. Fisher*, L. Rep. 5 Eq. 51;  
*Robinson v. Sykes*, 23 Beav. 401.

They also cited

*Crossley v. Clare*, 3 Swanst. 390;  
*Smith v. Horsfall*, 25 Beav. 628;  
*Jarman on Wills*, 3rd edit., vol. 2, p. 92.

*Dickinson*, Q.C. and *H. A. Giffard*, for the grandchildren of Mrs. Wingate.—"Descendants" is not a wider word than "issue," and the rule in *Sibley v. Perry* is just as applicable as if the word "issue" had been used. That rule, followed as it has been in *Pruen v. Osborne* (11 Sim. 132), and many other cases, should not be disturbed. Here the word "parent" is strictly correlative with "those who may have died," that is, the children of Mrs. Wingate; it cannot mean anyone else, and therefore the word "parent" restricts "descendants" to children, and the case comes within *Sibley v. Perry* and not within *Ross v. Ross*.

*Bristowe*, Q.C. and *G. J. Forster Cooke*, for the trustees of the will.

*J. Gerard Laing* for another respondent.

No reply.

JAMES, L.J.—In my opinion we cannot agree with the decision which the Vice-Chancellor has arrived at in this case. I am bound to say that, though I have been more than once referred to *Sibley v. Perry* (7 Ves. 522) as having laid down the law, or what has been adopted as a rule, it is, I think very much to be regretted that that case was ever made a leading case; because, according to the report of what Lord Eldon himself said in that case, it is to my mind perfectly clear that he never intended to lay down any general rule or canon of construction whatever, but was in terms dealing, and said he was dealing, with the very peculiar language of the will in that particular case. He found one gift in it which led him to the conclusion that there the testator had used the word "issue" to signify child only, and then he said, I give the same meaning to the word "issue" in other parts of the will. It has been considered and it is, I think, settled by the case of *Pruen v. Osborne* (11 Sim. 132) that there is a general rule that, when you find a gift to a person and then a gift to the issue of that person, such issue to take only the parent's share, then in that case the word "issue" is cut down to mean children. I am not quite sure that some of the consequences of that decision laid down as a general rule have always received the attention they ought to have received, because if that be laid down as a general rule of construction, this might happen



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not improbably; the testator might leave his property in this way, to his wife for life, at her death to all his children equally to be divided between them, and then if they should die leaving issue, the issue only to take the parent's share and then a gift over in terms. In that case the testator's children might die, their children having predeceased them leaving families, and the whole of the grandchildren might go to the workhouse and the family estate would go to a stranger under the residuary gift. That seems to me to be a very possible result of that rule. Now the word "issue" is an ambiguous word. In the ordinary parlance of laymen it means children and only children. When you talk of what issue a man has or what issue there has been of a marriage you always talk of children, not grandchildren or great grandchildren; you would say a man had issue so many sons and daughters. But in the language of lawyers and only in that language it means descendants; and in that particular will in the case of *Sibley v. Perry*, Lord Eldon found ground for coming to the conclusion that the word "issue" had the layman's meaning of children and not the lawyer's meaning of descendants. But in this case there appears to me to be a perfectly unambiguous word "descendants," a word which I venture to say no layman or lawyer would use to designate children only. "Descendants" mean descendants, that is children and their children, and their children to any degree. To me it is difficult to find any context except in express words which would lead one to imagine that when I say descendants I simply mean children. It is difficult to conceive any context by which the word "descendants" could be limited to mean children only. I should therefore say that the case of *Sibley v. Perry* has really no authority whatever as to this will. But supposing the word not to have been "descendants," but to have been "issue." It seems to me impossible to distinguish the case from *Ross v. Ross* (20 Beav. 645), or, according to my view, impossible to say that the case of *Ross v. Ross* was not decided upon very sound principles. There it was held that the language of the gift over rendered it really impossible to give that limited meaning to the word. It is one of the most settled, and appears to me one of the most reasonable rules of construction that where there is a gift over on the failure of certain persons the previous gift must, if the words reasonably admit of it, be construed as a gift to the same persons, and that is what occurred in *Ross v. Ross*, and that is what occurred here. Here it is beyond all question that the gift is only to take effect upon an absolute failure of the descendants of any one of the heirs, and all the descendants must fail. We are bound, unless there is something which absolutely compels us to the contrary, to suppose that the gift was to be to persons in whose favour the gift over was to take effect. The courts have constantly by implication done the same thing. It is the common thing when you create an estate tail to say, I give an estate to A. for life, and if he shall die without issue, then over. Of course the estate is not to go over until the natural failure of issue takes place. The words imply an estate tail, with a gift to the issue. It also refers to the case of cross remainders which are constantly limited by implication in the same way where there is a gift to classes and to their children, and then an ultimate gift on failure of all

of them. You imply cross remainders until there is a failure, and then the gift over takes effect. Here you have not a gift over except in this sense: a gift over of each particular share in such a way that it would go to other persons and create cross remainders, which cross remainders are not created except in the particular case where there is a total failure of the class. That is exactly what was decided in *Ross v. Ross*; and it seems to me rightly decided, and what I should myself decide now if it were a new point occurring for the first time upon the gift in this will. I really cannot bring myself to entertain any doubt whatever as to the meaning of this will. I have no doubt that when the testator said "descendants" he meant descendants, and he meant that the descendants were to take. It appears that the effect of the word "parent" would be that they would take *per stirpes*, not *per capita*; and that, giving all the effect that is required to that, there is no incongruity or inconsistency in that part of the will. We are therefore of opinion that the descendants will take *per stirpes* and not *per capita*, and that there is a gift over. Therefore we must discharge the first declaration of the Vice-Chancellor as to that part, and declare that all the descendants were entitled, but not of course to come into competition with the parent. They are only to take in any degree the share their parents would have taken.

BRETT, L.J.—I think after the way in which *Sibley v. Perry* has been spoken of in subsequent decisions, we are not at liberty to say that *Sibley v. Perry* does not contain a general rule. But I think I see the fate of that general rule. It will be the fate which usually accompanies a rule laid down in a case which is not liked, and therefore it is a general rule which will be applied to cases exactly like *Sibley v. Perry* and to no others. In other words it will be no general rule at all; and after hearing what the effect of such a general rule may be as described by my lord, I should have no objection to be present at the funeral of *Sibley v. Perry* as soon as that can take place. But, assuming *Sibley v. Perry* to lay down a general rule, it seems to me that general rule is not applicable to any part of this will. That general rule applies to the collocation in a particular manner of the words "issue" and "parent," but it seems to me that it does not apply, neither does the principle of it apply to any collocation of the words "descendants," and "parent." I agree that in ordinary parlance the *primâ facie* meaning of "issue" is children. In legal documents if the word "issue" is used without anything to restrict it, the *primâ facie* meaning of issue is descendants; that is to say, that the word issue may mean children only, or it may mean descendants. But the *primâ facie* meaning of "descendants" in ordinary parlance is really all descendants and not only children. I can hear of no authority for saying that in any legal document the word "descendants," merely because it is in collocation with the word "parents," is to have any other than its ordinary meaning in ordinary parlance. It is said that the converse is to be true if the word "issue" is the converse of the word descendants; but very often converses are not correct, and I do not think that it can properly be said that because "issue" may mean either children or descendants, "descendants" may mean either children or descendants. I do

not deny that if it could be shown by something much more clear than the mere collocation of the words parents and issue, or parents and descendants, that a particular testator had used the word "descendants" in a way in which no other person would use it, that might not be the construction of the will; but the mere presence of the collocation of parents and descendants does not bring the case within the rule of *Sibley v. Perry*. But even if the word "issue" had been used in the first part of this will, it seems to me nevertheless that the construction of this will would have been different from that in *Sibley v. Perry*, and would have been in accordance with the construction of the will in *Ross v. Ross*. Now, with regard to the case of *Ross v. Ross*, I have tried hard to understand the first part of the judgment of the Master of the Rolls in that case. I have no doubt that it is some obtuseness of mine, but as to that part of the judgment dealing with the shifting meaning of the word "parents," I confess I do not understand it. But, however, we do gain from that case a very distinct ground of decision, which is the decision arising from the gift over, and the way in which the terms are used in the gift over, and it lays down a rule, that, notwithstanding in one part of the will you find the collocation of issue and parents as it existed in *Sibley v. Perry*, if you can show by other parts of the will that the testator did not use "issue" in that sense, then it is not to be used in the sense of *Sibley v. Perry*, even in the place where it is collocated with the word "parents." So that here if you take "descendants" to be the same as issue in the first part of the will, when you come to the gift over, or the gift of cross remainders, as it has been said, and find that this testator did not use the word "descendants" in the manner supposed, it seems to me that *Ross v. Ross* is an authority applicable to this case, seeing the way in which he clearly uses the word "descendants" in the gift over, and we must determine that he intended to use it in the same sense in the former part of the will. Therefore it does not seem to me, on the present occasion, that we have to determine what is the full effect of *Sibley v. Perry*, because it does not seem to me to govern this case.

CORROD, L.J.—I am of opinion that the decision of the Vice-Chancellor on this point cannot be sustained. I should have thought it unnecessary to add anything to what has already been said, but for the course of the argument in this case. It has been very much pressed upon us that there was a general rule laid down by Lord Eldon in *Sibley v. Perry* and that to reverse the decree of the Vice-Chancellor would be in fact to depart from the general rule so laid down. Certainly for myself, if there had been a general rule of construction laid down I should be unwilling, whoever the judge was who laid down that rule, to depart from it, or to distinguish a will and take it out of the rule on slight grounds, and certainly if Lord Eldon had laid down any general rule of construction which would apply to the present case I should follow it. But one must consider what general rules of construction are. They are not fetters so as to prevent the testator if he pleases, expressing a meaning not in accordance with the construction established on a particular will by that rule of construction. It is this, as I understand it. Unless there is anything to control

the expressions used in the will, certain expressions are to bear a particular meaning. I may instance that by referring to the meaning which has been given to the word "survivors." We all know that if there is a life estate and a gift to survivors, it means those, as a general rule of construction, who survive the life estate, or the particular estate, if there is not a life estate; then *primâ facie*, as a general rule, it refers to those who survive the testator—a general rule to be controlled in each particular case by the expressions used by the testator if those are sufficient to indicate an intention contrary to the general rule of construction. So that, even if there had been a general rule laid down in *Sibley v. Perry*, we must apply that to the words used in this particular will, and see how far those words do or do not take the case out of the general rule. Now it has been argued as if *Sibley v. Perry* had laid down this general rule: wherever you find "issue" and "parent" in collocation "issue"—although, unless restrained, the word is most general in its meaning, and includes all descendants—will be cut down to mean children of the persons described as parents. Now, in the first place, *Sibley v. Perry*, as far as the decision went, laid down no general rule whatever, because Lord Eldon, in framing the decree, was careful to declare his opinion in these terms: "I shall express the ground of my opinion in the declaration. Declare that upon the true construction of this will, and the whole of it taken together, the testator by the words 'lawful issue' in these clauses meant children, and the distribution shall be accordingly." He most carefully guarded himself. The general principle which he laid down was that issue included all descendants, but it was a word capable of being controlled by the context. He says, in this particular will I hold that looking at it altogether the meaning of the word "issue" is cut down and confined to children. Then I agree there is that which has generally been referred to as the rule laid down that in consequence of the reference to parents in that case he did say that in one of the clauses of the will, but not that, as I understand, which he was considering, "issue" will be cut down to children. That, I understand, was the third and the fourth clause. One hardly need refer to the fourth clause, because there the parent was described as the individual, but the case most favourable to the respondent's contention on this appeal is that which arises on the third clause of the will which, no doubt, Lord Eldon did consider assisted him in arriving at the meaning of the word "issue" in other clauses. What was the third clause? It was a clause which gave 1000*l.* to each of three persons named, and then it went on: "And if all or any of them shall die before I do, then I will that the lawful issue of every one of them so dying before me shall share and share alike, have, and enjoy that 1000*l.* stock which their respective parents, if living, would have had and enjoyed." Now no person or parent of anybody could enjoy the 1000*l.* as a whole except the three individuals named; and all therefore that Lord Eldon laid down there on the construction of this clause as differing from the others was that "parent" in that clause must bear its proper meaning of father or mother, as there was nothing to control it. Then I find a person referred to, to whose issue in that description there

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is a gift, and the person, the original taker, is referred to as the parent of all the issue, and it must be that person referred to because no other person could take the 1000*l.* as a whole; and when I find that a person to whose issue there is a gift is referred to as the parent of all the issue to whom the gift is given, "issue" in that will must mean children. That is all the rule, if there is any rule. He also goes through the rest of the will most carefully to see whether, having regard to all the clauses of the will he could not see that throughout the will the testator had used the word "issue" as synonymous with children. Now assuming that that is all the rule, let us see how far that governs the present case. Here we have a gift of certain portions of the estate, the first only is the limitation, but a share is given "to the children of my late aunt Mrs. Wingale, equally among them the descendants (if any) of those who may have died being entitled to the benefit which their deceased parent would have received had he or she been then alive." Now there is nothing there to show that the person there referred to as parent must of necessity be the child of Mrs. Wingale, and, if that be so, the foundation of Lord Eldon's decision upon the third clause of that will goes, because there it is evident that the person referred to as parent must of necessity be one of the three persons named, one of the first takers of the 1000*l.* But assume that these descendants here could be construed to be children of the children of Mrs. Wingale. If Lord Eldon laid down a general principle it was this, that he considered the word "issue" in the portion of the will under consideration to mean children because that was the meaning which the testator showed throughout the will he intended to give to that word. Now, can we for a moment say that throughout this will "descendants" is used to mean children? You have to refer to the limitations that follow these gifts and then you find that it cannot be used in that way because there are these words: "and should there be no children or lawful descendants of any of my aunts above named remaining at the time these bequests shall become payable," then it is to go amongst the other *stirpes*. Then we have these words, "no children or lawful descendants of any of my aunts," showing clearly that in that part of the will the testator did not consider "descendants" to mean children, because if that had been so, "children or descendants of any of my aunts" would be synonymous; but he has intended there to provide in the first instance for the failure of children, and unless one can restrict it in any way failure of all the descendants of any of his aunts. "Descendants" of his aunts must go beyond children as children have been already mentioned. Now in that last gift over I can see nothing whatever to restrict the meaning of the word "descendants," and therefore I consider that throughout the will the testator has not used the words "descendants" as meaning children only; and that that ground, therefore, is out away, and here it is impossible, I think, to say that he meant this forced limitation to take effect, unless there had been an entire failure of one of the *stirpes*. I think that the share given originally to one of the *stirpes* was only to go to the other if there was an entire failure of that *stirpe*. I think it is a sound principle that when there are ambiguous words in the original gift you should not construe the gift over in a restrictive sense which it does

not otherwise bear, but you should construe the ambiguous words, if they be ambiguous, contained in the previous gift, so as to mean the unambiguous words contained in the other gift. If there were any general rule laid down, this will does control that general rule, and it does not show that the word "descendants" is used in the restricted sense of children, but it shows that it is used in its general ordinary sense of descendants. It is not necessary in this case to consider how far the word "descendants" is liable to be restricted. In my opinion there is not sufficient here to restrict it in the way in which it was restricted in *Sibley v. Perry*, but I must say that as a mere matter of ordinary construction "descendants" is a more difficult word to control than "issue."

Solicitors: *Patrick; Clarke, Woodcock, and Ryland, agents for Isaac Cooke and Sons, Bristol; Walter, Moojen, and Son; Nelson, Son, and Hastings; Phelps, Sidgwick, and Biddle.*

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Friday, Jan. 17.

(Before JESSEL, M.R.)

PRINGLE v. GLOAG. (a)

*Practice—Costs—Set-off—Solicitor's lien.*

*A solicitor's lien for costs is not by title paramount; and when his client has been successful in an action, and recovered costs from, but is adjudged to be indebted in a sum of money to, the other party, the lien does not deprive that other party of the right to set off the sum owing to him against the costs due from him to his adversary.*

THIS was an action for the dissolution of a partnership formerly subsisting between the plaintiff and the defendant.

The questions in dispute were, under the Common Law Procedure Act 1854, submitted to an arbitrator, who by his award, dated 17th Nov. 1877, directed that Pringle should within a month pay to Gloag a sum of 37*l.* 16*s.* 8*d.*, and that Gloag should pay to Pringle his costs of this action and half his costs of the reference. The plaintiff was also to bear one-fourth and the defendant three-fourths of the costs of the award.

The award was made a rule of the Chancery Division, and the plaintiff's costs payable by the defendant were fixed by the taxing master at 52*l.* 12*s.* 2*d.*

The defendant claimed to set off the 37*l.* 16*s.* 8*d.* due to him from the plaintiff against the plaintiff's costs, and tendered his solicitor 14*l.* 15*s.* 6*d.*, the amount of difference. This offer was refused, and the solicitor threatened to apply for a writ of execution for the total amount of the costs.

The defendant accordingly moved that the plaintiff and his solicitor should be restrained from issuing execution for these costs without setting off the sum of 37*l.* 16*s.* 8*d.* due from the plaintiff to the defendant.

The plaintiff had absconded, and his solicitor had received none of the costs payable by the defendant.

*H. J. Hood* for the motion.—The set-off must clearly be allowed. Costs can be set off against costs, and why should not a debt be set off against

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costs? It is true that in *Cowan v. Batley* (10 Bing. 432) damages were allowed to be set off against costs, only on condition of the attorney's lien being preserved; but in that case there were two separate actions. In *Figes v. Adams* (4 Taun. 632), where costs of a nonsuit were ordered to be paid by one party to whom a larger sum was to be paid by the other, it was held that the former had a right to set off his costs in diminution of the sum owing by him. [JESSEL, M.R.—The old rule of the Common Pleas disallowed the set-off; but Lord Eldon said it was a bad rule and ought to be altered, and it was afterwards altered.] There are many authorities which show that the right exists:

*Mercer v. Graves*, 26 L. T. Rep. N. S. 551; L. Rep. 7

Q. B. 449;

*Cooper v. Pitcher*, 4 Hare, 485;

*Thompson v. Parish*, 5 C. B. N. S. 685.\*

See also

*Mayne on Damages*, 3rd ed. 102;

*Morgan and Davey on Costs*, 92, 127.

[*Whitehorne* referred to *Ex parte Cleland* (16 L. T. Rep. N. S. 403; L. Rep. 2 Ch. 808.) But in *Ex parte Cleland* the debt was already existing; here the debt and the order for payment of costs were created by the same order. Willes, J. in *Thompson v. Parish* (*ubi sup.*) observes that it would be a great injustice if a party to an action who was unwilling or unable to pay a debt to the other party should be able to enforce payment in full of costs owing to himself.

*Whitehorne* for the plaintiff.—This case is governed by rule 63 of the *Regulæ Generales Hilary Term 1853*, which says: "No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought." The additional rules of court as to costs (1875), rules 19 and 28, leave the pre-existing rule by which a solicitor is entitled to his lien in priority to a set-off in full force; and that rule must prevail in all the divisions. It is true that rule 19 allows the taxing master to set off costs against costs, but rule 28 says: "The rules, orders, and practice of any court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs and the allowance of the fees of solicitors and attorneys, and the taxation of costs existing prior to the commencement of the Act, shall, in so far as they are not inconsistent with the Act and the rules of court in pursuance thereof, remain in force, and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court, and the taxation of costs in the High Court of Justice and Court of Appeal." [JESSEL, M.R.—But how do you apply the 28th rule? how is it binding on me? The rule you wish to enforce is a rule of the common law courts; and their rules were sometimes in conflict with those of equity. All that rule 28 means is that the old rules of the Court of Chancery, except when they have been expressly altered, are still in force.] The arbitration here was under the Common Law Procedure Act, and the principles of equitable set-off are the same as those of legal set-off. This is a case of *jus tertii*, and it would be unjust to deprive the solicitor of his lien. The case of *Ex parte Cleland* (*ubi sup.*) is conclusive, and binding upon your Lordship. In that case Lord Cairns, L.J. pointed out that

costs are not the property of the person recovering them for him to do what he likes with; they are subject to his solicitor's lien. No doubt costs may be set off against costs; but that is done by the taxing master. You cannot, however, set off an unascertained amount against an ascertained amount, or *vice versa*. Two amounts must be owing in respect of the same subject-matter, and both must be ascertained.

*Hood* was not called upon to reply.

JESSEL, M.R.—I think this set-off must be allowed. The facts are these: Two partners quarrel. One institutes an action for dissolution of the partnership against the other, and for taking the accounts. The matter is referred to arbitration. The arbitrator makes his award. He finds what sum is due from one to the other, what the assets are, and what proportion of the costs is to be paid by either party. He cannot say what amount is to be paid in respect of costs, because they are not taxed. He simply directs the payment of a sum of money by one party to the other, and orders the costs to be taxed and paid, and thus he leaves it. The matter then goes before the taxing master. If A. is ordered to pay costs to B., and B. ordered to pay costs to A., the rule is that the taxing master may order a set-off of one set of costs against the other. But here A. is ordered to pay a sum of money to B., and B. is ordered to pay costs to A., the result being that there is a balance due from B. to A. But A. absconds, and cannot pay what he owes to B. B. claims a set-off, and offers to pay the balance to A. or his solicitor. I should have thought it was a matter of common sense and justice that he should be allowed to do so. But it is said that the set-off cannot be permitted because A.'s solicitor has a lien on the costs which B. is ordered to pay. Now, what has a solicitor a lien for? For costs of action payable to his client. What is payable to his client? Nothing at all beyond the balance. Even in the common law courts the judges have allowed a debt or damages in an action to be set off against costs in another action. In such a case there might be some difficulty; but here it is a mere matter of items of one account, and the items of account arise out of one transaction. If Mr. *Whitehorne* is right in principle, then the general order (Additional Rules 1875, rule 19) is wrong, because that order expressly provides that when a party is liable to pay and entitled to receive costs, these costs may be set-off against one another, which is inconsistent with the idea that each solicitor has a lien on the costs due to his client. If 500*l.* is due from A. to B., and 400*l.* from B. to A., only 100*l.* has to be paid by B. to A. But if Mr. *Whitehorne* is right that is not so, because he says it would interfere with the solicitor's lien, and therefore each party may be liable to pay costs, notwithstanding that the court may have ordered that the costs shall be paid by one of them. The answer to Mr. *Whitehorne's* argument is that the solicitor's lien is not a lien by title paramount, and that even at law you could set off damages against costs without regard to the lien. It appears to me that it would be a monstrous extension of the rights of a solicitor against the parties to an action to say that he should have the right to make the party who may have been successful in the ultimate result

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pay the costs of the losing party, and unless I were compelled by authority I should decline to accede to any such proposition. There is no harm to the solicitor. If he says unless I have a lien I cannot get paid, the answer is that he should see before he undertakes a business for a client that his client is able to pay him. He is not compelled to work for an insolvent client. I am of opinion therefore that the set-off must be allowed. As I cannot make the plaintiff's solicitor pay the costs of this motion, there will be no order as to costs.

Solicitors: *H. A. Lovett; Prideaux and Son.*

Thursday, May 1.

(Before FRY, J.)

BRITISH DYNAMITE COMPANY v. KREBS. (a)

*Practice—Order of House of Lords—How made an order of the High Court of Justice.*

*The application to make an order of the House of Lords in an appeal an order of the High Court of Justice may be made ex parte.*

THIS was an action to restrain the infringement of a patent.

The case was decided in the first instance by Fry, J. His decision was reversed by the Court of Appeal, but affirmed by the House of Lords.

*E. Cutler* now applied *ex parte* that the order of the House of Lords might be made an order of the High Court. There was a question as to whether the application ought to be made to Fry, J., who tried the case, or to Hall, V.C., from whom the action had been transferred for trial; and whether the application should be made *ex parte* or on notice. The form in Seton on Decrees (4th edit. 1160) appeared to contemplate it being made *ex parte*. He also referred to

*Man v. Ricketts*, 3 De G. & S. 446;

*Wentworth v. Lloyd*, 11 L. T. Rep. N. S. 355; 10 Jur. N. S. 1113.

FRY, J. made the order.

Solicitors: *J. and E. Gole.*

Friday, May 2.

(Before FRY, J.)

LLOYD v. JONES. (a)

*Solicitor and client—Costs not taxed—Charge upon property recovered or preserved—Threatened compromise—Injunction—23 & 24 Vict. c. 127, s. 28.*

By a decree made in an action for the recovery of some land it was declared that the plaintiffs in the action were entitled to one undivided third part thereof, and the defendants to the remaining undivided two thirds. The property was ordered to be sold, and the money paid into court, and certain accounts and inquiries were ordered to be taken; and it was also ordered that the plaintiffs' costs of the action up to and including the hearing be costs in the action, and further consideration was adjourned with liberty to apply. Before the accounts had been taken, or the property sold, the solicitors of the plaintiffs presented a petition under the Solicitors Act, alleging that the plaintiffs threatened to change their solicitors, and compromise the action without making any provisions for the petitioners' costs, and that their share in the property was not sufficient to pay

those costs. They therefore prayed for an order charging the whole of the property, with their costs, as between party and party, and the plaintiffs one third with their further costs chargeable only as between solicitor and client.

Held, that the petitioners' costs not having been taxed and ordered to be paid they were only entitled to a charge on the plaintiffs' one third of the estate and rents, but an injunction was granted restraining the plaintiffs from receiving any money under any order in the action or under any compromise without previous notice in writing to the petitioners.

THIS was a petition under the Solicitors Act 1860 (23 & 24 Vict. c. 127), s. 28, (a) by Messrs. Cobbett, Wheeler, and Cobbett, of Manchester, and Mr. Yelding, their London agent, asking for a charging order on certain property, the subject of the action of *Lloyd v. Jones* (reported on another point 37 L. T. Rep. N. S. 524).

From the statements in the petition the following facts appeared: Robert Lloyd, and his wife Elizabeth Lloyd, who were the plaintiffs in that action, claimed to be entitled to one undivided third share of certain property in Denbighshire, which was then in possession of the defendants, and the petitioners acted as their solicitors in the action of *Lloyd v. Jones*, which was commenced to obtain it. The writ was issued on the 29th June 1876, in the Manchester District Registry, and the statement of claim was delivered on the 24th Jan. 1877, and asked for a partition or sale of the property.

By an indenture dated the 26th July 1876 the plaintiffs' interest in the property was settled, after the decease of Elizabeth Lloyd, on certain trusts for the benefit of the plaintiff, Robert Lloyd, and of the children of the marriage.

Elizabeth Lloyd died on the 26th Aug. 1876, and after her death an order was obtained by which Robert Lloyd and David Harris became plaintiffs in the action, as trustees of the settlement.

The defendants pleaded possession under Order XIX., r. 15, and the plaintiffs were thus put to proof of pedigree dating from the last century.

The action came on for trial before Fry, J., and by a decree dated the 1st Feb. 1878 it was declared

(a) In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and, upon such declaration being made, such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of, or in reference to, such suit, matter, or proceeding, and it shall be lawful for such court or judge to make such order or orders for taxation of, and for raising and payment of such costs, charges, and expenses out of the said property as to such court or judge shall appear just and proper, and all conveyances and acts done to defeat, or which shall operate to defeat such charge or right, shall, unless made to a bond *fade* purchaser for value, without notice be absolutely void, and of no effect as against such charge or right. Provided always that no such order shall be made by any such court or judge in any case in which the right to recover payment of such costs, charges, and expenses is barred by any statute of limitations.

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

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that the plaintiffs were entitled to one undivided third part of the property, and that the defendants, David Jones and George Jones were entitled to one other undivided third part, and the defendant Smith to the remaining undivided third part, and the defendants by their counsel requesting a sale of the property instead of a partition, it was ordered to be sold, and the money paid into court.

An account was ordered to be taken of the rents and profits of the property received by the defendants during the six years preceding the 29th June 1876, the date of the issue of the writ, and an inquiry was directed whether the defendants had in any way incumbered or assigned their interest in the property, and it was also ordered that the plaintiffs' costs of the action up to and including the hearing be costs in the action, and that the further consideration of the action be adjourned, with liberty to apply.

At the time the petition was presented, the account and inquiry directed by the decree had been partly proceeded with, but the chief clerk had not made his certificate, nor had the property been sold.

The 13th paragraph of the petition was as follows :

A considerable sum is due to your petitioners in respect of the plaintiffs' costs in the said action of which they have not been able to obtain payment, and the plaintiffs hereto threaten to change their solicitors and compromise the action without making any provision for the payment of the said costs. The share of the plaintiffs in the said property is insufficient to pay the amount of costs due to your petitioners.

The petitioners therefore prayed :

That it may be declared that your petitioners, as the solicitors employed by the plaintiffs in the prosecution of the present action, are entitled to a charge on the said hereditaments mentioned in the said decree, and of and in any other property recovered by or preserved for the plaintiffs in the said action for the taxed costs, charges, and expenses of your petitioners or of in reference to the said action, as solicitors of the plaintiffs, and that such of the said costs as are chargeable between party and party be charged upon the whole of the said hereditaments, and such of the said costs as are chargeable only between solicitor and client be charged upon the one undivided third share of the plaintiffs of the said hereditaments and other property recovered by or preserved for them in the said action.

North, Q.C., and J. Henderson for the petitioners.—If the case had come on for further consideration we should then have obtained our costs, but the plaintiffs threaten to change their solicitors, and compromise the action. Nothing more will then be heard of it, and we shall lose our costs. The petitioners are entitled to their costs out of the whole fund independently of the statute. In *White v. Pearce* (7 Hare 276) the plaintiff and defendant were ordered to pay the costs the plaintiff's solicitor would have obtained if the case had gone on. They were not costs already ordered to be paid. In *Twyman v. Porter* (23 L. T. Rep. N. S. 551; L. Rep. 11 Eq. 181) no decree had been made, nor any order as to costs, yet the solicitor was held to be entitled to a first charge for the amount of his taxed costs, as between solicitor and client, on the property recovered for the plaintiff. [Fay, J.—The cases go to show the quantum of costs to be charged, and not on what property the charge is to be made.] The petitioners ought to stand in the plaintiffs' shoes. These two cases show that the fact that in the ordinary course the court would

have ordered the petitioners' costs to be paid on further consideration, is sufficient to give them a charge on the property now. This being a partition action the costs will be a charge on the whole fund. They also referred to

*Ex parte Cleland*, 17 L. T. Rep. N. S. 187; L. Rep. 2 Ch. Ap. 808;  
*Pilcher v. Arden*, 38 L. T. Rep. N. S. 111; L. Rep. 7 Ch. Div. 318;  
*Bulley v. Bulley*, 38 L. T. Rep. N. S. 401; L. Rep. 8 Ch. Div. 479;  
*Bailey v. Birchell*, 2 H. & M. 371.

The plaintiffs were served with notice of the petition, but did not appear.

*Cozens Hardy* for the defendants in the action.—I oppose the petition as far as it asks that the whole property may be charged. The petitioners can only succeed if they come within the statute. No order has been made for the payment of costs—they have only been made costs in the action, and there is no case in which they have been charged on the fund unless there has been an order to pay or an agreement to do so. In *White v. Pearce* there was an agreement to pay. There is no evidence that the defendants intend to evade payment of costs; it is only alleged that the plaintiffs intend to do so. By the language of the Act the only property to be charged is that which the solicitor has recovered for his client, which is merely the one-third :

*Borris v. Howitt*, 21 L. T. Rep. N. S. 414; L. Rep. 9 Eq. 1;  
*Re Keene*, 24 L. T. Rep. N. S. 780; L. Rep. 12 Eq. 115.

It is not certain that the costs will come out of the property, as there are incumbrances upon it. The defendants will undertake not to pay anything to the plaintiffs except with notice to the petitioners.

North, Q.C. in reply.—The mortgagees have nothing to do with this petition :

*Scholefield v. Lockwood*, L. Rep. 7 Eq. 83.

FAY, J., after stating the facts of the case, said it was clear that two things had been recovered by the solicitors on behalf of the plaintiffs in the action of *Lloyd v. Jones*, namely, one-third of the estate, and also one-third of the rents and profits thereof for six years previous to the commencement of the action. The plaintiffs had not appeared, and must be taken to acquiesce in that. As to the remaining two-thirds of the property the plaintiffs received no benefit from it, and therefore it was out of the question to say that the petitioners had recovered it for them. It was said that the plaintiffs had a charge on the whole estate for their share of it, and as they had recovered that charge through their solicitors the solicitors ought themselves to have a charge for their costs on that charge. No such right existed until it was given by a judge. Probably the costs would be paid out of the entire estate, but not necessarily so. It was a matter for further hearing. If and when an order that the costs be so paid was made they would be recovered out of the whole, but until then it would not be the case. He could not anticipate the question of costs, and therefore could not give the petitioners a charge on the other two-thirds of the property. It was alleged that the plaintiffs threatened to change their solicitors, and compromise the action without making any provision for the petitioner's costs, but it was not alleged that the defendants intended

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to do so. His Lordship thought, therefore, that he was entitled to restrain the plaintiffs from receiving any money either on further consideration or by compromising the action without notice to the petitioners. He therefore declared that the petitioners were entitled to a charge on the plaintiffs' one-third of the estate and rents for their costs, and restrained the plaintiffs from receiving any money under any order in the action, or under any compromise without previous notice in writing to the petitioners, and the defendants by their counsel giving an undertaking in similar terms as to paying any money to the plaintiffs without notice, the petitioners to pay the defendants' costs of this petition.

Solicitors: Yeilding, for Cobbett, Wheeler, and Cobbett, Manchester; Abbott, Jenkins, and Co., for J. Lewis, Wrexham.

Tuesday, April 8.

(Before FRY, J.)

CONSTABLE v. CONSTABLE. (a)

*Apportionment—Apportionment Act 1870 (33 & 34 Vict. c. 35)—Will executed before, and codicil confirming the will executed after, the passing of the Act.*

*A testator by his will, dated before the passing of the Apportionment Act 1870, gave the clear and undisposed-of rents and profits of his real estate (appointed and devised to his son for life, with limitations over) to his trustees until his son should make a certain settlement (required by the will to be made as a condition precedent to the son or his issue taking any interest under the will), if he should make it within the time specified or otherwise, until the expiration of such time, in the former alternative for the son, and in the latter alternative upon the trusts on which the same would have gone in case the limitations over had been accelerated and taken effect immediately after the decease of the testator. The testator, after the passing of the Act, made a codicil, by which some further gifts were made, but which did not affect the above-stated portion of the will, and in all other respects confirmed it. The son executed the settlement required within the time specified.*

*Held, that the will spoke from the date of the death of the testator, that the words "clear and undisposed-of rents" included only the rents accrued since such death, and that the apportioned rents up to such death belonged to the personal estate of the testator.*

SIR THOMAS ASTON CLIFFORD CONSTABLE, by his will dated the 4th Dec. 1869, after making certain specific and pecuniary bequests, and bequeathing his ready money and all his personal estate not thereinbefore given upon certain trusts, gave, devised, and appointed all his real estate whatsoever (except certain hereditaments at or near Teddington) unto and to the use of his trustees, their heirs and assignees, upon trust, by sale or mortgage, to raise such sum or sums as might be required in aid of his personal estate for payment of debts and funeral and testamentary expenses and pecuniary legacies, and upon trust, out of the rents, issues, and profits of the real estate, to pay interest due on mortgage and

other debts, rates, and other annual payments, a rentcharge, and annuities; and, subject as aforesaid, the testator gave, devised, and appointed that all his real estate whatsoever and wheresoever should be held by his said trustees upon the trusts thereinafter mentioned—that was to say, he devised and appointed the same to the use of his son Frederick Augustus Talbot Clifford Constable and his assigns for life, with remainder to the use of his first and every other son successively, in order of seniority, in tail male, with certain remainders over. And, after reciting that some short time after his (the testator's) marriage with his first and late wife he had executed a post nuptial settlement of the bulk of his ancestral estates, situate in the North Riding of the county of York, under which settlement his said son and only child was entitled at the testator's decease to an estate in tail, the testator declared that it should be a condition precedent to his son or his issue taking any estate under the will and the limitations thereinbefore contained, either in his East Riding estates or in any real estate under the will appointed, given, or devised, that within twelve calendar months next after the testator's decease his son should execute such disentailing or other deed or deeds as counsel, to be approved of by the trustees of the will, might judge proper for the purpose, and thereby settle and assure all the hereditaments, with the appurtenances comprised in such post-nuptial settlement (subject to certain charges), to the use of himself, the son, and his assigns for his life, without impeachment of waste, other than the cutting down of ornamental timber, with the same remainders to his issue, and, failing them, with the same remainders as previously expressed with regard to the bulk of the testator's real estate. And the testator further declared that, in case his said son should decline or neglect to make and deliver within twelve calendar months next after the testator's decease the settlement thereby required to be made by such son of the hereditaments and premises comprised in the said post-nuptial settlement, then, unless such son should die within such twelve calendar months, leaving issue surviving him (in which case the present proviso requiring such settlement was to be null and void, and the will was to take effect as if the limitations therein contained to such son and his issue had not been made, subject to such conditions precedent as aforesaid), the limitations thereinbefore contained of the testator's devised and appointed real estate to take effect on the death of his said son and failure of his issue were to be accelerated and take effect as if such son had actually died at the end of the said twelve calendar months without having had any issue; and the testator made the following bequest:

I give the clear and undisposed-of rents and profits of my appointed and devised real estate unto my said trustees until my son shall make the settlement required to be made by him as aforesaid, in case he shall make the same within the said twelve calendar months, or otherwise, until the expiration of such twelve calendar months, in trust, in the former alternative for my said son, subject to the further condition hereinafter mentioned, and in the latter alternative upon the trusts and in manner in which the same would have gone in case the then accelerated limitations of this my will had taken effect immediately on my decease. . . . I further declare that on my said son's executing the settlement required to be made by him as aforesaid (in case he shall execute the same), the clear rents and profits up to that time,



hereinbefore declared to be in that case in trust for him, shall be paid to him only on his relinquishing all claim under his mother's will to the diamonds I have hereinbefore given to my wife; and in case of his thereupon refusing or neglecting to relinquish all claim to such diamonds, the said clear rents and profits, up to the date of his executing the said settlement, shall be added to and considered part of my residuary personal estate.

The testator made two codicils, neither of which altered the said trusts, dated respectively the 30th March and the 5th Nov. 1870. The former concluded with these words: "In all other respects I confirm my said will." The latter concluded as follows: "In all other respects, and as not altered by this codicil, I confirm my said will and first codicil."

The testator died on the 22nd Dec. 1870, without having revoked or altered the testamentary disposition effected by his said will and codicils, which were duly proved by one executor only.

On the 1st Nov. 1871 the executor commenced a suit in the High Court of Chancery against the testator's son for the administration of the real and personal estate of the testator and the execution of the trusts of his will, in which a decree was made on the 11th Nov. 1871.

The suit now came on for hearing before Fry, J. (to whom the suit had been transferred) on further consideration, the only question in dispute being whether the words "clear and undisposed-of rents and profits" included the whole rents, without apportionment, as they would have done if the testator had died immediately after making his will, or whether they included only the rents accrued since the death of the testator, the rents being apportioned under the Apportionment Act 1870 (a), which received the Royal assent on the 1st Aug. 1870.

*Glassey, Q.C.* and *Nalder* for the defendant.—There has been no decision on the precise point to be now determined. The Apportionment Act 1870 does not apply, as the will was executed prior to the passing of that Act. [*Fry, J.* referred to *Jones v. Ogle*, 27 L. T. Rep. N. S. 367; 28 L. T. Rep. N. S. 245; L. Rep. 14 Eq. 419; 8 Ch. App. 192.]

*J. Pearson, Q.C.* and *O. Chapman Barber*, for certain parties interested in remainder, who had been served with notice of the decree for administration, and having liberty to attend.—Although the will is dated before the passing of the Apportionment Act, the second codicil was executed after the passing of that Act, and the testator died some time after that. By the 24th section of the Wills Act the will speaks from the death of the testator, and therefore the Apportionment Act applies to this will, and the words "clear and undisposed-of rents" include only the rents and profits as from the death of the testator. They cited

*Capron v. Capron*, 29 L. T. Rep. N. S. 826; L. Rep. 17 Eq. 288;

*Hastuck v. Pedley*, L. Rep. 19 Eq. 271;

*Jones v. Ogle*, *sup.*

*Glassey, Q.C.* in reply.

*Higgins, Q.C.* and *Yate Lee* for the plaintiff.

(a) 33 & 34 Vict. c. 35, s. 2: "From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

*Fry, J.*—Down to the recent Apportionment Act no rent, apportioned in respect of time, came under the operation of certain statutes, which do not apply to this now. By the Act of 1870 rent became apportionable and was deemed to have accrued from day to day. The testator in this case made a will before the passing of the Act of 1870, and he made a codicil subsequent to the Act of 1870, by which, except so far as he had altered his will, he confirmed his will and previous codicil. Now, the testator by his will, which bore date in 1869, bequeathed all the rest and residue of his personal estate to certain persons upon trusts which I need not refer to. Having given that, he proceeded to devise his real estate. Now, with regard to that the position of this property was this: His eldest son had, under a post-nuptial settlement, become tenant in tail of certain estates in the North Riding of Yorkshire. The testator was possessed of other large real property, and he devised this property over which he had such power to dispose, putting it shortly, upon trust for his son in strict settlement if he resettled the estate to which he was tenant in tail. In the event of the son's doing so the testator gave the estate, which he had power to devise, in another direction. To put it very shortly, he gave the estate to A. in one event, and to B. in another, and he gave to A. an interval of twelve months during which to elect whether he would dispose of the estate of which he was tenant in separate tail in the manner in which the testator required, or would not do so. Then the testator gave the clear and undisposed-of rents and profits of his appointed and devised real estate to his trustees until his son should make the election, or make the settlement in case he should do so. Again, stating the will shortly, he gave those clear and undisposed-of rents to his son in the event of his electing in the manner that his father desired, and to other persons in the event of his not so electing. The question I have to determine is, what are the clear and undisposed-of rents and profits? If they are the clear and undisposed-of rents and profits as they would be existing supposing the testator had died after the making of his will, that would have included the whole rents without apportionment; but if, on the other hand, they are to be treated as if the testator's will speaks from the date of his death with regard to the construction to be put upon those words, then of course the Apportionment Act applies, and the clear and undisposed-of rents do not include anything but the rents accrued since the death of the testator, and the apportioned rents go to the personal estate. That is the question which I have to determine. Now, it appears to me that, according to the true construction, these rents are to be apportioned. The Apportionment Act is, as has been already observed by judges who have had to construe it before myself, very general in its words. It enacts that from and after the passing of the Act rent shall be apportioned as if it were interest, and as if it accrued from day to day. That lays down a general principle upon which everything is to proceed, and I think therefore that it would be a very narrow construction which held that it did not apply to every instrument which came into operation after the passing of the Act. I think in this case that conclusion is confirmed by two considerations: one, that the testator made a codicil confirming his will, and

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therefore in effect causing his will to speak from the date of that codicil, which codicil itself was subsequent in date to the Act; the second, which I cannot entirely lay aside, is this, that by the 24th section of the Wills Act it was enacted that every will should be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appeared by the will. Now, if I inquire, as at the date of the death of the testator, what was the personal estate which passed, I find that that personal estate must have included the apportioned part of the rents down to the death of the testator, and if the personal estate did include those apportioned rents, then it follows that those apportioned rents were not undisposed of, because in fact they had gone as part of the personal estate. Two cases have been referred to, which certainly throw considerable light on the views of other judges on this particular question. They were *Capron v. Capron*, before Malins, V.C., and the case of *Hasluck v. Pedley*, before the Master of the Rolls. In that case the Master of the Rolls used this language, which I adopt: "The Act does not affect the meaning of the will; it only alters its legal operation. A devise of Blackacre, before the Act, carried the accruing rents; now it does not, not because the meaning of Blackacre has been altered, but because the legal effect of the devise is different." So here it appears to me that the bequest of the personal estate operated upon something which but for the Act it would not have operated upon. And inasmuch as the testator desired to deal with the rents, accruing during twelve months or until the execution of the settlement, which should come to the trustees—because that, I think, is the real subject-matter of the bequest—and the Act has altered the amount of rents coming to them, it may well be said that the will of the testator is not affected, as regards construction, by the Apportionment Act, although that Apportionment Act, having altered the rights under it, has in effect produced a different result. The construction remains the same, to use the language of the Master of the Rolls, although the legal effect is different. It appears to me that is the true conclusion I ought to come to, and I must make a declaration accordingly.

Solicitors for the plaintiff, *Bell and Steward*.

Solicitors for the defendant, *Collyer - Bristow, Withers, and Russell*, agents for *Stamp, Jackson, and Birks*, Hull.

Solicitors for the parties having liberty to attend, *Slaughter and Colegrave*.

## QUEEN'S BENCH DIVISION.

Wednesday, April 2.

(Before COCKBURN, L.C.J. and MELLOR, J.)

REG. on the prosecution of A. CRILP (app.) v. SIR RICHARD WALLACE (resp.). (a)

*Highway—Diversion—View by justices—Validity of certificate—5 & 6 Will. 4, c. 50, ss. 85, 91.*

*Where justices certify that a new road will be more commodious than the one for which it is proposed to be substituted, it must unequivocally appear on the face of the certificate that they have arrived*

*at that conclusion from their own personal inspection, and not from statements which they might have received from other parties.*

*An application was made to the court of quarter sessions for power to divert and turn a certain highway in the parishes of O. and S., and to substitute a new highway in lieu thereof.*

*The certificate of two justices required by the 5 & 6 Will. 4, c. 50, did not state that the old road would become unnecessary upon the completion of the new road, but that the new road would be more commodious to the public, "because the old pathway passes at the O. end through a low part of the park, which upon inquiries we find in spring and winter is necessarily wet and uncomfortable for walking; and along the S. portion is very irregular, not only in its direction, but also by the numerous holes and uneven ground over which it passes."*

*The sessions were of opinion that the certificate was insufficient, and altered the appeal.*

*Held (upon appeal), that the order of sessions was right, as it did not appear by the certificate of the justices that the statement that the new road would be more commodious was based on their own personal inspections.*

*Held also by Cockburn, C.J.: That as this was merely an application to divert a highway, it was not necessary to state in the certificate that the old road would become unnecessary.*

THIS was an appeal, which came on for hearing at the general quarter sessions at Ipswich, in and for the county of Suffolk, on the 5th July 1878, against an order or certificate of two justices to divert and turn a certain pathway, being a highway in the parishes of Orford and Sudbourne, Suffolk, under the 5 & 6 Will. 4, c. 50.

The sessions allowed the appeal, upon the ground that the justices' certificate was incomplete in not stating that the old pathway or highway is or will become unnecessary. It was now sought to set aside the order of sessions, and the following case had been stated for the opinion of the court:

1. The notices on both sides were admitted, and form part of the case.

2. The justices' certificate was as follows:

To Her Majesty's justices of the peace at their general quarter sessions, to be holden at the County Hall, in and for the county of Suffolk, on the 5th July 1878.

We, Arthur John Bethel Thellusson and Ernest St. George Cobbold, Esqs., two of Her Majesty's justices of the peace, in and for the said county, do hereby certify that on the 20th March last requisitions were made to us, as two of Her Majesty's justices of the peace in and for the said county, by Henry Brindley, the surveyor of the highways of the parish of Orford, in the county aforesaid, to view a certain pathway or highway situate in the parishes of Orford and Sudbourne aforesaid, leading from Orford aforesaid to Sudbourne and Chillesford in the said county commencing at or near to the east gate of the Sudbourne Hall Park and terminating on the east side of a certain wood, called Watling Wood, the whole of the said lands being in the occupation of Sir Richard Wallace, of Sudbourne Hall, in the said parish of Sudbourne, Baronet, M.P., and also the lands and grounds through which a new pathway or highway was intended to be made, commencing also at or near to the east gate of the said park, and proceeding thence in a westerly direction through lands in the said parishes of Orford and Sudbourne (the whole of the said lands being in the occupation of the said Sir Richard Wallace), and terminating at or near the east side of the said wood, called Watling Wood, so as to make such new pathway or highway more commodious to the public than

(a) Reported by A. H. FORSTER, Esq., Barrister-at-Law.

Q.B. Div.] *Reg. on the prosecution of A. CRILF (app.) v. SIR RICHARD WALLACE (resp.).* [Q.B. Div.]

the present pathway or highway. And we do further certify that on the 1st April last we jointly made the view required by the said surveyors, and that upon such joint view it appeared unto us that such proposed new pathway or highway would be more commodious to the public than the present pathway or highway. And the said Sir Richard Wallace, being the owner of the lands and grounds through which such new pathway or highway hereinbefore particularly described is proposed to be made, having consented thereto by writing under his hand; bearing date the 4th April last, and hereunto annexed, we directed the said Henry Brindley and John Martin as such surveyors as aforesaid to affix copies of the several notices, &c. . . . And we do further certify that a plan hath this day been delivered to us, particularly describing the said highway so proposed to be diverted and turned as aforesaid. And the said lands and grounds through which a new highway is proposed to be made as aforesaid by metes, bounds, and admeasurements thereof, verified on the oath of Benjamin Moulton, of Woodbridge aforesaid, a competent surveyor. And we do further certify that the proposed new pathway or highway leading from Orford aforesaid, to Sudbourne and Chillesford in the same county, and particularly described in the said notice as aforesaid, will be more commodious to the public than the present highway, because the old path passes at the Orford end through a low part of the park, which upon inquiries we find in spring and winter is necessarily wet and uncomfortable for walking, and along the Sudbourne portion is very irregular, not only in its direction, but also is made inconvenient by the numerous holes and uneven ground over which it passes, whereas the new path, by taking a slight curve from the Orford end, avoids the wet ground, and thence continues along the Sudbourne portion in a perfectly straight direction, and is smooth and regular and a made path, the present one being in fact simply a track, the exact direction of which is uncertain, while the new path there is clearly apparent both by night and day, the slight addition in length of but sixteen yards being fully and more than compensated for by the even and regular manner in which the new path has been made. Given under our hand this 18th May 1878.

(Signed)

ARTHUR J. B. TRELLUSON.  
ERNEST S. G. COBBOLD.

4. It was objected on the part of the appellant that the justices' certificate was incomplete and insufficient because it did not state that the old pathway or highway is or will become unnecessary, and, if so, why it was or would become unnecessary.

5. The sessions decided that the justices' certificate was incomplete and insufficient in not stating that the old pathway or highway is or will become unnecessary. A copy of the order of sessions, certified by the clerk of the peace, is set out in the appendix herunto annexed.

6. It being thus the opinion of the quarter sessions that the justices' certificate was incomplete and insufficient, the sessions considered it unnecessary to hear the evidence on the question of fact, and the appeal was allowed, subject to a case for the opinion of the Queen's Bench Division of the High Court of Justice.

7. The appellant also contends that the said certificate is insufficient on the ground that the statement therein, that the new path will be more commodious, is based partly upon inquiries made by the justices, and it does not unequivocally appear that they acted on their own view as required by the 85th section of the Act 5 & 6 Will. 4, c. 50.

8. The appellant further contends that the certificate and plan herein do not "particularly describe the old and new highways by metes, bounds, and admeasurements thereof," as required by the 85th section of the said Act.

9. The questions for the opinion of the court are whether the certificate is complete and

sufficient, and also whether the plan accompanying the said certificate is in accordance with the Act of 5 & 6 Will. 4 c. 50.

10. If the court shall be of opinion that the certificate is complete and is sufficient, and that the plan is in accordance with the Act, then the judgment of the quarter sessions is to be reversed, and the matter to go back to the sessions for the purpose of having the questions of fact determined and of proceeding thereon according to law.

By 5 & 6 Will. 4 c. 50, s. 85 it is enacted that

When it shall appear upon such view of such two justices, made at the request of the surveyor as aforesaid (sect. 84), that any public highway may be diverted and turned either entirely or subject as aforesaid, so as to make the same nearer or more commodious to the public; and the owner of the land or grounds through which new highway so proposed to be made shall consent thereto by writing under his hand; or if it shall appear upon such view that any public highway is unnecessary, the said justices shall direct the surveyor to affix a notice in the form or to the effect of schedule 4, in legible characters, at the place and by the side of each end of the said highway from where the same is proposed to be turned, diverted, or stopped up . . . the notices to be published. . . . and the said several notices having been so published, and proof thereof having been given to the satisfaction of the said justices, and a plan having been delivered to them at the same time particularly describing the old and proposed new highway by metes, bounds, and admeasurements thereof, which plan shall be verified by some competent surveyor, the said justices shall proceed to certify under their hands the fact of their having viewed the said highway as aforesaid, and that the proposed new highway is nearer or more commodious to the public; and if nearer the said certificate shall state the number of yards or feet it is nearer, or if more commodious the reason why it is so, and if the highway is proposed to be stopped up as unnecessary, either entirely or subject as aforesaid, then the certificate shall state the reason why it is unnecessary.

Sects. 88 and 89 provide for an appeal to sessions.

By sect. 91:

If no such appeal be made, or being made shall be dismissed as aforesaid, then the justices at the said quarter sessions shall make an order to divert and turn and to stop up such highway either entirely, or subject as aforesaid, or to divert, turn, and stop up such old highway, and to purchase the ground and soil for such new highway, or to stop up such unnecessary highway, either entirely or subject as aforesaid, by such ways and means, and subject to such exceptions and conditions in all respects as in this Act is mentioned in regard to highways to be widened . . . but no old highway (except in the case of stopping up such useless highway as herein mentioned) shall be stopped up until such new highway shall be completed and put into good condition and repair, and so certified by two justices of the peace upon view thereof.

*Poyser (Gully, Q.C. with him) for the appellant.*

—The certificate before the court contains no statement that the old road which it is proposed to stop up either is or will become unnecessary. It is true that the justices are only asked to give authority "to divert and turn," but in reality authority to stop up the old road is sought for, though the conditions precedent to such stopping up are evaded. The 85th section of the Act contemplates two things: the stopping up of an old way as unnecessary, and the diverting a way by substituting a new way for it. It is submitted that though there may be a stopping up without a diversion, there cannot be a diversion without a stopping up, and if that is so all the conditions with respect to stopping up must be complied with in the latter case, and that has not been done here. *Reg. v. Phillips* (L. Rep. 1 Q. B. 648; 35 L. J.

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217, M. C.) supports this argument. If all allusion to the old road was surplusage, the time spent in discussing that case was time wasted. As suggested in the case cited, it is not the road that is diverted, but the traffic over the road, and that can only be done by stopping up the old road either by a barrier or some order of justices. That there could not be a diversion without a stopping up is clearly contemplated by the Act. The order of justices is provided for by sect. 91, which says, "the justices at the same quarter sessions shall make an order to divert and turn and to stop up such highway either entirely or subject as aforesaid, or to divert, turn, and stop up such old highway, and to purchase ground for such new highway, or to stop up such unnecessary highway," so there can be no order for diverting without at the same time an order to stop up. (See form of order, sched. 19 of Act.) The new highway might be shorter or more commodious, and yet there might be some reason which would still make the old road necessary. There might, for instance, be a well to which it was the sole means of approach, and the certificate should show that this is not so. The authorities upon the second point are conclusive. Here the certificate states that the justices base their opinion that the new road will be more commodious upon inquiries that they have made, or at all events partly upon inquiries made by them. In *Reg. v. The Marquis of Downshire* (4 A. & E. 698) Lord Denman says: "We think that it does not by any fair or reasonable inference (and such only ought we to apply) follow that the motive operating upon the justices was the view only. They might, consistently with a fair and reasonable construction of the order, have been influenced by other proof. If so, the justices never obtained jurisdiction over the subject, and their order cannot be supported." *Reg. v. Stephen Jones* (12 A. & E. 684) is also in point, and the principle was recognised in *Reg. v. Milverton* (5 A. & E. 841). On both grounds therefore this certificate is bad, and the order of quarter sessions should be affirmed.

*Bulwer, Q.C. (C. E. Malden with him).*—The application here is merely to divert a highway and not to stop up. The distinction is clearly recognised in the sections of the Act, and a different mode of procedure is provided for in each of those cases. All we ask for here is to be allowed to go by steps. Later on it may be an application may be made to stop up the old road, but that is not so at present. The distinction between diverting or turning and stopping up was recognised in *Agmundesham v. Cornwallis* (Anderson's Rep. 234). It is not necessary to inquire into the precise meaning of the words diverting and turning, but they mean something distinct from stopping up, and all conditions for diverting and turning have been complied with here. As to the second point, the Act has been fully carried out. The magistrates have viewed, and upon such view in the earlier part of the certificate they say the new way will be more commodious. The statement in the later part of the certificate is mere surplusage and may be rejected. Besides even there it is stated that the old road was uneven, which was information gained from the view. *Reg. v. Milverton* (*ubi sup.*) supports my argument. *Reg. v. The Marquis of Downshire* and *Reg. v. Stephen Jones* (*ubi sup.*) are distinguishable, as

there was no sufficient statement of a view in any part of the certificate.

*Gully, Q.C. in reply.*

COCKBURN, C.J.—I regret to say that I have come to the conclusion that the order cannot be maintained, that is to say the order of the justices, and that the order by the court of quarter sessions in setting the order aside, and in refusing to proceed upon it is right. Two objections have been taken by the party resisting the order in question. The first is that it was necessary that the justices in their certificate stating that this proposed diversion should have for its effect the making of a road more commodious for the public, should have contained in addition a statement that [the old road would be unnecessary, and should be stopped up, and I have been rather struck by that argument; but I think, looking at the sections in the Act of Parliament more closely, that there is no foundation for it, and for the simple reason that as soon as the proceedings have terminated for the substitution of a new road for an old one, the diversion to which the certificate of the magistrates had reference had been established, and hence the old road ceased to be a highway at all. It was divested of its character of a highway, the public were no longer entitled to use it as such, and it reverted unincumbered by any public easement or obligation to the original owner. The other objection however is a far more formidable one, and that is that it does not appear upon the certificate that the proposed substitution of a new road would be more commodious to the public as the result of the view of the magistrates themselves affecting their own judgment. I think this is necessary under the Act of Parliament. The Act of Parliament requires that the justices should view, and not only that they should view, but that they should certify under their hands the fact of their having viewed, and that the proposed new highway was shorter and more commodious than the former one. If more commodious, which was the ground upon the certificate as given here, they had to set out the reason why it was so. The reasons, I think, must be reasons resulting from the view on their own personal inspection, and not from statements which they might have received from parties possibly interested in the result. The justices in this case appear to have founded their decision not upon their own view, but upon inquiries. I do not mean to say that they must not consult, but it must appear that the view upon which they founded their decision was their own, and such a view was totally wanting in the certificate. I cannot help regretting the decision, but the order of quarter sessions must be affirmed.

MELLOR, J.—I think I have come to the conclusion on the same grounds. The term diversion must mean a change of direction in the highway, and that the portion of the highway abandoned is no longer highway. What remains is merely the property of the person who owned the land. That, however, is not a point for decision at present.

*Order of quarter sessions affirmed.*

Solicitors for the appellant, *Rhodes and Son*, for *Steward and Rouse*, Ipswich.

Solicitor for the respondent, *Wood*.

Q.B. Div.]

LEEDS UNION (apps.) v. TADCASTER UNION (resps.).

[Q.B. Div.]

Wednesday, May 7.

(Before COCKBURN, C.J. and LOPES, J.)

LEEDS UNION (apps.) v. TADCASTER UNION (resps.) (a)

*Settlement by residence—Child living apart from parent—39 & 40 Vict. c. 61, s. 34.*

*A pauper child, born in 1870, a bastard, was placed by her mother, when about a fortnight old, in the charge of a person, who resided with the child for eight years in the appellants' union. Afterwards the child and the person having charge of her removed to the respondents' union, and there, in about seven months, became chargeable to the poor rates. The mother's settlement and residence were not known.*

*Held, that the pauper's settlement by residence under 39 & 40 Vict. c. 61, s. 34, was in the appellants' union; and that the order of removal thereto was rightly made.*

At a general quarter sessions of the peace for the said riding, holden at Wakefield, in the said riding, on the 14th Oct. 1878, before Thomas Brooke, Esq., and others, justices of the peace, an appeal in which the guardians of Leeds Union were appellants, and the guardians of Tadcaster Union were respondents, came on to be tried against an order of removal made by two justices of the said riding on the 2nd Sept. 1878 adjudging the place of the legal settlement of Beatrice Emily Wright, aged eight years, the illegitimate child of Caroline Wright, to be in the parish or township of Seacroft, in the said riding and in the said Leeds Union. At the hearing of the appeal the said court of quarter sessions confirmed the said order of the justices, subject to the following case:

1. The pauper, Beatrice Emily Wright, is the illegitimate child of Caroline Wright, and was born in the parish or township of Roundhay, in the West Riding in May 1870.

2. When the pauper was about a fortnight old she was placed by her mother in the care of John Oakes and his wife.

3. John Oakes and his wife resided at Seacroft from Dec. 1871 to Feb. 1878, and during all this time the pauper lived with them without receiving any relief, except that in Sept. 1875 the pauper was sent by John Oakes for one week (during the temporary illness of his own daughter) to the house of his son, who lived at Crossgates, in the West Riding.

4. At the time the pauper was so sent to Crossgates, both John Oakes and his wife intended to bring her back to their house at Seacroft within a period of a week or thereabouts.

5. In Feb. 1878 John Oakes and his wife with the pauper left Seacroft and went to reside in Crossgates within the respondents' union, and in Sept. 1878 the pauper became chargeable to the respondents' union.

6. No evidence was given of the settlement by birth or otherwise of Caroline Wright, the mother of the pauper, though evidence was given that the respondents had made unsuccessful enquiry about it.

7. During all the time aforesaid the parishes or townships of Seacroft and Roundhay were comprised within the appellants' union.

8. Copies of the order of justices and grounds

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-law.

of removal and grounds of appeal accompany and form part of this case.

9. Upon the above facts the court of quarter sessions confirmed the above order.

The question for the court of Queen's Bench Division was whether they were right in doing so.

If the answer of the court were in the affirmative, the order of sessions was to stand, otherwise it would be reversed.

*Lofthouse* for the respondents.—This settlement comes within the words of 39 & 40 Vict. c. 61, s. 34, by which it is enacted that "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise." [Stopped by the Court.]

*Poland and Lumley* for the appellants.—To reside, according to the meaning of this section, must involve some personal act by the individual who thereby obtains a settlement. A child of this age is incapable of selecting a residence as a voluntary proceeding; if it were otherwise and the settlement in this case were good, the result must be frequently to separate children from their parents. Moreover, this was not a residence at Seacroft which would constitute irremovability under 9 & 10 Vict. c. 66; it is rather the case of the child who was sent year after year to a charitable institution, but yet constructively resided with his mother in another parish, and was held to be irremovable when he became chargeable in the mother's parish:

*Reg. v. Abingdon*, L. Rep. 5 Q. B. 406.

This statute of irremovability is subject to the proviso in 11 & 12 Vict. c. 111, s. 1, "Provided always that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the said recited Act (i.e. 9 & 10 Vict. c. 66), and should not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act." There was nothing here to make the mother irremovable from Seacroft, and therefore the pauper can neither be irremovable from there, nor have a settlement there:

*Reg. v. Pott Shrigley*, 12 Q. B. 143.

COCKBURN, C.J.—We think our judgment must be to confirm the order of removal and that of the quarter sessions. It has been ingeniously argued that the case is bound by the proviso in 11 & 12 Vict. c. 111, to 9 & 10 Vict. c. 66, s. 1, which, it is said, limits the irremovability of a child to the place where the parent is irremovable. But the proviso has nothing to do with the present case: its object was to prevent the dispersing of different members of a family. Here there is no consideration of that kind, and we have only to decide upon the applicability of sect. 34 of the Act of 1876 to the circumstances. The pauper has actually resided for three years in Seacroft, but it is contended that, because the mother lived in another parish, the child constructively resided with her and where she resided. It is

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[C.P. Div.]

true that where a child is under the authority and control of its parent, it may, even placed at a school in a different parish, be said to constructively reside with the parent. Here, however, the child had been entirely given up by its mother; it was not a suspension, but a virtual abandonment of the maternal right. Circumstanced as she was, she asked Oakes and his wife to take the child off her hands, and the child resided with them in another parish without any intention on the part of the mother to resume her rights. Mr. Poland has contended that under sect. 34, there must be an intention on the part of the person residing to choose a residence, but nothing of the kind is expressed in the Act. The expression is simply "shall have resided." The child must have resided somewhere, and the words and spirit of the section are satisfied by actual residence on its part. The section may sometimes produce inconvenience, but on the whole, its operation, by preventing people from being torn from a neighbourhood in which they have long been living, is likely to be beneficial. I think this is a case certainly within its application.

LOPES, J.—I am of the same opinion.

*Judgment for respondents.*

Solicitors for appellants, C. G. G. Rushworth, for Clarke and Son, Leeds.

Solicitors for respondents, Torr and Co.

#### COMMON PLEAS DIVISION.

Dec. 7, 1878, and Jan. 11, 1879.

(Before DENMAN, J.)

NIGOTTI v. COLVILLE. (a)

*False imprisonment—Time, mode of computation—Calendar month—Expiration of term of imprisonment.*

The plaintiff, who had been sentenced by a police magistrate on the 31st Oct. to two different terms of imprisonment on two convictions, the first for "one calendar month," the second "for fourteen days, to commence at the expiration of the imprisonment previously adjudged," sued the defendant, the governor of Coldbath Fields Prison, for false imprisonment. The plaintiff was received into the defendant's custody on the 31st Oct., and finally released on the 14th Dec. at 9 a.m.

Held, that the facts disclosed no cause of action, the term of imprisonment not strictly expiring until midnight on the 14th Dec.

"One calendar month," in a sentence of imprisonment, means a period expiring on that day in the succeeding month which corresponds numerically with the day on which the sentence is pronounced.

#### FURTHER CONSIDERATION.

The plaintiff, who sued the governor of Coldbath Fields Prison for false imprisonment, had been sentenced on the 31st Oct. to two successive terms of imprisonment, one calendar month and fourteen days respectively.

The defendant received the plaintiff into his custody on the afternoon of the same day, and finally discharged him at 9 a.m. on the 14th Dec.

The jury having provisionally assessed the

damages at 20s., the case was adjourned for further argument.

Kydd and Barnard, for the plaintiff, argued that the first period of one calendar month's imprisonment must be regarded as having commenced at midnight on the 30th Oct., the plaintiff having been in custody during part of the 31st, and a part of a day being in law equivalent to a whole day for such a purpose. This being so, the month would expire at midnight on 29th Nov., that completing thirty entire days. If the term were reckoned to midnight on 30th Nov., the plaintiff would have been detained in prison during the whole of November (which would be one calendar month), and, in addition, one day in October, under a sentence for one month. Fourteen days from midnight on 29th Nov. would expire at midnight on 13th Dec., so that there was an illegal detention.

A. L. Smith, for the defendant, contended that the first sentence of one calendar month did not expire until midnight on the 30th Nov. at the earliest.

*Cur. adv. vult.*

DENMAN, J. subsequently delivered the following written judgment.—This was an action for false imprisonment by detaining the plaintiff in custody for a longer period than, as he contended, he was liable to be detained. The facts were not in dispute. I took the opinion of the jury as to the damages, which were assessed at 20s. After hearing counsel, I took time to consider whether judgment ought to be for the plaintiff or for the defendant. The plaintiff had been convicted by a metropolitan police magistrate of two different assaults, and sentenced to imprisonment upon each conviction. The convictions took place at 11 a.m. on the 31st Oct., and the commitments were drawn up in accordance with the sentences passed. For the first assault the plaintiff was sentenced to be imprisoned "for one calendar month;" and, for the second assault, "for fourteen days, to commence at the expiration of the imprisonment previously adjudged." He was taken into the custody of the defendant, being the governor of Coldbath Fields Prison, during the afternoon of the 31st Oct., and finally released at 9 a.m. on the 14th Dec., having claimed to be released on the previous day. It was contended for the plaintiff that the calendar month (the term of the first sentence) commenced at midnight on the 30th Oct. So far I am of opinion that the plaintiff's contention was well founded. I can find no express authority on the point, but, arguing from analogous cases, I think I ought so to hold. It has been held in many cases that, as a general rule, except where it is necessary in order to settle which of two actions on the same day is to prevail, the law takes no notice of parts of a day, and that the first day to be counted is the day, any part of which is occupied in the particular business which is to endure for a certain number of days in order to fulfil any requirement of the law. This principle is recognised in the often-cited case of *Combe v. Pitt* (3 Burr. 1434); in *Field v. Jones* (9 East. 154); in *Glassington v. Rawlings* (3 East. 407), where it was held that, under the statute which enacted that a trader lying in prison two months after an arrest for debt should be adjudged a bankrupt, the day of arrest was to be included in the computation of the two months; and also in *Wright v. Mills* (4 H.

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

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& N. 488) and other cases; and this is stated to be the rule applicable "to all judicial acts" in the judgment of the Exchequer Chamber in *Edwards v. The Queen* (9 Exch. 628). There are no doubt several cases in which, where the date is to run from an act done, it has been held that the day on which the act is done is to be excluded from the computation. See *Lester v. Garland* (15 Ves. jun. 254). There are also cases in which, where a payment is to be made or something to be done "within so many days or months," or "at the expiration of so many days or months," the day of the event within or at the expiration of so many days from which the payment is to be made, or the act done, is not included in the reckoning. The case of a bill of exchange is a familiar instance. But I can find no authority for saying that the general rule ought not to apply to the case of a sentence of imprisonment. Nor can I see any ground for doubting that it applies to the case, where the sentence is for a calendar month, or a given number of calendar months, just as much as to a sentence for so many days. Holding, then, that the first sentence in the present case must be computed from midnight on the 30th Oct., when did the calendar month expire? The plaintiff contends that it expired at midnight on the 29th Nov. at the latest; and he does so on the ground that, if not, the plaintiff under a sentence of one calendar month's imprisonment would have to undergo something more than a calendar month's imprisonment, inasmuch as he would be imprisoned for the whole of one day in October (i.e., from midnight on the 30th to midnight on the 31st Oct.), plus twenty-nine days and something more (nay, even a whole calendar month more) in November, making in the whole more than thirty days; whereas November, which is a calendar month, only consists of thirty days. Therefore, it is argued, it follows of necessity that he will have suffered more than a calendar month's imprisonment, and in this particular case he will have actually been imprisoned during the whole calendar month of November, plus one day in October. It appears to me that this argument, however plausible, is not sound. The question appears to me to depend entirely upon what was the meaning of "one calendar month" at the time the sentence was passed; and I am of opinion that at that time, viz., on 31st Oct., those words meant a month ending on the day in the succeeding month corresponding to the day of the sentence, according to the ordinary understanding of the words "this day calendar month." The whole difficulty of the case here arises from the fact of October having thirty-one days, and November only thirty; but I think that a few considerations will show how that difficulty ought to be solved. Suppose instead of the 31st Oct. this sentence had been passed on the 26th. Then, applying the rule mentioned above as to the commencement of the term, the prisoner would be entitled to count the whole of the 26th as a day of imprisonment, i.e., the sentence would have begun to run from midnight on the 25th. I apprehend that no one would contend that it would have expired before midnight on the 25th Nov. Why? because that would be the expiration of the "calendar month." Yet in that case, as in this, the calendar month spent in prison would have been one of thirty-one days and not of thirty days. This seems to show that the meaning of

"one calendar month" cannot be construed with reference only to the duration of the latter of the two months over which it may extend. If it did, then a sentence of one calendar month passed on the 29th Jan. would expire not on the 28th Feb., but at midnight on the 25th, because, February being a calendar month of twenty-eight days, the prisoner would have in that sense spent a calendar month in prison. In the case of bills of exchange, in which the word month is held to mean "calendar month," it is laid down by all the text writers that bills of one month drawn on the 28th, 29th, 30th, or 31st Jan. will fall due (excluding the days of grace) all on the same day, viz., 28th Feb., or in Leap Year on the 29th. See Byles on Bills, 12th edit., p. 206; Ohitty on Bills, 11th edit., by J. A. Russell, p. 264 (and the older books there cited in the note); Story on Bills, 1st edit. s. 335, note 1. Yet those drawn on the 28th and 29th would, according to the mode of reckoning here contended for by the plaintiff have been running one or two days more than the whole of February, and therefore more than a calendar month. It is no doubt true that the law applicable to bills of exchange depends upon the usage of merchants, and is not necessarily applicable to other cases; but where the question is, what is the true meaning of so familiar an expression as "one calendar month," it is useful to consider how such an expression is regarded in any case in which it is constantly used in familiar legal instruments. On the whole I am of opinion that a sentence of imprisonment for one calendar month passed on any given day of any given month, is held to begin to run from the first moment of that day, and to expire upon arriving at the first moment of the corresponding day in the succeeding month. If there be no such corresponding day by reason of the succeeding month not having so many days as the preceding month, then, by analogy to the law established in the case of bills of exchange, I think the calendar month should be held to have expired at the last moment of its last day; but as long as there is a day in the calendar numerically corresponding with the day from which the sentence begins to run, so that it is unnecessary to trench upon a succeeding month, I see no ground for anticipating the expiration of the sentence. This being so, it follows that the plaintiff was not strictly entitled to his discharge until midnight on the 14th Dec., being one calendar month and fourteen days from the time from which his first sentence begun to run, and fourteen days from its expiration. I am of opinion, for these reasons, that the plaintiff, who was discharged at nine o'clock in the morning of the 14th Dec., was not detained illegally, and I accordingly give judgment for the defendant with costs.

*Judgment for the defendant.*

Solicitors for the plaintiff, *Gold and Son.*

Solicitors for the defendant, *Nicholson and Herbert.*



C.P. Div.]

WYNNE v. FORESTER.

[C.P. Div.]

*Friday, May 23.*

(Before Lord COLERIDGE, C.J., and LINDLEY, J.)

WYNNE v. FORESTER. (a)

*Mines—Agent—Certified manager—Conviction—Mines Regulation Act 1872 (35 & 36 Vict. c. 76), sect. 51.*

*By sect. 51 of the Mines Regulation Act 1872 (35 & 36 Vict. c. 76), it is enacted (sub-sect. (1) that an adequate amount of ventilation for certain defined purposes shall be constantly produced in every mine; and by sub-sect. (31), that, in the event of any contravention of or non-compliance with any of the preceding rules being proved in the case of any mine to which this Act applies, the owner, agent, and manager shall each be guilty of an offence against the Act, unless he proves certain exculpatory facts.*

*Held, that the conviction and fine of the certified manager of a mine for a breach of the regulation contained in sub-sect. (1) did not prevent the respondent, who was the agent of the mine, from being also convicted in respect of the same breach.*

*The following case (omitting formal parts) was stated by the stipendiary magistrate for Stoken-upon-Trent for the opinion of the court.*

## CASE.

4. The statute under which the appellant instituted proceedings is the Coal Mines Regulation Act 1872 (35 & 36 Vict. c. 76), s. 51, which enacts that

The following general rules shall be observed so far as is reasonably practicable in every mine to which this Act applies:

(1.) An adequate amount of ventilation shall be constantly produced in every mine, to dilute and render harmless noxious gases to such an extent that the working places of the shafts, levels, stables, and workings of such mine, and the travelling roads to and from such working places, shall be in a fit state for working and passing therein.

(31.) Every person who contravenes or does not comply with any of the general rules in this section shall be guilty of an offence against this Act; and in the event of any contravention or of a non-compliance with any of the said general rules in the case of any mine to which this Act applies, by any person whomsoever, being proved, the owner, agent, and manager shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing, and to the best of his power enforcing, the said rules or regulations for the working of the mine, to prevent such contravention or non-compliance.

5. Every person who is guilty of an offence against the Act is by sect. 60 made liable to a penalty not exceeding (if he is an owner, agent, or manager) 20*l.*

6. The said mine is a mine to which the said Act applies.

7. The respondent is the agent of the said mine.

8. One George Hollins was at the date of the said proceedings duly appointed manager of the said mine, and he holds a certificate under the said Coal Mines Regulation Act 1872.

9. On the 12th Oct. 1878, Mr. S. B. Gilroy, the assistant-inspector of mines for the district, visited the said colliery and found that the ventilation of the said mine was defective and inadequate, the defect having been caused by a fall in the roof of the said mine, and he thereupon gave directions to the said Martin Forester (the respondent), who accompanied the said assistant-inspector in the absence of the manager, to have the same remedied.

10. On the 1st Nov. the said S. B. Gilroy, as such assistant-inspector, examined the said mine again, and still found the ventilation defective and inadequate for the safe working of the mine, and that nothing had been done for the purpose of removing the said fall or improving the ventilation, and thereupon the said appellant instituted proceedings both against the said Martin Forester (the respondent) and the said George Hollins the certificated manager for such offence.

11. It was proved by the evidence that the said George Hollins was a duly certified manager of the said mine, and that the said mine was worked under his directions. It was also proved that the said respondent was the agent of the said mine, and that occasionally in the temporary absence of the said George Hollins, which was about two days per week, he gave certain directions for the management of the said mine.

12. I thereupon convicted the said George Hollins as the certified manager of the said mine, who in my judgment was responsible for the said offence, and fined him the sum of 15*l.* and costs for the said offence, which the said George Hollins duly paid, and I dismissed the summons as against the said respondent.

13. It was contended, on the part of the appellant, that upon the above facts being proved, I was bound under the provisions of sect. 51 of the said Act to convict the respondent as the agent of the said mine, as well as George Hollins, the certified manager; but I held that, as the said George Hollins had already been fined for the offence, I had no right to convict the respondent as such agent as aforesaid for the same offence. I was of opinion that, though the assistant-inspector on his first visit gave directions to the respondent to remedy the defect, the promise given by him was simply a promise that he would mention the matter to the manager, the person made responsible by the statute, for by sect. 26 it is expressly declared that every mine to which the Act applies should be under the control and daily supervision of a manager, and that no mine should be worked for more than fourteen days without there being such a manager. The intention of this enactment is, in my opinion, that there shall be some person attached to such mine thoroughly conversant with mining operations, and who shall be deemed responsible for the proper and safe working of the mine; and that, if that be not so, but that the owner or agent who may know little or nothing of the subject is to share the responsibility with the manager, there would be a divided authority which might lead to very serious results, because the two parties may differ in opinion as to any remedies or alteration to be adopted; and if so, whose influence is to prevail if both are responsible? By adhering to what I believe to be the clear intention of the statute, that is, of making the manager alone responsible, the difficulty and danger is overcome. Some stress was put upon the fact that the manager was generally absent two days a week. Be it even so; that did not relieve him from his responsibility as manager, or throw it upon the respondent. It would be the duty of the manager in his unavoidable absence to leave some equally efficient person in charge. On these grounds I dismissed the summons against the respondent.

If the court shall be of opinion that my view of the law is right, the summons will stand dismissed; but if they should be of a contrary

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

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opinion, the case is to be remitted to me with their opinion, in order that I may hear the case upon the evidence.

*Gorst, Q.C. (M. Mackenzie with him) for the Crown.*—The stipendiary magistrate seems to have thought that a *mens rea* must be shown; but this is one of those cases such as are not uncommon in recent legislation, in which certain persons are presumed by the law to be guilty of a certain offence, upon certain facts appearing, unless they prove the contrary. The section of the Act in question (sect. 15) applies to all the three persons mentioned in it, and they are all three liable.

The respondent did not appear.

Lord COLERIDGE, C.J.—I am of opinion that the appellant is entitled to succeed. There is no doubt great force in the observations of the stipendiary magistrate, which would have been very well addressed to Parliament against the passing of this Act, or this clause in it. But I do not know whether I may not say that I believe such observations and similar arguments were addressed to Parliament in vain, and yet the Act was passed with this clause in it. I have no doubt that by this section it was intended to compel the persons at the head of these great mining establishments to give their personal attention to these matters, and to render them personally responsible if these rules were neglected. The section expressly exempts them from liability if they can show that they have done their best to carry these regulations into effect, by doing all that a man can reasonably be expected to do to discharge themselves from this liability. The Act seems to me to be a wise and salutary one, and the language of the sections referred to is quite clear. Our judgment must be for the appellant.

JANDLEY, J.—I am of the same opinion. The language of sects. 51 and 52 at first sight might suggest that there might be found in the Act some sections pointing to a separate sphere of duties which it would be incumbent on the several persons mentioned to discharge; but there are in fact no such sections; and this clause plainly enacts that in the event of a breach of these regulations by anybody, the three persons mentioned shall be held to be guilty of an offence, unless they show that they have done their best to avoid the event. It appears to me therefore that, notwithstanding the *prima facie* good sense of the observations of the stipendiary magistrate, the language of the Act is too strong to be got over, and that the scheme of the Act is somewhat different from what he has supposed.

*Judgment for the appellant.*

Solicitor for the appellant, *Solicitor to the Treasury.*

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### DIVORCE BUSINESS.

*Tuesday, May 13.*

(Before the Right Honourable the PRESIDENT.)

HALL v. HALL AND RICHARDSON. (a)

*Petition for dissolution dismissed by consent—Subsequent petition alleging charges of adultery contained in former petition as well as new matter—Practice.*

*A petition for dissolution cannot be dismissed on the application of the petitioner without the consent of the respondent and co-respondent. The charges in a petition so dismissed do not therefore amount to res judicata (since it is in the power of the respondent and co-respondent to insist upon their determination by the court or a jury), and there is nothing to prevent the petitioner from alleging them in a subsequent petition, together with new matter.*

THIS was an application to strike out certain allegations contained in a husband's petition for dissolution by reason of his wife's adultery.

The petitioner, the Rev. Newman Hall, filed a petition for dissolution in 1873 on the ground of his wife's alleged adultery with the co-respondent. The following year the petition was dismissed on the application of the petitioner, with the consent of the respondent and co-respondent, on payment of their costs by the petitioner. In a petition filed recently by the petitioner the charges in the original petition were set out in addition to fresh charges.

*Willis, Q.C. and Bayford*, for the respondent, applied to the court to strike out of the petition all the charges that had been contained in the petition of 1873, on the ground that the order dismissing the original petition was a conclusive judgment in favour of the respondent.

*Inderwick, Q.C. and Dr. Tristram* appeared for the petitioner.

The PRESIDENT (Sir James Hannen).—I am of opinion that the answer which it is proposed to set up to the petition is bad in law. It amounts to a plea of *res judicata*—that is to say, the respondent alleges that the question of her guilt has been determined by the court in her favour. I am of opinion that neither in fact nor in form has there been any such adjudication. It has been contended that the order dismissing the petition ought to be taken as a final determination of the questions raised on the pleadings in the former suit. But in the first place it is admitted that no authority can be found for such a proposition derived from the practice of the Ecclesiastical Courts, and it is certainly also the case that there has been no decision to this effect since this court has been instituted. I have been referred to the practice in the Courts of Common Law and Equity, and some allusion has also been made to the practice of the Criminal Courts. The last, however, have, in my opinion, no bearing upon proceedings in this court, because it has been determined that they are of a distinctly civil character. Turning to the proceedings at common law it is a matter of common knowledge that the putting an end to a suit before the issue is tried and determined is not a bar to renewing the proceedings at any subsequent time. The particular

(a) Reported by L. D. FOWLES, Esq., Barrister-at-Law.

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*Ex parte* EVANS; *Re* WATKINS.

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form in which that end was attained in common law courts was by a judgment of nonsuit, and after a judgment of nonsuit another action might have been commenced. A change has been made in the proceedings of the Courts of Common Law by the Judicature Act. It has put their proceedings on the same footing as those of the Court of Chancery, but the rules of the Judicature Act are not binding upon proceedings for divorce. Those proceedings were especially excepted from the Act, and therefore no assistance can be derived from a reference to its rules. With regard to the proceedings in Courts of Equity, there is no doubt that an order of the Court of Chancery of 1845 provided that where, after a case had been set down to be heard, the bill was dismissed on the application of the plaintiff, such dismissal, unless the court otherwise ordered, should be equivalent to a judgment on the merits, and be treated as a bar to a subsequent suit on the same matter. But, as to that, it is sufficient to say that there never has been any such rule made in this court, and that the rules of the Court of Chancery have no bearing on the practice of this division. It seems to me that the practice of the court in the matter rests on a perfectly clear and intelligible basis. It is this—That if a petitioner desires to put an end to the proceedings, and have the petition dismissed, he can do so only with the consent of the respondent and co-respondent. That gives the respondent and co-respondent control over the power which the petitioner desires to exercise, and places them in a position in which they can say, "We will not give our consent to this because the effect will be that the matter will be left open and that there will be no determination of it." If the respondent or co-respondent were to say, "I refuse to give my consent to the petition being dismissed," the necessary consequence would be that the matter would have to be tried out; the issues would be determined by the court or a jury, and then the matter would be concluded. But that could not be the case when the petition was dismissed with their consent before the merits were ascertained. It is said that the circumstances in which this petition has been dismissed amount to a compromise; but there is nothing in the nature of a compromise in the case. There was no agreement between the parties. The case amounts to this: the petitioner asked, the court did it, the respondent consenting, and the only terms being that the costs should be paid by the petitioner. For these reasons I hold that the answer is insufficient, and that the petitioner is entitled to proceed on all the charges alleged in the petition. I have finally to say that the fact that the petitioner has applied to have his petition dismissed several years ago is one which cannot but have a very important influence in determining the case when it comes to be tried before a jury.

Solicitors for the petitioner, *Lewis and Lewis*; for the respondent, *F. R. A. Franklyn*.

## COURT OF BANKRUPTCY.

April 28 and May 5.

(Before the CHIEF JUDGE.)

*Ex parte* EVANS; *Re* WATKINS. (a)

*Bankruptcy—Liquidation—Action for payment of judgment and mortgage debts—Writ of elegit—Receiver—Tacking—27 & 28 Vict. c. 112, s. 1—Bankruptcy Act 1869, s. 16, sub-sect. 5.*

A., a judgment creditor of the debtor, whose only property consisted of certain leaseholds which were subject to a mortgage, instead of suing out an elegit, took a transfer to himself of the mortgage debt, and then issued a writ in the Chancery Division of the High Court, whereby he prayed that an account should be directed of what was due to him in respect of both the judgment and mortgage debts, and an order for payment, and of what should be found due upon taking such account, or for a sale, and for a receiver, and on the same day an interim receiver was appointed by the Master of the Rolls without security. An order was subsequently made whereby the interim receiver was appointed receiver upon his giving security. Before such security was given the debtor filed a petition for liquidation.

Held, that, by virtue of the appointment of the receiver, A. was a secured creditor by virtue of his judgment, although no writ of elegit had been issued; and that he was entitled, as against the trustee in the liquidation, to tack the judgment to his mortgage debt.

THIS was an appeal from the decision of the judge of the County Court of Glamorgan, holden at Aberdare, whereby it was declared that the respondent, William Davies, who had obtained a charge or lien upon the equity of redemption in certain leasehold hereditaments of Thomas Watkins, the liquidating debtor, in respect of a judgment recovered by him against Watkins, was entitled to tack the judgment debt to a mortgage debt owing to him by Watkins, in respect of the same leasehold property.

On the 15th May 1878 William Davies recovered against Thomas Watkins judgment in the Queen's Bench Division for the sum of 80*l.* 2*s.* 1*d.* and costs. At that time the only property to which Watkins was entitled was the equity of redemption in seven leasehold cottages, which, having been previously mortgaged to Charles Herbert James for securing the sum of 200*l.* and interest, could not be given in execution by the sheriff. Accordingly no writ of elegit was ever issued, and the judgment remained unpaid and unsatisfied.

On the 26th July W. Davies paid to C. H. James the sum of 126*l.* 8*s.* 6*d.*, the balance of principal and interest due to him upon his mortgage, and took a transfer of his mortgage security. On the 7th Aug. 1878 W. Davies issued a writ against T. Watkins out of the Chancery Division of the High Court, praying, amongst other things, that an account might be taken of what was due to him for principal and interest upon his mortgage, which had been paid off by and transferred to him, and also upon the judgment recovered by him in the Queen's Bench Division, and for payment of the amount which should be so found due; or that the hereditaments comprised in the mortgage might be sold, and that a receiver of the

(a) Reported by A. A. DORIA, Esq., Barrister-at-Law.

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*Ex parte* EVANS; *Re* WATKINS.

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rents and profits of the said hereditaments might be appointed.

On the same day an order was made by the Master of the Rolls appointing Thomas Whitsun Jones interim receiver to receive the rents and profits of the hereditaments comprised in the mortgage, without security, until after Wednesday, the 14th Aug. 1878, but that such interim receiver was not in the meantime to take possession of the said hereditaments. On the 14th an order was made to continue Mr. Jones as receiver of the rents and profits of the mortgaged premises upon his giving security. Mr. Jones immediately upon his appointment entered into possession, but neglected to give security.

On the 14th Aug. Thomas Watkins filed a liquidation petition, and at the first meeting held on the 31st Aug. a special resolution was passed for the liquidation of his affairs by arrangement, and David Evans was appointed trustee, with a committee of inspection.

On the 12th March 1879 Mr. Davies applied to the County Court judge at Aberdare for an order directing that an account might be taken of what was due to him for principal and interest upon his mortgage debt, and upon the judgment recovered by him against the debtor in the Queen's Bench Division, and also for costs, charges, and expenses of the action in the Chancery Division, and payment of the amount found to be due upon taking such accounts, and for further relief.

The County Court judge made an order in the terms of the notice of motion, with the addition of a declaration that "William Davies had obtained a charge or lien upon the equity of redemption in the leasehold hereditaments of the debtor in respect of the said judgment and the subsequent proceedings in the said Chancery Division of the High Court of Justice, and that he be at liberty to tack the said judgment debt to his mortgage debt . . . and that the said action in the Chancery Division should be stayed."

The trustee appealed.

By 1 & 2 Vict. c. 110, s. 13:

A judgment already entered up, or to be hereafter entered up, against any person in any of Her Majesty's Superior Courts at Westminster shall operate as a charge upon all lands, tenements . . . and hereditaments . . . of or to which such person shall at the time of entering up such judgment or at any time afterwards be seised, possessed, or entitled for any estate or interest whatever at law or in equity, whether in possession, remainder, or expectancy, or over which such person shall at the time of entering up such judgment have any disposing power, which he might, without the assent of any other person, exercise for his own benefit.

By 27 & 28 Vict. c. 112, s. 1:

No judgment, statute, or recognisance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority, in pursuance of such judgment, statute, or recognisance.

Romer appeared for the appellant.—The respondent, not having issued or attempted to issue out a writ of *elegit*, the judgment debt did not operate as a charge upon the land, and could not be tacked to the mortgage debt. A mortgagee was not entitled to tack a debt due to him from the mortgagor, unless such debt constituted a charge upon the land. Judgment debts were made charges upon the land, and might be tacked to mortgage debts by virtue of 1 & 2 Vict. c. 110, s. 13. Then

by 23 & 24 Vict. c. 24, it was provided that judgments should not affect lands until they were registered; and by 27 & 28 Vict. c. 112, s. 1, actual delivery in execution was required. The property must have been either capable of being realised under an *elegit*, or, if it were not, as being an equity of redemption, a charge could not be obtained until two things had been done: first, a writ of *elegit* must be issued; and secondly, the appointment by the court of a receiver, in an action brought to enforce the judgment:

*Neate v. Duke of Marlborough*, 3 M. & Cr. 407;  
*Hutton v. Haywood*, 30 L. T. Rep. N. S. 279; L. Rep. 9 Ch. App. 229.

In the present case no *elegit* had been issued. It was true that a receiver had been appointed, but not in an action to enforce the judgment, which could only be brought after the issue of the writ of *elegit*, but in an action to recover a mortgage debt. Such appointment therefore could not operate as an equitable execution. The case of *Anglo-Italian Bank v. Davies* (39 L. T. Rep. N. S. 245; L. Rep. 9 Ch. Div. 275) decided only that the receiver might be appointed upon an interlocutory application before the trial, but not that a previous issue of the *elegit* was unnecessary. Moreover, upon the appointment of the interim receiver, it was expressly ordered that he should not take possession. The subsequent order was that "T. W. Jones, upon his giving security," be appointed receiver. Mr. Jones never gave such security, and until he had done so he was not constituted receiver:

*Edwards v. Edwards*, L. Rep. 2 Ch. Div. 291; 34 L. T. Rep. N. S. 472.

He also referred to

*Smith v. Hirst*, 10 Hare, 30;  
*Re Cowbridge Railway Company*, 18 L. T. Rep. N. S. 871; L. Rep. 5 Eq. 413;  
*Earl of Cork v. Russell*, 26 L. T. Rep. N. S. 230; L. Rep. 13 Eq. 210;  
*Wallace v. Morris*, 10 L. T. Rep. N. S. 709;  
*Godfrey v. Tucker*, 33 Bea. v. 230.

Winslow, Q.C. and Millar for the respondent.—The appointment of the receiver operated as an equitable execution, and made the respondent a secured creditor within the meaning of the Bankruptcy Act 1869, s. 16, sub-sect. 5. Under the old law a judgment creditor obtained a lien upon land of the debtor by virtue of the statute of *elegit* (13 Edw. 1, stat. 1, c. 18), and a first mortgagee was entitled to tack a subsequent judgment, although no execution had issued:

*Baker v. Harris*, 16 Ves. 397;  
*Ex parte Cos*, 2 Mont. D. & D. 486.

The effect of 1 & 2 Vict. c. 110, was to make all judgments a charge upon the land (*Prideaux on Judgments*, p. 72), and the subsequent Acts modified, but did not repeal, that provision. The inchoate right of the judgment creditor given by the statute of *elegit* and 1 & 2 Vict. c. 110, still remains, and the creditor was not bound to go to law, but he might go at once into equity to enforce the judgment. As the High Court constituted one court, equitable execution might now be issued, although the legal formalities had not been gone through. We obtained the appointment of the receiver as judgment creditors, and not as mortgagees, as suggested. In any case he was appointed by the High Court, and the Court of

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Bankruptcy could not get rid of him. The application should have been made to the High Court.

*Romer in reply.*

THE CHIEF JUDGE.—The ground upon which I decide this case is not affected by the able and interesting argument of Mr. Romer. The law of *elegit* is a law of great antiquity, but the only part of it which bears upon this case is contained in the later enactments on the subject. The object of those enactments has been to provide that, when judgment has been obtained in an action against the owner of land, subsequent purchasers of, or incumbrancers upon such land shall not be affected by the judgment unless the judgment creditor has taken certain steps prescribed by the statutes. But the rights of the parties to the action *inter se* are not in the least degree affected. In this case an action has been properly instituted in the Chancery Division, and not demurred to or objected to in any way, for the purpose of having an account taken of what is due to the plaintiff from the defendant on account of the mortgage debt and the judgment debt. The plaintiff made an affidavit that the defendant, Mr. Watkins, was not to his knowledge entitled to any other lands and hereditaments, or any other property than the leasehold houses in question, against which any writ of *elegit* or other process-execution might be issued for the purpose of obtaining payment of the money due and owing to him upon his judgment. Upon that representation the court has acted, and has appointed a receiver. I am of opinion that the appointment of a receiver amounts to an equitable execution. The court decided that, according to the facts proved by the affidavit, it was right that there should be a delivery in execution, which was to last for seven days. That put the court into possession. The fact that the further order, continuing the receiver after the expiration of the seven days, contained the words "upon his giving security," cannot affect the possession of the court. That possession commences at the moment the order is made, and from that moment the property came into the custody of the law, and it would be a contempt of court if any one should interfere with this possession. The argument of Mr. Romer, that the fact that the interim receiver was not to take possession of the premises prevented the appointment from operating as an equitable execution, I cannot entertain for a moment. If the second order could not of itself have operated as an equitable execution, its effect was that whatsoever was then in the possession of the court was to remain so. The court having thought fit to exercise its power of appointing a receiver, I cannot interfere with it.

*Appeal dismissed.*

Solicitors for appellant, *Hacon and Turner*, for *W. Beddoe*, *Aberdare*.

Solicitors for respondent, *Bell, Brodrick, and Gray*, for *H. P. Linton*, *Aberdare*.

May 12 and 19.

(Before the CHIEF JUDGE.)

*Ex parte Wigg; Re JOHNSON. (a)*

*Bankruptcy—Adjudication as a trader—Person aggrieved—Appeal—Time for—Affidavits not filed in time—Practice—Bankruptcy Act 1869, 10, 34, 71—Bankruptcy Rules 1870, rr. 143, 148.*

*An appeal against an order of adjudication by a person aggrieved must be brought within twenty-one days, notwithstanding that the alleged aggravement does not arise until long after the twenty-one days prescribed by the 143rd rule have expired.*

*Upon an appeal from the decision of a County Court the Chief Judge will not shut out evidence not before the court below, where the proposed evidence has been filed and notice given in ample time to allow the effect of such proposed evidence to be fully considered and answered by the other side.*

THIS was an appeal from a decision of the judge of the Norwich County Court.

The appellant, Charles Heyhoe Wigg, who is a farmer residing at East Dereham, in the county of Norfolk, had for some time previously to the bankruptcy proceedings let a farm containing about 150 acres to Pettitt Johnson, the bankrupt, at a rent of 370*l.* per annum, and at Michaelmas 1878 there was due from Johnson, in addition to one whole year's rent, the sum of 103*l.* for arrears. On the 26th Nov. 1878 Johnson absconded, whereupon a distress was levied by the landlord for the sum of 473*l.*, being the full amount then owing to him in respect of his rent.

On the 30th Nov. a bankruptcy petition was filed by one Henry Baker, the alleged act of bankruptcy being that the bankrupt being a trader, to wit, a cowkeeper, had, with intent to defeat and defraud his creditors, departed from his dwelling-house, or otherwise absented himself. Johnson was adjudicated a bankrupt on the 14th Dec.; and on the 22nd March an order was served upon Mr. Wigg, directing him to pay over to the trustee in the bankruptcy the sum of 103*l.*, the excess over and above the one year's rent which could be distrained for under sect. 34 of the Bankruptcy Act 1869.

On the 7th April a motion made by Mr. Wigg, under the 71st section, to review and rescind the order of adjudication, upon the ground that the bankrupt was not a trader, having been dismissed by the County Court judge with costs, the present appeal was brought.

*Coxens-Hardy* and *H. E. Knipe*, for the appellants, submitted that, inasmuch as the order of the 22nd March was rightly made upon the materials then before the County Court judge, it was impossible for him to appeal against that order. Until the order of the 7th April was made *W. H. Wigg* was not aggrieved by the adjudication of bankruptcy, but he was clearly a person aggrieved within the 71st section by the terms of that order. The notice of appeal from that order having been given on the 16th April was in time. An exactly similar course had been pursued in *Ex parte Learoyd, Re Foulds* (L. Rep. 10 Ch. Div. 3; 39 L. T. Rep. N. S. 525), where James, L.J. intimated that the limit of time for appealing

(a) Reported by A. A. DORIA, Esq., Barrister-at-Law.

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*Ex parte PIKE; Re ESICK.*

[BANK.]

applied only to the parties to the order for adjudication. They also cited

*Ex parte Thoday; Re Ellis*, L. Rep. 2 Ch. Div. 229, 797; 34 L. T. Rep. N. S. 261.

Evidence was then gone into as to the alleged trading, whether or not the bankrupt was a trader as a cowkeeper within the meaning of the Bankruptcy Act 1869, or whether he was merely a farmer, who kept cows and sold the milk, as was customary for farmers in Norfolk to do as ancillary to the enjoyment of their farm.

*Boaburgh*, Q.C., for the respondent, proposed to read affidavits filed since the hearing before the County Court, and notice of which had been given to the appellants on the 24th April, four days before the day appointed for hearing the appeal.

*Cosens-Hardy* objected to their being read, and relied upon the 148th rule.

The CHIEF JUDGE.—I do not see that there has been any surprise here. The appellant has had ample time to consider the affidavits, and has made no application for time to answer them. The affidavits may be read.

*Boaburgh*, Q.C. and *Finlay Knight*, for the respondent, took the objection that the appeal was not in time. The notice of appeal was against the three orders, namely, the order of adjudication of the 14th Dec. 1878; that of the 22nd March 1879, directing the payment of the 103*l.*; and the order of the 7th April, refusing to rescind the order of adjudication. They were all out of time except the last, and that was in effect an appeal against the order of adjudication, which could not be brought except within twenty-one days. The consequences of allowing a person to hold his hand for a long time, and then when he considered himself aggrieved permitting him to dispute the adjudication of bankruptcy, would be indeed serious. They cited

*Ex parte Learoyd; Re Foulds* (*ubi sup.*);

*Ex parte Dilton; Re Woods*, L. Rep. 1 Ch. Div. 557; 34 L. T. Rep. N. S. 109, and 40 L. T. Rep. N. S. 297.

*Cosens-Hardy*, in reply, contended that the twenty-one days for appealing applied only to the parties to the order, and not to third persons.

The CHIEF JUDGE.—I am of opinion that this appeal is out of time. After the lapse of twenty-one days the order of adjudication is conclusive as against all the world. In the present case the appellant had full notice of the adjudication of bankruptcy, which was advertised in the usual way; and, although he had distrained for the rent due to him, the amount for which he could so distrain for is regulated by the provisions of the Bankruptcy Act. It is not until the power of the Bankruptcy Court is invoked, and an order which is unassailed and unappealed from is made, that he now comes as an aggrieved person, and claims to have the order of adjudication reviewed or rescinded. If that could be done, this absurd consequence would follow, that the order of the 22nd March, directing the appellant to pay the 103*l.* to the trustee, which was a perfectly valid and binding order, would have no effect whatever, because there was no bankruptcy. I have no jurisdiction to make the order required, and prefer to follow the decision of the Lords Justices in *Ex parte Learoyd* (*ubi sup.*), which decided that an adjudication of bankruptcy is, so long as it stands, conclusive as against a third person. Here no appeal from the order of adjudication having

been brought within the time limited by the 143rd rule, the order is binding upon all; and I cannot make a different law for, or draw any distinctions between, those who are parties to the order of adjudication and those who are not. The Legislature has said that twenty-one days shall be the time in which any person aggrieved may be heard. Upon the question whether the bankrupt was a trader or not I decline to pronounce any opinion whatever. The appeal must be dismissed with costs.

Solicitors for the appellant, *Johnson and Master*, agents for *J. B. Coaks and Co.*, Norwich.

Solicitors for the respondent, *Whites, Renard, and Co.*, agents for *M. S. Emerson*, Norwich.

Monday, May 19.

(Before the CHIEF JUDGE.)

*Ex parte PIKE; Re ESICK.* (a)

*Liquidation—Promissory notes undorsed—Proof—Subsequent indorsement—Registration—Right of creditor—Bankruptcy Act 1869, sects. 31 and 135.*

*A bonâ fide holder for value of promissory notes, which were undorsed at the date of tender for proof, procured the necessary indorsement before application to register the resolutions.*

*Held, that he was entitled to prove for the full amount of his debt, and that the time of the indorsement of the notes was immaterial.*

THIS was an appeal from a decision of the judge of the County Court of Glamorganshire, holden at Swansea, refusing to admit a proof for 393*l.* due to William Pike from the debtor Henry Manship Acland Eslick, whose affairs were in liquidation, and directing the registration of the resolutions passed by the creditors.

At the first general meeting, held on the 16th Jan. 1879, the creditors resolved that the affairs of the debtor should be liquidated by arrangement, and not in bankruptcy, and a trustee was appointed. In the statement produced by the debtor at the meeting, the name of Mary Williams appeared as a creditor to the amount of 393*l.* 6*s.* 8*d.*, which sum was secured by three promissory notes, dated respectively the 19th Aug. 1876, and amounting in the aggregate to 393*l.* All the notes were made payable to order, and it was admitted that they constituted the debt in question.

William Pike, whose name also appeared in the statement as the holder of a bill of sale dated the 5th Nov. 1877, of all the debtor's goods and stock-in-trade, was surety for the debt owing to Mary Williams, and had become the purchaser for value of the before-mentioned three promissory notes.

Mr. Pike attended at the first meeting, and tendered a proof for 393*l.*, as owing to him from the debtor, upon the three promissory notes, which were set out in the proof. At that time the promissory notes had not been indorsed by Mary Williams, and in consequence the proof was objected to, and subsequently they were so rejected upon the application to register the resolutions, notwithstanding that the notes had been indorsed by Mary Williams, but they were so indorsed prior to, and were exhibited upon, the application to register. The County Court

(a) Reported by A. A. DORIA, Esq., Barrister-at-Law.

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*Ex parte GUSH; Re PRATT.*

[BANK.]

judge, however, refused to admit the proof, and directed the resolutions to be registered.

It was admitted at the bar that, if Mr. Pike's proof was good, the resolutions alleged to have been passed at the meeting of creditors were not passed by the requisite majority, and were therefore invalid. A further question was raised in the court below as to the *bona fides* of the resolutions; but the only point argued before the Chief Judge was as to the validity of the proof before mentioned.

*Winslow, Q.C.* and *W. D. Benson*, for the appellant, submitted that Mr. Pike was entitled to prove upon the promissory notes, inasmuch as they were properly indorsed by Mary Williams before the resolutions were registered. Even if that were not so, the 31st section of the Bankruptcy Act 1869 was quite sufficient to cover the case, as that section included every liability for which the bankrupt could be made responsible. There was no question of the existence of the debt, for it was admitted by the debtor in his statement of affairs, and the only ground upon which the County Court judge rejected the proof was, that the consideration for the debt did not appear in the affidavit of proof. *W. Pike* was also in possession of the debtor's goods under a bill of sale of the 5th Nov. 1877 from the debtor, and which bill of sale was a collateral security for the liability incurred by him in respect of the debt then due to Mary Williams upon the notes in question.

*Finlay Knight*, for the respondent, contended that the debt was not sufficiently proved, inasmuch as the assignor had not been joined in the proof, and the notes were not indorsed at the time when tendered for proof. The creditor was also in possession under a bill of sale, and was thus a secured creditor, who sought to prove without realising or valuing his security.

The CHIEF JUDGE.—The question which I have to decide in this case is, whether the registration of the resolutions in this liquidation was right, and that turns upon the point whether the proof of a debt for 393*l.*, claimed to be owing to Mr. Pike, was properly refused. The simple question, therefore, is whether a man who buys and is in possession of promissory notes as a *bona fide* holder, but who omits to have them indorsed at the time when presented for proof, is entitled to have them admitted to proof, if at any subsequent time he procures the necessary indorsement. I am of opinion that he is so entitled. The affidavit of the creditor is to the effect that he bought the notes for value, and that he has therefore a right to sue in respect of them, and consequently to be reckoned amongst the creditors, and he then opposes the resolutions proposed to be passed by the creditors at the first meeting. The order of the County Court judge must be discharged, and the proof of the debt must be admitted.

Solicitors for the appellant, *Williamson and Hill*, agents for *Field*, Swansea.

Solicitors for the respondent, *Crowder, Ainslie*, and *Vizard*, agents for *Gaskoin and Fry*, Swansea.

Monday, May 19.

(Before the CHIEF JUDGE.)

*Ex parte GUSH; Re PRATT.* (a)

*Composition—Registration—Costs of solicitors appointed by creditors—Jurisdiction—Bankruptcy Act 1869, sect. 126—Bankruptcy Rules 1870, r. 275.*

*Where the creditors of a liquidating debtor resolved to accept a composition, and appointed a firm of solicitors to register the resolutions:—Held on appeal (affirming the decision of the court below), that the court has no jurisdiction to order the debtor to pay the costs of the solicitors appointed by the creditors to register the resolutions, no provision having been made by the creditors for that purpose.*

THIS was an appeal from a decision of the Registrar of the County Court of Norwich, sitting as judge, dismissing an application by the appellants to direct the debtor to pay to them their costs incurred in and about the registration of the resolutions passed by the creditors at the ordinary meeting.

On the 9th Nov. 1877 William Pratt, a boot and shoe manufacturer, filed a petition for liquidation, and at the first meeting, held on the 6th Dec., the creditors resolved to accept a composition of 10*s.* in the pound. The resolutions passed at the first meeting were confirmed at a second meeting held on the 20th Dec., and were duly registered by Messrs. Walters and Gush, solicitors, who had been appointed for that purpose. Subsequently to the passing of the resolutions a change had taken place in the firm of Messrs. Walters and Gush by the retirement of Mr. Walters and the introduction of Mr. Phillips as a partner, the business of the firm being then carried on by Messrs. Gush and Phillips, the appellants, who thus became entitled to the profits of the late firm of Walters and Gush. The debtor having refused payment to Messrs. Gush and Phillips of a bill of costs amounting to 37*l.* 16*s.* 2*d.*, they applied to the registrar of the County Court, sitting as judge, to have the bill taxed and paid by the debtor. By an order of the 21st April 1877 this application was dismissed with costs, upon the ground (1) that there was no retainer or relationship of solicitor and client between Messrs. Gush and Phillips and the debtor; and (2) that no provision was made by the resolutions for the payment of the costs of the composition. From this order Messrs. Gush and Phillips appealed.

*S. Woolf*, for the appellants, contended that the debtor, having submitted to the jurisdiction of the court, and having asked the creditors to accept a composition, ought to pay the costs incidental to the proceedings, as it could not be supposed that the creditors intended that these costs should be paid out of their dividends. He cited

*Ex parte Lyons; Re Lyons*, 7 Ch. App. 404; 26 L. T. Rep. N. S. 401;

*Ex parte Shepherd; Re Dixon*, L. Rep. 2 Ch. Div. 430; 34 L. T. Rep. N. S. 743;

and referred to Bankruptcy Rules 1870, r. 275.

*Cozens-Hardy*, for the respondent, was not called upon.

The CHIEF JUDGE.—It is unreasonable that the costs should go unpaid; but what jurisdiction have

(a) Reported by A. A. DORIA, Esq., Barrister-at-Law.



I to order the debtor to pay them? The creditors were the acting parties in this matter, and they should have provided for the payment of these costs. As they have not done so, I have no right to say that the debtor shall pay them. The matter is in the hands of the creditors alone, and as it is impossible for me to make a separate order, I must dismiss this appeal, but I make no order as to costs.

Solicitors for appellant, *Gush and Phillips*.

Solicitors for respondent, *Johnson and Master*, agents for *W. B. Cooper*, Norwich.

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT LINCOLN'S INN.

Wednesday, Feb. 19.

(Before JESSEL, M.R., BRAMWELL, and BRETT, L.JJ.)

#### Re RICA GOLD WASHING COMPANY. (a)

*Company—Winding-up petition—Vague allegations—Fully paid-up shareholder—Majority of shareholders opposed to a winding-up order.*

A limited company was formed in 1872, with a nominal capital of 50,000*l.* in shares of 1*l.* each, for the purpose of purchasing and working a mining property. The property was bought of one B. (who was subsequently elected a director), for 20,000*l.* in cash, and 15,000*l.* in paid-up shares. A fully paid-up shareholder, who had bought seventy-five shares in the market, presented a winding-up petition on the ground that the company had wholly failed to attain the object for which it was ostensibly formed, and that it was got up really for the purpose of enabling the promoters to distribute among themselves large profits at the expense of the shareholders. It was also alleged that, on the facts stated, the company was entitled to set aside the sale and have the 20,000*l.* repaid. There was no definite allegation of fraud, and nothing to show that the company had any assets.

Held (affirming the decision of Hall, V.C.), that this was a demurrable petition. The petitioner, who was not liable to contribute anything to the assets of the company, ought to have alleged in his petition, and to have shown by evidence, that after full payment of debts and liabilities there would remain assets of such an amount that in the event of a winding-up he would have a tangible share of surplus to receive of sufficient value to authorise him in presenting a petition.

Where, on a winding-up petition, fraud is alleged, the facts constituting the fraud must be stated, although it is not necessary to state the evidence of the facts alleged.

Where there is only a vague allegation of fraud, evidence of the act of fraud is not admissible.

Quere, whether a winding-up petition can be maintained, where the petitioner, a fully paid-up shareholder, alleges there are no available assets except those to be obtained by the successful prosecution of proceedings against directors and

others to get back money they were liable to pay by reason of fraud.

This was an appeal from the refusal of Hall, V.C. to make an order for the winding-up of the Rica Gold Washing Company, on the petition of a fully paid-up shareholder. The petition stated: 1. That the company was a limited one. 2. That the company was one of three gold washing companies, which were got up under the same management within short intervals of each other, ostensibly for the purpose of acquiring and working for the benefit of the shareholders certain auriferous deposits in Columbia, but really for the purpose of enabling the promoters, several of whom were directors of the said companies, to appropriate and distribute among themselves large profits at the expense of the said companies and the shareholders thereof. 3. That the names of the two other companies were the Malpas Gold Washing Company (Limited), and the Malabar Gold Washing Company (Limited). 4. That the management of the affairs of the said companies, from the date of their formation up to the present time, had continued and still remained in the hands of the promoters and their nominees, and in consequence thereof there had been no independent examination or investigation of their affairs. 5. That the said companies and each of them had wholly failed to attain the objects for which they were ostensibly formed. No profits had been realised by any of the said companies, but, on the contrary, great losses had been sustained by all of them. The promoters, however, had succeeded by means of the said companies and the contrivances adopted by them in connection with their formation, and the sale of shares, in unlawfully appropriating, and had in fact unlawfully appropriated to and among themselves very considerable profits. 6. That the petitioner was induced to become and still was a shareholder in each company, and that he was presenting petitions concurrently with the present petition to wind-up the other two companies. 7. That the memorandum and articles of the Rica Gold Washing Company were dated the 19th March 1872, and were registered shortly after that date. 8. That the objects of the company, as stated in the memorandum were (*inter alia*) to carry into effect an agreement of the 12th March 1872 between Rogers of the one part and Cobbett and Pechey of the other part for the purchase by the company from Rogers of certain property in Columbia. 9. That by the memorandum and articles the capital was to be 50,000*l.* in 1*l.* shares. 10. That the articles provided that the number of directors, not being less than three, should, from time to time, be determined by a general meeting. 11. That the first directors were to be the above-named Cobbett and Pechey, and R. B. Barrow. 12. That the directors might within the time therein named increase the number of directors. 13. That immediately after the registration the above-named Rogers was added as a director. 14. That Rogers, Pechey, and Barrow were subscribers to the memorandum and articles, and promoters. 15. That promoters and directors of the company, for the purpose of procuring subscriptions for and selling its shares to the public, issued and published a prospectus of the company, which contained various untrue, misleading, and deceptive statements with regard to the property comprised in the said agreement,

(a) Reported by E. S. ROCHER, Esq., Barrister-at-Law.

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Re RICA GOLD WASHING COMPANY.

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and the advantages which might be expected to be obtained by persons who should become shareholders. 16. That one of the promoters was Cobb, who rendered assistance in the disposal of the shares by the publication in a monthly investment circular, in which he, in the character of a stock-broker, gave advice to parties seeking investments. 17. That Cobb, in his circular, spoke of the shares in these three companies in high terms, and advised that they should be purchased without delay. 18. That by such means subscribers were obtained for the whole of the shares of the Rica Company, other than the vendors' and promoters' shares, and a large number of the vendors' and promoters' shares were disposed of for the benefit of the vendors and promoters. 19. That the petitioner perused copies of the said prospectus and of the said investment circular, and subsequently purchased seventy-five of the said shares in the Rica Company, and was now, and for six months past had been, the holder of seventy-five shares in the said company. 20. That the operations of the Rica Company were from the commencement unsuccessful. The said company in a short time exhausted the funds available for the purpose of its business, and had for several years past ceased to carry on any business. It had no means of raising further capital, and there was no prospect that the business of the company could be recommenced with any advantage, even if further capital could be procured. 21. That it was just and equitable, and absolutely necessary in the interests of the petitioner and the other shareholders who had paid for their shares, that the Rica Company should be wound-up by the court. An affidavit was filed by the petitioner in support of the above statements.

In opposition to the petition, an affidavit was made by Cobbett, Pechey and Rogers, in which they denied the statements in paragraph 5 of the petition; alleged that Rogers was not elected a director till after the purchase from him had been completed, that the petitioner was only a holder of fully paid-up shares, denied the statements in paragraph 15, and denied all connection with the investment circular, set forth reasons for the delay in carrying on the operations of the company, stated that the company had no liabilities except a sum of 2000*l.* due to themselves and a Mr. Drake; that 40,000 shares had been subscribed for, of which they themselves held 3705; and that eighty-six shareholders, holding in all 16,473 shares, had authorised the directors to oppose the petition on their behalf. The deponents were cross-examined before a special examiner, and the petitioner contended that, on the facts appearing on this cross-examination, the company was entitled to set aside the sale to them of the property in Columbia. It appeared that the property purchased by the company from Rogers, under the agreement of the 12th March 1872, was bought for 20,000*l.* in cash, and 15,000*l.* in paid-up shares.

On the 17th Jan. 1879 this petition and the petition to wind-up the Malpasco Gold Washing Company came on for hearing before Hall, V.C. The circumstances were very similar in each case.

Dickinson, Q.C. and Bradford for the petitioner.

W. Pearson, Q.C., and Grosvenor Woods and Welby King, *contrd.*

HALL, V.C.—It appears to me that upon this petition there is no case stated in which the

petitioner is entitled, *ex debito justitiae*, to have an order made to wind-up this company; on the contrary it appears to me, as far as I can collect from the facts stated upon this petition, that this is a case in which it would be a mere idle and absurd ceremony to go through the form of winding-up this company. The petitioner is the holder of seventy-five shares which he had paid for in the market; the original price being 1*l.* per share. Therefore he has not paid more than the original issue price, and I cannot take his interest in the matter as being further than at the outside 75*l.* which represents his interest in the concern. He has presented a petition for the winding-up of the company, and the ground which seems to have influenced him very much in taking this course is that the company, as he alleges, was got up by certain persons who are named, for the purpose, I may say, of robbing the people who would be induced to become shareholders through the medium of a false prospectus. That is the case he makes, and he says that robbery was committed by creating a certain number of shares which, when paid up, the promoters could go into the market and dispose of; and that they did so. The petitioner says, "I want all those things thoroughly investigated, and the proper mode of doing that is by winding-up the company, and in that way I shall bring forward and make out a case of that kind and get back 25*l.* or some portion of it, out of the pockets of the persons who sold those shares to me." Now, as regards his own individual equity, founded upon any such case as is alleged here, he does not tell us when he acquired the shares. This company has been in existence now for several years, having, I believe, begun business in 1871 or thereabouts. The petitioner says the prospectus was false, but he does not say that he acted upon the faith of that prospectus; he does not say that the shares he purchased were original shares, or, if not, that the persons who took the shares were deceived, nor does he say that he is entitled to stand in the shoes of the persons who were deceived in that respect. Now, under the circumstances that have been put forward, the petitioner's great object is to have an investigation into these transactions, which investigation would cost in all probability not merely hundreds, but thousands of pounds, and whether the money would be ever recovered from the persons who were convicted, if they were convicted, of fraud, I do not know. According to all my experience in these matters, even if the litigation were successful as against the persons sought to be charged, it is not probable that, after payment of costs payable by the defendants, there would be one available sovereign for the purpose of distribution amongst the shareholders. That is the nature of the case made, through the medium of which the petitioner seeks to get back his 75*l.* or some portion of it. It is not disputed that the company has not got assets, and that the mine is worth nothing. Under these circumstances, it appears to me that I cannot treat this as being a substantial and *bonâ fide* petition, and I therefore decline to make any order upon it. The result is, according to my view of the case, considering, as I do, that the petition is opposed by a very large number of shareholders, although it is supported by a considerable number of other shareholders, that it is not a case in which this court ought to make an order to wind-up the

company. Therefore I dismiss the petition with costs.

*Dickinson, Q.C.* said the only distinction between the case of the Malpas Company and the case of Rica Company was that, in the latter, an additional ground was put forward for winding-up the company, namely that it had ceased to carry on the business for four years.

*HALL, V.C.*—It does not appear to me that the additional ground is favourable to the petitioner, but rather against him. If he had a substantial case he ought to have come to the court sooner, and not have allowed four years to elapse.

*Graham Hastings, Q.C.*—There is another petition.

*HALL, V.C.*—They are all in the same position. The same order will be made on all three petitions. The petitioner appealed.

*Dickinson, Q.C.* and *Job Bradford*, for the appellant, contended that the allegations in the petition were ample to warrant an investigation of the circumstances mentioned by them, and that such investigation would result in putting into the hands of the company the purchase money which had been paid for the estate, and in that way considerable assets could be recovered to be divided among the shareholders. They relied upon paragraphs 2, 4, 5, 6, 8, 14, 15, 18, 19, and 20 in the petition, as showing that it was just and equitable that the company should be wound-up. [*JESSEL, M.R.*—It is a wonderful petition for the absence of certainty. I do not find any sufficient grounds stated in it to warrant a winding-up order. You must succeed *secundum allegatur et probata*. Facts must be stated. The petitioner is bound to show us that he has an interest in the winding-up. An allegation that it is just and equitable is not a statement of a fact but of an inference of law. *BRAMWELL, L.J.*—But if the opposing party says, "I know what you mean, and do not ask for any more specific allegations," and then fights the case on the merits, can the objection be raised on appeal?] We submit that it cannot. [*JESSEL, M.R.*—If your opponents had been heard below, and had fought the case on the evidence without taking any objection to the form of your petition, there might have been some ground for the argument that they had waived any such objection, but they were not called upon.] They, however, have entered upon evidence. [*JESSEL, M.R.*—That is no waiver of an objection to the form of the petition. *BRAMWELL, L.J.* referred to *Re Steam Stoker Company* (32 L. T. Rep. N. S. 143; L. Rep. 19 Eq. 416). *JESSEL, M.R.* referred to *Bush v. The Trowbridge Waterworks Company* (32 L. T. Rep. N. S. 182; L. Rep. 19 Eq. 291, and 10 Ch. App. 459.)] The question is whether we are entitled to go into the merits or not. If not, we may ask for leave to amend the petition. [*JESSEL, M.R.*—If you can make out that your evidence shows with reasonable certainty that there will be a substantial surplus divisible among the fully paid-up shareholders, that may be a reason for giving leave to amend.] The cases of

*Re The Suburban Hotel Company*, 17 L. T. Rep. N. S. 22; L. Rep. 2 Ch. App. 737;

*Re The Star and Garter Hotel Company*, 28 L. T. Rep. N. S. 258; 42 L. J. 374, Ch.,

were referred to in the course of the argument.

*Graham Hastings, Q.C.* and *J. Wilkinson*, for

the company, and *W. Pearson, Q.C., Grosvenor Woods*, and *Welby King*, for shareholders who opposed the winding-up, were not called upon.

*JESSEL, M.R.*—This is an appeal from the decision of *Hall, V.C.*, dismissing a petition to wind-up the company, on the ground that it was not a *bona fide* petition, and that the petitioner, as I read the judgment, had not sufficient interest to support it. The petition is that of a clergyman, who says that he holds seventy-five shares in the company of 1l. each. He does not tell us when he acquired them, but he says that he saw them in the market, and subsequently purchased them. He does not tell us exactly how long he has been a shareholder. The only allegation I can find is that he is now, and for six months past has been, the holder of shares. Of course it is consistent with the fact, that he has been a holder for a longer period. He does not tell us exactly when the company was registered, but he says that it was registered shortly after the 19th of March 1872. Therefore we may take the establishment of the company to have been in March 1872, and the petition in question was presented on the 25th Oct. 1878, which is more than six years after the formation of the company. The petitioner says that his shares are fully paid up. Now, I will say a word or two on the law as regards the position of a petitioner holding fully paid-up shares. Such a petitioner is not liable to contribute anything towards the assets of the company, and if he has any interest at all it must be that, after full payment of the debts and liabilities of the company, there will remain a surplus applicable for division among the shareholders, which will bring in some amount of sufficient value to authorise him in presenting a petition. That being his position, and the rule being that the petitioner can only succeed upon allegations which are proved, of course the petitioner must show the court by sufficient allegation that he has a sufficient interest to entitle him to ask for the winding-up of the company. I say "a sufficient interest," for the mere allegation of a surplus or of a probable surplus will not be sufficient. You must show what I may call a tangible interest. I am not going to lay down any rule as to what that must be, but if he showed only that there was such a surplus as, on being fairly divided, irrespective of the costs of the winding-up, would give him 5l., I should say that would not be sufficient to induce the court to interfere in his behalf. Now, that being the state of the law, I will first of all mention generally how this petition is wrong, and then I will discuss it a little in detail. The petition, as drawn, contains vague allegations of fraud, but I have always understood it to be a rule in equity that, where you allege fraud you must state the facts which constitute the fraud. You are not entitled on a petition, any more than in an action, to say to the other side, "You have defrauded me; you have obtained my money by fraud." You must state the facts which you say amount to a fraud, so that the other side may know what they have to meet. I agree that it is not necessary to state the evidence which shows the fraud, but you must state the facts which constitute the fraud. In the next place, of course, you must show that the relief to be obtained on the ground of the fraud would increase the assets of the company; and even then I am not prepared to go this length, that if

a petitioner shows that there are no other possible available assets except those which may be obtained by the successful prosecution of proceedings against directors or others to get back money which they are liable to pay by reason of some fraud committed, that would as a general rule be sufficient to support a winding-up petition. I think it would not. I think the rule should be as a general rule, first establish your fraud, and get the money, and then divide it—for that is the object of a winding-up petition by a fully paid-up shareholder. There will be, no doubt, some exceptions. One which I think is well worth mentioning, because it occasionally happens, is where the majority of the shareholders side with the directors or other persons who may have committed the fraud, and so prevent the companies bringing an action to make them liable for the fraud so committed. In that case I can well understand the court saying that, as the minority of the shareholders who are entitled to complain of the fraud cannot themselves institute an action in the name of the company, they may invoke the assistance of the court to wind-up the company, so that by means of the liquidation, such an action may be brought or proceedings may be taken under the 165th clause of the Companies Act. Having said thus much, I will just state what the allegations are, and why I think them vague and unsatisfactory. The first allegation is contained in paragraph 2 of the petition, which states this: "The Rica Company is one of the three gold washing companies which were got up under the same management within short intervals of each other, ostensibly for the purpose of acquiring and working for the profit and advantage of the shareholders, certain auriferous gravel deposits in the United States of Columbia, but really for the purpose of enabling the promoters (several of whom were and are directors of the said companies) to appropriate and distribute among themselves large profits at the expense of the said companies and the shareholders thereof." That is not an allegation of fraud at all. Even promoters, I should imagine, do not intend to work for nothing, or to work otherwise than for profits, and generally for large profits. It does not say that the companies were got up ostensibly for fraud, but that they were got up "really for the purpose of enabling the promoters to appropriate and distribute among themselves large profits at the expense of the companies and the shareholders thereof." Then it states what the names of the companies were, and afterwards states, this: "The management of the affairs of the said companies from the date of the formation thereof to the present time, has continued, and still remains, in the hands of the promoters thereof and their nominees, and in consequence thereof there has up to the present time been no independent examination or investigation of their affairs." On first reading this clause I thought that it might possibly amount to an allegation that the majority of the shareholders sided with the persons accused of fraud, but when you come to examine it, it does not amount to that. It obviously relates to the management of the business of the companies, and does not show that the directors will necessarily command a majority in general meeting. Then the 5th paragraph states this: "The said companies, and each of

them, have wholly failed to attain the objects for which they were ostensibly formed. No profits have been realised by any or either of the said companies, but, on the contrary, great losses have been sustained by all and each of them. The said promoters, however, have succeeded by means of the said companies, and the contrivances adopted by them in connection with the formation thereof, and the sale of the shares therein, in unlawfully appropriating, and they have in fact unlawfully appropriated to and among themselves very considerable profits." Now, that is open to the objection of being a vague and indefinite charge of illegality of some kind. I cannot find out what the directors have done. It says that there have been some contrivances in connection with the formation of the company. What contrivances? Then it says, "And the sale of the shares therein." What does that mean? To whom did they sell the shares? It is said that they have made profits. What profits? How have they made profits? At whose expense? There is not a word of allegation to show that the profits they have made have been by misappropriating the assets of the company, and, besides that, the petitioner lumps together the charges as to the three companies and the promoters, and he has not said that they have made a shilling of profit separately out of this company. It is quite consistent with the allegation that the three companies together made large profits, but large profits may have been made by the two other companies and very little profit out of this. That may be called hypercritical, but when we come to deal with vague allegations of this kind I think no criticism is too severe. People are not to be brought into court on a vague charge of fraud of this kind. Then the petitioner goes on to say that "he was induced to become and still is a shareholder in each of the said companies. He has caused to be prepared and intends to present petitions for winding-up the said Malpas Gold Washing Company (Limited) and the said Malabar Gold Washing Company (Limited) concurrently with the present petition. The petitioner craves leave to refer to the said petitions respectively." Then he states that there were a memorandum and articles of association, by which it appears a certain contract was made, but there is no allegation that the contract, which was a contract for the purchase of a mine, was ever carried out. Then we get this allegation: "The promoters and directors of the company, for the purpose of procuring subscriptions for and selling its shares to the public, issued and published a prospectus, which contained various untrue, misleading and deceptive statements with regard to the property comprised in the said agreement, and the advantages which might be expected to be obtained by persons who should become shareholders in the company." That again is a vague and most improper charge of fraud. It is not sufficient to say that the prospectus "contained various untrue, misleading, and deceptive statements." The petitioner ought to say what they were, and state which of them were untrue. Besides that, it does not appear that the prospectus was a representation made to the company at all, or one upon which the company can maintain an action or obtain damages or compensation to increase the amount of its assets. Then there is a reference

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Re RICA GOLD WASHING COMPANY.

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(par. 16) to one of its promoters who was a broker and who sent out a circular called "The investment circular," in which he spoke in very high terms of the company. The petitioner then states: "By the means above referred to, subscriptions were obtained for the whole of the shares in the Rica Company, other than the vendors' shares, and a large number of the vendors' shares being also promoters' shares were also disposed of for the benefit of the vendors and promoters;" and then he states, "The petitioner perused copy of the said prospectus and of the said investment circular, and subsequently purchased seventy-five of the said shares in the Rica Company, and he is now, and for six months past has been, the holder of seventy-five shares in the said company." He does not say that he was induced by the circular or by the prospectus to buy, but simply that he bought. If he were defrauded, of course, his remedy would be an action as an individual against the person or persons who defrauded him; but that would not in the least increase the assets of the company. The petition afterwards states: "The subsequent operations of the Rica Company have continued unsuccessful. The company has in fact been from the commencement, and still is, a total failure. It is without available funds to enable it to continue its business, and it would be impossible to continue the said business with any advantage if further funds could be procured." Now that is an allegation of insolvency, certainly of commercial insolvency, but there is nothing else in the petition to show assets. There is nothing to show that any one of these alleged frauds ended in abstracting moneys from the assets of the company, which the parties committing the fraud are liable to pay. Therefore, really, when you come to look at the petition fairly, there is no allegation of any assets left, much less of there being any surplus in which the petitioner could participate after payment of the debts and costs of the winding-up. It seems as clearly a demurrable petition as I ever saw. But what was the case presented to us in argument? It was a totally different one. It was said that the mine was sold to the company under circumstances, which would entitle the company either to rescind the contract or to obtain from the persons who sold it a very large sum of money, variously stated at 15,000*l.* or 20,000*l.* The answer is that there is not a word of this in the petition. There is no allegation of the sale, or of the completion of the purchase, or of the payment of the money, or that the money came out of the coffers of the company, or that anybody is liable to repay it. There is no doubt that those allegations ought to have been made, if any reliance is to be placed upon such a case. I have to add one word more about the amount of the petitioner's claim. I am sorry to say I have had a very lengthened experience in winding-up cases, both at the bar and on the bench, and I cannot believe that a shareholder who has seventy-five *l.* paid-up shares can imagine that he has sufficient interest to make it worth his while to present a winding-up petition. Of course I am not going to say there might not be a case in which 75*l.* would be payable to the petitioner, but it is very unlikely and very improbable. We must look at the extent of his interest as reasonable men, and as men having experience in these matters, and speaking as such, I have no doubt that, as the Vice-Chancellor says,

this is not a *bonâ fide* petition, but a petition presented with a very different object than that of obtaining for the petitioner simply the 75*l.* or any part of it. In my opinion it is either presented for the purpose of obtaining costs, or for the purpose of annoyance to some other person or persons; and I entirely agree with the Vice-Chancellor that it is not a *bonâ fide* petition. Therefore I think we must dismiss this appeal.

BRAMWELL, L.J.—I am of the same opinion.

BRETT, L.J.—It seems to me that this case depends partly upon the rules of pleading under the Judicature Act, and partly upon the facts; and the judgment of the Vice-Chancellor really comes to this, that assuming all the facts which are alleged on this petition to be proved by any evidence which could be brought forward, it could not be shown that any tangible amount would ever come to the petitioner, and, inasmuch as the petitioner is a holder of paid-up shares, he, therefore, has not shown sufficient interest to support this petition. It seems to me, without referring to the old rules of pleading in equity, that we are bound by the rules of pleading under the Judicature Act, and by those rules of pleading, I apprehend that every fact must be stated which would have to be proved in order to support a cause of action. It is necessary, therefore, to show that there are facts stated on this petition which, if proved, would satisfy the court that some tangible amount might come to the petitioner. Now it is not suggested that there are any, what you may call, real assets of this company. Whether it is alleged that it is insolvent or not I care not to inquire. There are no assets in hand, and the only moneys which it is said could be brought in so as to become available for the petitioner are moneys to be recovered back from somebody, on the ground that they have been obtained by fraud. One fraud relied upon before us in argument was, that the estate had been sold and purchased under fraudulent circumstances. The fatal objection to any reliance being placed upon that, to my mind, is that there is no allegation of that nature in the petition, and therefore no evidence can be brought forward to support this contention. Then it is suggested that there are other frauds. It is suggested that the promoters or directors of this company had received money for shares and had embezzled it, but I apprehend that under the present rules of pleading you must state how the money was embezzled. It is not sufficient to say that you can prove those facts, but you must state how it is. There is no allegation that they had received money from the company or had embezzled it, and proof of those facts is therefore inadmissible. Then the only other suggestion is, that they obtained money by false representations. It ought to be shown that they made false representations to a person who acted upon those false representations. I can find no allegation of that sort in this petition. There is, therefore, no allegation in this petition of any fraud which, if it were proved, would bring money to any person through whom the company could get any benefit. With regard to what the Master of the Rolls has said, as to whether the court would order a winding-up on the application of a fully paid-up shareholder where the company has no assets except moneys to be recovered under a case of fraud alleged and proved, I, for the present, with great deference, decline to give an opinion, because I think it is not raised in

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this case. Therefore I entirely agree that the judgment of the Vice-Chancellor must be supported.

*Appeal dismissed.*

Solicitors: *Snell and Greenip; Stevens and Harries.*

### SITTINGS AT WESTMINSTER.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

Dec. 17 and 19, 1878, and March 22, 1879.

HAYN, ROMAN, AND CO., v. CULLIFORD AND CLARK. (a)

#### APPEAL FROM THE COMMON PLEAS DIVISION.

*Ship—Damage to cargo by negligent stowage—Liability of shipowner—Bill of lading—Signature by agent.*

*Plaintiffs were consignors of sugar to be carried from Hamburg to London in defendants' steamship, and received bills of lading signed by "P. and K., agents." The ship was at the time under charter to P. and K., who were merchants at Hamburg, but plaintiffs had no knowledge of such charter.*

*The bill of lading excepted liability for "all accidents, loss, or damage . . . from any act, neglect, or default whatsoever of the pilot, master, or mariners in navigating the ship, the owners of the ship being in no way liable for any of the consequences of the causes above excepted, it being agreed that the captain, officers, and crew of the vessel in the transmission of the goods, as between the shipper, owner, or consignee thereof, and the ship and shipowner, be considered the servants of such shipper, owner, or consignee."*

*Plaintiffs' sugar was damaged owing to negligent stowage.*

*Held, that, if the bill of lading was a contract of carriage between plaintiffs and defendants, the exception did not apply, and that, if there was no contract of carriage between plaintiffs and defendants, the sugar being lawfully in the ship with the defendants' licence, the negligence was a breach of duty, and therefore in either case defendants were liable.*

*Judgment of Denman, J. affirmed.*

The action was brought to recover damages for injury caused by negligent stowage to 280 bags of sugar belonging to the plaintiffs, which had been shipped on board the defendants' ship.

By a charter-party dated the 15th Nov. 1877, and made between the defendants, owners of the steamship *Cleanthes*, and Messrs. Pott and Korner, merchants, "by the intercession of the ship-broker W. Zoder," it was agreed that the ship, after discharging her inward cargo, should load from the said merchants a full and complete cargo of general lawful merchandise at Hamburg, and proceed to one wharf only in London as ordered by charterers' correspondents, and deliver the cargo on payment of freight (for sugar) at the rate of 7s. 6d. sterling in full, per ton, gross weight delivered—"it being agreed that for the payment of all freight, dead freight, and demurrage, the said master or owner shall have an absolute lien . . . on said cargo, which lien they shall be bound to exercise; the charterers' liability to cease when cargo is shipped and bills of lading signed; the captain shall sign bills of lading at rates as presented without prejudice to this charter-party." The charter-party was

signed "H. W. Pott and Korner," and "By telegraphic authority of owners, W. Zoder as agent."

The plaintiffs, who were not aware of the existence of the charter-party, shipped the sugar under the following bill of lading:

Shipped in good order and well conditioned in and upon the steamship *Cleanthes* whereof is master P. Andrews, now lying at Hamburg, and bound for London, 280 bags of sugar, which are to be delivered in like good order and condition to Hayn, Roman, and Co. or their assigns, freight at the rate of 7s. 6d. sterling, plus 10 per cent. per ton gross weight, to be paid by consignees; the act of God, the Queen's enemies, pirates, robbers, restraints of princes, vermin, jettison, barratry, and collision, fire on board or on shore, and all accidents, loss or damage of whatsoever nature or kind, or howsoever occasioned from machinery, boilers, steam, and steam navigation, or from perils of the seas or rivers, or from any act, neglect, or default whatsoever of the pilot, master, or mariners in navigating the ship, the owners of the ship being in no way liable for any of the consequences of the causes above excepted, it being agreed that the captain, officers, and crew of the vessel in the transmission of the goods, as between the shipper, owner, or consignee thereof, and the ship and shipowner, be considered the servants of such shipper, owner, or consignee. In witness whereof the master or agent of the ship has signed four bills of lading of this tenor and date. Dated in Hamburg, 19th Nov. 1877.

POTT and KORNER, Agents.

At the trial, before Denman, J., it was proved or admitted that the damage to the sugar was occasioned by negligence in stowing oxide of zinc in casks above the sugar, and the jury assessed the damages at 501l. 6s.

All other questions were left for the decision of Denman, J., who reserved the case for further consideration, and, after hearing arguments, gave judgment for the plaintiffs. The evidence on which the learned judge came to the conclusion that there was a contract between the plaintiffs and the defendants for the carriage of the sugar is fully set out in his judgment, which is reported 39 L. T. Rep. N. S. 288.

The defendants appealed.

Dec. 17 and 19, 1878.—*Watkin Williams, Q.C. and C. Bowen* for the defendants.—The real question is, whether there is any evidence of a contract of carriage between the plaintiffs as shippers and the defendants as shipowners, for otherwise on what ground can the plaintiffs put their case? The contract was made with Pott and Korner, the charterers, who signed the bill of lading. To make out a ratification so as to make the defendants liable on that ground, it must be shown that the contract purported to be made on their behalf, and there is nothing in this bill of lading to show that it was made on behalf of the ship. The cases which were cited in the court below do not establish any liability on the part of the defendants. Even if there was a contract, the defendants were discharged by the exception in the bill of lading.

*Butt, Q.C. and J. O. Mathew* for the plaintiffs.—The evidence is sufficient to show that the bill of lading was a contract between the plaintiffs and the defendants, on which the latter are liable, and the damage having been caused by negligent stowage, the defendants are not protected by the exceptive clause. The goods were lawfully on board with the defendants' consent, and in the defendants' custody, and therefore the defendants are liable for the injury caused by negligence. [BRAMWELL, L.J. referred to

*Marshall v. The York, Newcastle, and Berwick Railway Company*, 11 C. B. 655; 21 L. J. 34, C. P.]

(a) Reported by P. B. HURKINS, Esq., Barrister-at-Law.

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The following cases were also cited :

*Blaikie v. Stenbridge*, 6 C. B. N. S. 894, 911; 28 L. J. 329, C. P.; 29 L. J. 212, C. P.;  
*British Columbia Saw Mill Company v. Nettleship*, 18 L. T. Rep. N. S. 604; L. Rep. 3 C. P. 499;  
*Good v. London Steamship Owners' Association*, L. Rep. 6 C. P. 563;  
*Sandemann v. Scurr*, 15 L. T. Rep. N. S. 608; L. Rep. 2 Q. B. 86;  
*Peck v. Larsen*, 25 L. T. Rep. N. S. 580; L. Rep. 12 Eq. 378;  
*Steel v. The State Line Steamship Company*, 37 L. T. Rep. N. S. 333; L. Rep. 3 App. Cas. 72;  
*Taylor v. The Liverpool and Great Western Steamship Company*, 30 L. T. Rep. N. S. 714; L. Rep. 9 Q. B. 546;  
*Fletcher v. Rylands*, 19 L. T. Rep. N. S. 220; L. Rep. 3 H. L. 330;  
*Jones v. The Festiniog Railway Company*, L. Rep. 3 Q. B. 733;  
*The St. Cloud*, Br. & Lush. 4.

*Cur. adv. vult.*

March 22, 1879.—The judgment of the court (Bramwell, Brett, and Cotton, L.J.J.) was delivered by BRAMWELL, L.J.—This case comes before us in a very unsatisfactory way, so far as relates to one of the questions principally argued before us. We are not told how the goods come to be shipped, and are left to guess with whom the plaintiffs made their contract of carriage. We are, however, satisfied that the plaintiffs are entitled to recover. The case is in a dilemma. Either there was a contract between the plaintiffs and the defendants, or there was not. If there was a contract between them, it is the one contained in or evidenced by the bill of lading. Now it is clear that, if that is the contract, the defendants are liable on the ordinary contract of a carrier, unless there is (and there is not) some clause in the contract to relieve them; whether the words in other respects would extend to this case we need not say, as there is one respect in which they do not; they extend to the acts of captain, officers, and crew; they do not extend to the acts of the defendants and their other agents and servants, therefore not to the acts and defaults of the stevedores. But it is by these acts and defaults that the goods were damaged. If then there is a contract between the plaintiffs and the defendants, the defendants are liable. So also if there is not. For if so, the case is this: the goods were lawfully with the defendants' licence in their ship, and they tortiously so dealt with them that the goods were injured. It was found, as a fact, that the loading of the oxide was negligent. It was therefore wrongful, not as a breach of contract, but as a wrongful act in itself. If the defendants had done what was done wilfully, that is to say, intentionally that it would injure the plaintiff's goods, it is clear that they would be liable. But what difference does it make that they did it ignorantly? It may be asked where is the duty of care? I answer, that duty that exists in all men not to injure the property of others. This is not a mere nonfeasance which is complained of, it is a misfeasance—an act and wrongful. Suppose A. lets B. a horse, B. with C.'s licence puts up at C.'s stables for reward to C. from B., C. turns into the stable loose a vicious horse, known to be so, not to injure A.'s horse, but not thinking of the matter; there cannot be a doubt that C. would be liable to A. if the horse was injured. So if he gave the horse bad oats which injured the horse he would be liable, though he would not be to A. if he omitted to feed him;

so here justice is done, though indirectly. It is certain that, if the charterers sued on the charter in respect of the complaint in this action, there would be no defence, and it is certain they ought to sue if necessary for the benefit of the plaintiffs. The judgment must therefore be affirmed.

*Judgment affirmed.*

Solicitors for plaintiffs, *W. A. Crump and Son*.  
 Solicitors for defendants, *Hollams, Son, and Coward*.

Thursday, March 27.

(Before BRETT, COTTON, and THESIGER, L.J.J.)

LAMB v. BREWSTER AND ANOTHER. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Landlord and tenant—Property tax—Agreement by landlord to repay tax not deducted from rent—Legality of contract—5 & 6 Vict. c. 35, s. 103.*

*If a landlord agrees with his tenant to repay him property tax at some future time instead of allowing a deduction from the rent of the amount of the tax, such an agreement is not illegal, and the tenant may recover the amounts paid in accordance therewith.*

THE plaintiff gave notice under Order XXI., r. 4, that his claim was that which appeared from the indorsement on the writ.

The claim was against the defendants as executors, for 37*l.*, for six years' property tax paid by the plaintiff as tenant of the testator for him, and which the executors had refused to return to the plaintiff.

The statement of defence alleged that, assuming that the property tax was paid by the plaintiff as alleged, no demand or application was ever made by the plaintiff for the said property tax to be paid or allowed, or deducted out of the rent, which became due and payable by the plaintiff to the testator, next after each payment of the said property tax respectively; that the said plaintiff made each payment of rent without making or claiming any such deduction of the amount liable to be deducted in respect of property tax, according to the statutes in such case made and provided.

In his reply the plaintiff stated that demands or requests were frequently made by the plaintiff for the said property tax to be paid, allowed, or deducted out of the rent which became due and payable by the plaintiff to the testator next after such payment of the said property tax respectively. That the said testator promised the plaintiff that if he would continue to pay the said rent in full, without deducting anything for the said payment of property tax, the testator would pay to him all sums which he had paid or should pay for such property tax; and that the plaintiff did continue to pay the rent in full, yet the testator did not repay such sum as agreed.

To this reply the defendants demurred.

The Divisional Court (Mellor and Field, JJ.) held that the reply was good, and gave judgment for the plaintiff (reported 40 L. T. Rep. N. S. 457). The defendants appealed.

*F. Meadows White*, Q.C. and *A. P. Stone* for the defendants.—The contract set out in the reply is void by the 103rd section of the Property Tax Act (5 & 6 Vict. c. 35). (b) The policy of the

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

(b) 5 & 6 Vict. c. 35, sect. 103 enacts "That if any person shall refuse to allow any deduction authorised to



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Legislature is to prevent all private arrangements by which the mode of assessment prescribed by the Act may be interfered with. This is a contract to pay the rent in full without any deduction within the meaning of sect. 103, and the only possible consideration for it is the doing by the landlord of something which would expose him to penalties, that is, refusing to allow the deduction of the property tax when the tenant paid the rent. They cited

*Denby v. Moore*, 1 B. & A. 123.

*Dodd*, for the plaintiff, was not called upon to argue.

BRETT, L.J.—I think the judgment in this case ought to be affirmed. In the absence of the specific agreement which is put forth in the reply, the fact of the tenant having paid the rent in full would not either him to recover the amount of the property tax from the landlord; but the question is, not whether on mere payment of the rent in full the tenant can recover the amount of the property tax from the landlord, but whether, when the tenant pays the rent in full, on an understanding that the landlord will repay him the amount of the property tax, he can recover that amount from the landlord. The question turns entirely on the construction of sect. 103 of the Property Tax Act (5 & 6 Vict. c. 35), and sect. 73 has no bearing on the case. Now, in construing an Act of Parliament, just as in construing any other document, we ought to see what is the substantial reason of the Act, and, unless we are prevented by the words, we ought to try to give effect to it; the fulfilment of the substance of the enactment is sufficient. Here, although by the provisions of the Act the tax is imposed upon the tenant in the first instance, the landlord is finally to pay it, and no agreement, of which the effect is that the tenant is to pay both the rent and the tax, is valid; but there are no words to show that a contract that for a time the tenant is to pay the tax is void, for by such an agreement, in substance, although the liability is in the first instance on the tenant, in the result the landlord would pay the amount of the tax, and so the object of the statute is fulfilled, for the tax is collected from the tenant, but the landlord pays it. No doubt the word "deduction," if construed in the most strict sense, would mean a deduction of the amount of the property tax before or at the time of the payment of rent, so that the full amount of the rent should never pass from the tenant to the landlord; but, if we carry this construction to its strict result, it follows that if the tenant pays the rent in full, and the landlord immediately gives him back the amount of the tax, this would not be a deduction within the meaning of the Act; but I think the fair meaning is, that the landlord shall in the result pay the amount of the property tax, and therefore there is nothing in sect. 103 of the Act which can have the effect of invalidating the contract set out in the reply, and therefore, if that contract is proved in fact,

the plaintiff is entitled to recover, and the reply is good, and the judgment ought to be affirmed.

COTTON, L.J.—The question is, whether the express promise contained in the agreement set out in the reply is void. Some question was raised as to the terms of the agreement, but in substance it comes to this, that if the tenant will pay the amount of the rent in full the defendants' testator will repay to him the amount of the property tax, and the question is whether this is against the Act. The intention of the Act is that the property tax shall be a landlord's and not a tenant's tax; this is partly provided for by sect. 73, but sect. 103 goes further. The Act means that for convenience of collection the occupier shall pay the tax in the first instance, but he may deduct the amount when he pays his rent to the landlord, and if he neglects to exercise this right of deduction he has no remedy in the absence of an express agreement on the part of the landlord to repay the amount. In such a case the tenant makes the payment in his own wrong. Now what is the agreement which is sought to be set aside here? It comes to this: that if the landlord receives the whole amount of the rent he will afterwards pay back to the tenant the amount of the property tax; but still by the agreement it is a landlord's and not a tenant's tax. The contention on behalf of the defendants would go as far as this, that if the tenant pays the full amount of the rent, and the landlord the very next day repays him the amount of the property tax, this would be an illegal transaction; but, in my opinion, such a transaction as that would not be a violation of the provisions of the Act. I think it would be keeping too close to the words, and not paying sufficient attention to the substance of the Act, if we were to say that this agreement makes the tax a tenant's and not a landlord's tax. It is said on behalf of the defendants that the Act makes the agreement void, for the tenant has the right to deduct the amount of the tax when he pays his rent, but, if he does not then exercise that right, he cannot claim afterwards. But I think there is nothing in the Act to say that the agreement is void. Here the tenant has at the request of the landlord paid the rent in full without insisting upon his right of deduction, and the landlord has promised to repay to the tenant the amount of the tax. The general intention of the Act is that this shall be a landlord's and not a tenant's tax, and this is carried out by giving effect to the agreement in question. The power of deduction is for the benefit of the tenant, and there is nothing to prevent his enforcing an express promise by the landlord to repay him the amount of the tax in consideration of his having waived his right to deduct it from the rent. I think this agreement is not void within the words of sect. 103, nor against the intention of the Act. I agree, therefore, that the judgment ought to be affirmed.

THESIGER, L.J.—I am of the same opinion. The statute has two main objects: first, to collect the property tax from the tenant; and secondly, as a matter of policy, that the landlord shall be the person to pay it. By sect. 63 the collection from the tenant is provided for; by sect. 73 no agreement shall be binding, contrary to the intent and meaning of the Act; by sect. 103 it is provided that contracts for payment of rent, without de-

be made by this Act out of (*inter alia*) any rent or other annual payment mentioned in the 9th and 10th rules of No. 4, schedule A. . . . every such person shall forfeit the sum of fifty pounds; and all contracts, covenants, and agreements, made or entered into, or to be made and entered into for payment of any interest, rent, or other annual payment aforesaid in full, without allowing such deduction as aforesaid, shall be utterly void."

duction shall be void; to carry out the objects of the Act, a remedy is given to the tenant, that is the power of deduction. Sect. 103 provides that, if the landlord refuses to allow any deduction authorised by the Act, he shall be liable to a penalty. Then what is a refusal within the meaning of this provision? The latter part of the section must be correlative with the former part. If the tenant gave a cheque for the whole amount of the rent, and said to the landlord, "You must repay me the amount of the property tax," it is impossible to say that this would be a transaction which would subject the landlord to a penalty. If this is so, we come to understand the latter part of the section to mean that no contract is to be allowed by which the tenant is to be ultimately liable for the tax, but a contract made for the sake of convenience, by which the deduction is to be made in some other way than by a deduction of the amount of the property tax at the time when the tenant pays his rent to the landlord, is perfectly good.

*Judgment affirmed.*

Solicitor for plaintiff, *Marsh, for Bescoby*, East Retford.

Solicitors for defendants, *Collyer-Bristow* and Co., for *Hett, Freer, Hett, and Hett*, Brigg.

*Feb. 25 and March 22.*

(Before BRET, COTTON, and THESIGER, L.JJ.)

RUNTZ v. SHEFFIELD. (a)

APPEAL FROM THE EXCHEQUER DIVISION.

*Practice—Appeals from orders at chambers—Time for appealing—Order LIV., r. 6—Order LVII., rr. 5 and 6.*

*An appeal from the order of a judge at chambers, although made in vacation when no divisional court is sitting, must be brought within eight days under Order LIV., r. 6, (b) and if brought after the eight days to the first divisional court sitting after vacation, the appeal is out of time.*

*Decision of the Exchequer Division affirmed.*

*Crom v. Samuels* (35 L. T. Rep. N. S. 423; L. Rep. 2 C. P. Div. 21; 46 L. J. 1, C. P.) approved.

THE facts sufficiently appear from the head-note to this report, and are fully stated in the judgment read by Thesiger, L.J. post.

*Sexton* appeared for the defendant.

*D. Kingsford* for the plaintiff.

They referred to

Order LIV., r. 6; Order LVII., rr. 5 and 6; Order LVIII., r. 16; Order LXI., rr. 6 and 7;

*Crom v. Samuels*, 35 L. T. Rep. N. S. 423; L. Rep.

2 C. P. Div. 21; 46 L. J. 1, C. P.;

*Hallams v. Hills*, 24 W. R. 956;

*Doyle v. Coleman*, 36 L. T. Rep. N. S. 195.

*Cur. adv. vult.*

*March 22.*—THESIGER, L.J. read the following judgment:—This is an appeal from the affirmance by the Exchequer Division of an order of Manisty, J.,

(a) Reported by W. AFFLETON, Esq., Barrister-at-Law.

(b) By the rules of the Supreme Court, March 1869, r. 6 of Order LIV., on which the above decision turned, is annulled, and is replaced by a rule providing that in the Queen's Bench, Common Pleas, and Exchequer Divisions, every appeal to the court from a decision in chambers shall be by motion, and shall be made within eight days from the decision appealed against, "or if no court to which such appeal can be made shall sit within such eight days, then on the first day on which any such court may be sitting after the expiration of such eight days."

made at chambers, under which the plaintiff was empowered, pursuant to the provisions of Order XIV., r. 1, to sign judgment for the amount of a promissory note sued upon. The learned judge's order was made in the long vacation, that is to say, upon the 29th Aug. in last year. On the 30th of the same month notice of appeal to the Divisional Court was given, and on the same day a summons to extend the time for appealing was taken out. That summons was heard on the 2nd Sept. by Field, J., who made an order extending the time to the first sitting of the Divisional Court, conditionally upon payment into court within fourteen days of 433*l.* 10*s.* 8*d.*, being the amount of the note and interest. The money was not paid into court within the fourteen days or at any other time, and no sitting of the Divisional Court having taken place in the interim, the defendant, at the first sitting of the Divisional Court in Michaelmas sittings, appealed against the order of Manisty, J. The Divisional Court held that the appeal was out of time, and the order appealed against stood affirmed. Upon appeal to this court the question of time is again raised, and has to be decided. The rule upon which the question turns is r. 6 of Order LIV., which is in these terms. [His Lordship read the rule.] (a) The court below has construed the rule as meaning that the defendant was bound to bring on his appeal within eight days after the decision appealed from, unless the time was extended, and I am of opinion that their construction is correct. In the first place the language of the rule is unambiguous. It directs that the appeal shall be by motion, and shall be made within eight days after the decision appealed against. Now, if it is not read in its plain and literal meaning, how is it to be read? Are the words "if practicable" to be taken as understood? If so, are we to read it thus: "And if not practicable within eight days, upon the first practicable day afterwards?" or are we to read it, "within eight practicable days," i.e., eight days on each of which the Divisional Court is sitting? If *Hallams v. Hills* (24 W. R. 956) is to be treated, as it has been argued it should be, as an authority upon the construction of this rule, the latter alternative would seem to be the proper one, in which case a very indefinite and at times unreasonably extended period within which to appeal from orders at chambers would be given. But whichever alternative be adopted, does it not entail the making instead of the interpreting of a rule? And is there any such manifest inconsistency with other rules, or any such necessary hardship consequent upon the interpretation of this particular rule according to its literal meaning, as to induce us to depart from that meaning? I think not; the rules have provided against hardships, and at the same time have, by their provisions for the exclusion altogether of certain days, and the exclusion of other days on certain occasions in the computation of time, indicated, according to the maxim *Expressum facit cessare tacitum*, that they intended no implication to arise as regards other days, or in reference to other occasions than those provided for. Suppose

(a) In the Queen's Bench, Common Pleas, and Exchequer Division, every appeal to the court from any decision at chambers shall be by motion, and shall be made within eight days after the decision appealed against. [But see new rules of the Supreme Court, March 1879.]

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the eighth day in this case had expired on a Sunday, then the motion might have been made on the following day pursuant to Order LVII., r. 3., which provides as follows. (a) By this rule, if the doing of an act upon the last day upon which it has to be done is only possible if the offices are open, then if the offices are not open on the particular day the act may be done on the day on which the offices shall next be open. Where the rules wish to exclude for a particular purpose the long vacation from the computation of time, we find express provision, as in the case of filing, amending, or delivering any pleading by Order LVII., r. 5. There is a reason for not excluding the long vacation from the computation of time for the purpose of appeal from chambers to a divisional court, because the rules contemplate that such a court will sit during vacation: (see sect. 28 of the Act of 1873, and Order LX., rr. 5 and 6.) Lastly, any hardship or injustice which might otherwise be worked by the strict interpretation of such rules as that which is in question in this case, can be remedied by rule 6 of Order LVII., which gives the widest power of enlarging the time appointed for the performance of any act either before or after the expiration of such time. Apart then from authority, I am of opinion that the terms of the rules upon which the present question arises are absolute and universal in their application, except so far as in other rules any qualification, limitation, or exception is to be found, and consequently that the order of the court below was right. As regards authority, there is in favour of the view which I have expressed a distinct decision turning upon the construction of this particular rule in *Crom v. Samuels* (sup.); while *Hallams v. Hills* (sup.), which is cited in support of the appellants' contention, is a case upon another rule couched in different language, and a case the decision in which may well stand with that in *Crom v. Samuels* and the present case. I am of opinion, therefore, that the appeal should be dismissed.

BRETT, L.J.—I assent with great reluctance to the judgment which has been read by Thesiger, L.J. I think there has been a denial of justice in this case.

COTTON, L.J.—I also agree with reluctance, but the rule is too plain for us to alter it because it has worked injustice.

#### Judgment affirmed.

Solicitor for the plaintiff, J. P. Poncione.

Solicitors for defendants, Champion, Dobinson, and Poole.

(a) Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done, or taken if done, or taken on the day on which the offices shall next be open.

Wednesday, May 7.

(Before BRAMWELL, BAGGALLAY, and THESIGER, L.JJ.)

THE CENTRAL AFRICAN TRADING COMPANY (LIMITED) v. GROVE.

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Practice—Third parties—Counter-claim—Alternative claim—Joining defendant to counter-claim—Judicature Act 1873, sect. 24, sub-sect. 3, Order XXII., r. 5—Order XVI., rr. 17 and 18.*

*In answer to a claim by the plaintiff company for money lent, defendant set up a counter-claim against the company and one T., stating that T. agreed to purchase a business from defendant on the terms that T. should obtain for defendant an indemnity from certain creditors who had charges upon the goodwill and effects, and also should pay certain of defendant's debts for him, and should pay defendant a share of profits and an annuity; that the business was accordingly transferred to T., who, after performing a small part only of the consideration, formed the plaintiff company, almost all the shares being held by T. and his relatives; that the company took over the business, and adopted the agreement, but, although they performed part, they failed to perform all the terms of it. Defendant claimed damages against the company for their breach; that they might be ordered to obtain an indemnity and discharge from the creditors; payment by them of the unpaid portion of the annuity, and, in the alternative damages against T. for his breach of the agreement.*

*Held (affirming the decision of the Queen's Bench Division, Cockburn, C.J. and Mellor, J.), that T. could not be joined as a defendant to the counter-claim under sub-sect. 3 of sect. 24 of the Judicature Act 1873, and Order XXII., r. 5; because the remedy overclaimed against him was in the event of the original defendant being liable to the company; and therefore that T. could only be brought in under Order XVI., r. 17, to abide the event of the original action.*

THE plaintiff company's writ of summons was indorsed with a claim for 400*l.* for money lent to the defendant. The defendant's defence and counter-claim were as follows:—

#### Statement of defence:

1. The defendant denies that he is indebted to the plaintiffs in the sum claimed on the writ of summons herein, or any other sum whatsoever.

2. If any sum of money was lent by the plaintiffs to the defendant, which he does not admit, the defendant says that it was advanced upon the terms that the defendant should not be required to repay the same, but that the plaintiffs should apply to the debt so created sums of money due, and accruing due, by the plaintiff company to the defendant in respect of the several agreements entered into between the plaintiffs and the defendant hereinafter mentioned. Before action sums of money had accrued due as aforesaid, sufficient to liquidate such debt (if any), and the defendant believes that the said sums have been applied in liquidation thereof by the plaintiffs, and the present action is brought, notwithstanding the said agreements, and in breach thereof.

3. If any money was at any time due by the defendant to the plaintiffs, as claimed on the writ of summons herein, the defendant says that before action he satisfied and discharged the plaintiffs' claim by payment.

#### Set-off and counter-claim:

1. By way of set-off, as against the Central African Trading Company (Limited), and by way of counter-claim, as against the said company, and the above-named

defendant, Taubman, the plaintiff in this counter-claim, says that in 1876 the said defendant, Taubman, purchased a certain business, carried on on the river Niger, under the firm and name of Holland, Jaques, and Co., of which firm the plaintiff was the principal and active partner. Messrs. Martin, the bankers, and Mr. John Senhouse Goldie Taubman had charges upon the goodwill and effects of the said business to a large amount.

2. It was thereupon agreed by and between the said defendant Taubman and the now plaintiff that, as the price of the said business, the said defendant, John Taubman, should obtain from Messrs. Martin, and Senhouse Goldie Taubman a full and complete discharge and indemnity from all claims by them against the private assets of the said plaintiff, and John Dixon Gibbs, his copartner in Holland, Jaques, and Co.; pay debts of the plaintiff amounting to 1500*l.*, and meet all due and accruing liabilities in respect of the business of underwriting carried on by the plaintiff and his said copartner, secure and pay to the plaintiff one-third share of the profits to be made in the said business, and pay to the plaintiff annually the sum of 600*l.*

3. In pursuance of the said agreement, the said business was transferred by the plaintiff and his copartner to the said defendant, Taubman, and the said defendant, Taubman, obtained from the said John Senhouse Goldie Taubman the indemnity and discharge hereinbefore mentioned, and paid certain debts and met certain of the underwriting liabilities of the plaintiff, and also for some time paid a proportion of the annuity of 600*l.*, which he agreed to pay to the plaintiff, but did not obtain the said indemnity and discharge from Messrs. Martin, and has refused and neglected to obtain the same, and has neglected and still neglects to meet the plaintiffs' liabilities in respect of the underwriting business, and to pay to the plaintiffs one-third of the profits of the business hereinbefore mentioned, and the residue of the annuity of 600*l.*

4. After the making of the said agreement, and whilst it was still performed only as to a small part thereof, the said defendant, Taubman, together with Alexander Taubman, Amelia Taubman, Keith Helen Erskine, the now plaintiff, and five other persons were incorporated as the Central African Trading Company (Limited), the above-named defendants. The said defendant, Taubman, took 1253 shares, Alexander Taubman 401, Keith Helen Erskine 268, Amelia Taubman 370, and the plaintiff and the five other persons a single share each. The object for which the said company was formed was to take over from the said defendant, Taubman, and carry on the business purchased by the said defendant, Taubman, hereinbefore mentioned.

5. The said company accordingly took over the said business and adopted the agreement entered into by the said defendant, Taubman, with the now plaintiff, and promised and agreed with the plaintiff, in consideration of his making over the said Niger business of Holland, Jaques, and Co., that they would perform all the terms of the said first-mentioned agreement. The plaintiff made over the said business, and all things were done and happened, and all times elapsed necessary to entitle the plaintiff to have the said last-mentioned agreement performed by the said Central African Trading Company; yet, although the said company paid certain liabilities of the plaintiff and a portion of the said annuity, they have failed to perform the whole of the terms thereof. They have not secured the plaintiff against his liabilities in respect of the underwriting business, nor have they obtained a complete indemnity and discharge from Messrs. Martin, nor have they paid to the plaintiff the unpaid portion of his annuity of 600*l.*

The plaintiff claims:

1. Damages against the Central African Trading Company for breach of the said agreement.

2. In the alternative damages against George Dashwood Goldie Taubman for breach of the agreement entered into between him and the plaintiff.

3. An account of all the moneys paid by the defendants or either of them, for or on the behalf of the plaintiff, or applied in liquidation of the alleged debt of the plaintiff.

4. That the defendants may be ordered to obtain a full indemnity and discharge from Messrs. Martin, or in lieu thereof, to indemnify the plaintiff against all claims by Messrs. Martin.

5. Payment by the defendants of the unpaid portion of the annuity of 600*l.*, and such other moneys as upon the taking of the accounts may be found to be due by the defendants, or either of them, to the plaintiff.

6. Such further or other relief as the nature of the case may require.

The Central African Company and G. D. G. Taubman, the defendants in the counter-claim, applied in chambers to strike out the alternative claim for damages against G. D. G. Taubman, being the second head of claim in the counter-claim.

The Master refused this application, and a judge in chambers confirmed the master's order.

On appeal to the Queen's Bench Division the court were of opinion that G. D. G. Taubman ought not to be joined as a defendant to the counter-claim, and ordered the second head of claim to be struck out.

The original defendant and plaintiff in the counter-claim appealed.

*Crump* for the appellant.—Taubman may properly be joined as defendant to the counter-claim under sub-sect. 3 of sect. 24 of the Judicature Act 1873, which enables the courts to grant to any defendant in respect of any equitable or legal estate or right claimed by him all such relief against any plaintiff as such defendant shall have properly claimed by his pleading, and as the courts, &c., might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff; "and also all such relief relating to or connected with the original subject of the cause or matter and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing, &c., as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim as if he had been duly sued in the ordinary way by such defendant." Then Order XXII, r. 5, provides that when a defendant by his defence sets up any counter-claim, "which raises questions between himself and the plaintiff, along with any other person or persons, he shall add to the title of his defence a further title, similar to the title in a statement of complaint setting forth the names of all the persons who, if such counter-claim were to be enforced by cross action, would be defendants in such cross action, and shall deliver his defence, &c." We have complied with the requirements of this rule. The counter-claim asks an equitable remedy against the defendants to it. In an original suit for specific performance of the agreement, there is no doubt Taubman and the company could have been joined as defendants. If, also, we had brought a cross action, we could have joined them, and we ask only to be in the same position as if a cross action had been brought: (*Turner v. The Hednesford Gas Company*, 38 L. T. Rep. N. S. 8, 37; L. Rep. 3 Ex. Div. 145.) [*BAGGALLAY, L.J.*—Ought you not to have proceeded under Order XVI, r. 17, which provides for the case of a defendant claiming to be entitled to "contribution or indemnity or any other remedy or relief over against any other person?"] We are not claiming an indemnity. The facts stated in the counter-

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claim show that the subject-matter of our claim against Taubman and against the company is the same. Either the company or Taubman is liable under the agreement to the plaintiff in the counter-claim. He can join them both as defendants, and is not obliged to wait until it is settled on whom the liability rests: (*Treleaven v. Bray*, 33 L. T. Rep. N. S. 827; L. Rep. 1 Ch. Div. 176; 45 L. J. 113, Ch.; see the observations of Mellish, L.J., at p. 114 of the L. J. Rep.; see also *Dear v. Sworder*, L. Rep. 4 Ch. Div. 476; *Padwick v. Scott*, L. Rep. 2 Ch. Div. 736, judgment of Hall, V.C.)

*Gainsford Bruce* for the Central African Trading Company and Taubman.—The claim of damages against Taubman is not a claim against the company "along with" Taubman within Order XXII., r. 5. If the company never took over the agreement, and Taubman is liable under it to the plaintiff in the counter-claim, the company is not bound to wait until the matter is settled between Taubman and the plaintiff. A counter-claim must be in some way a defence to the action. Here, if the plaintiff to the counter-claim succeeded against Taubman, that would not be an answer to the company's claim against plaintiff. Taubman could have been served with notice under Order XVI., rr. 17, 18, and he would then have been bound by the decision of the question in the original action. [Counsel was not required to argue further.]

BRAMWELL, L. J.—I am of opinion that this appeal should be dismissed. I may say that I entirely agree with the Queen's Bench Division in wishing that the whole of these matters could be tried together, but I think upon consideration that cannot be done. It is not within the rule, and not intended that any rule should comprehend it. There seems to be this dilemma in the matter: the counter-claim either states that there was a novation of the contract or it does not; if it does, then Taubman, on the face of the counter-claim, is not a party to the contract; if it does not, then defendant's remedy is against Taubman and not against the company. All that he states in his counter-claim is, "It may be that I owe the plaintiffs the money, but if so, I have a remedy over against Taubman." But that case is within Order XVI. If there had been a distinct allegation that there was a novation of the contract, then Taubman would not be wanted in the action at all. If, on the other hand, the allegation had been that there was no novation, but an alternative claim for damages against Taubman, then the case is within Order XVI., and the claim is not the subject-matter of a counter-claim. The only misgiving I have had is whether the defendant being in an uncertainty as to whether there has been a novation or not could make any difference. But that cannot really matter, because, if he had been certain, he would have no right to make Taubman a party to the counter-claim; he cannot have a right because he is not certain. The hardship pointed out by Mellish, L.J. in *Treleaven v. Bray* does not arise in this case. There there was a clear debt due to the plaintiff, who would have to wait while a quarrel was being settled between two other persons. I think this appeal should be dismissed; that the order striking out this part of the counter-claim was right, and that the defendant's remedy is under Order XVI. and not under sub-sect. 3 of sect. 24 of the act of 1873.

BAGGALLAY, L.J.—I am of the same opinion

I have nothing to add to the judgment given by Bramwell, L.J.

THESIGER, L.J.—At first I thought the case might be put in this way: that the counter-claim was in the nature of a bill for specific performance; that there was an agreement relating to the sale of defendant's business, between Taubman and the defendant, under which sums of money became due to defendant; that that agreement had been transferred to the company, who had taken over the business and the assets; and that both Taubman and the plaintiffs would be proper parties against whom to enforce the agreement. I thought that under rule 3 of Order XIX. this was a case in which, if the defendant had brought an original action in respect of the same subject-matter, both Taubman and the plaintiffs might be made parties. It struck me that the wording of r. 5, Order XXII., was wide enough to include such a case, but I have come to the conclusion that my first view was erroneous. I agree with Bramwell, L.J. The defendant alleges novation; he alleges that, as between him and the company, the company have become liable to perform the agreement which he entered into with Taubman. If so, Taubman is not a necessary party for the purpose of ascertaining the right between the plaintiff company and the defendant. But, assuming that there was no novation, and assuming that the words relating to novation were struck out, the difficulty at once presents itself that the defendant's claim is not against the company, but for damages against Taubman, which, if enforced at all, must be enforced, not under sub-sect. 3 of sect. 24 of the Act of 1873, but under r. 17 of Order XVI.

*Judgment affirmed.*

Solicitors for plaintiffs, *Flux and Co.*

Solicitors for defendant, *Elmalis, Forreth, and Sedgwick.*

Monday, May 19.

(Before BRAMWELL, BAGGALLAY, and THESIGER, L.JJ.)

TOMLINE v. THE QUEEN.

*Practice—Discovery—Petition of right—Petition of Rights Act (23 & 24 Vict. c. 34), s. 7—Order XXXI., r. 12.*

*By the Petition of Rights Act, sect. 7, statutes and laws in force for the time being for the procuring of evidence shall, so far as the same may be applicable, apply and extend to petitions of right.*

*Held (reversing the decision of the Exchequer Division), that Order XXXI., r. 12, applied to enable the Crown to obtain discovery against the suppliant to a petition of right.*

THIS was a petition of right on the part of Col. Tomline to recover tolls in respect of materials landed at a pier or jetty erected on the suppliant's estate adjoining the sea-shore.

A summons had been taken out by the Crown for discovery and production of documents by the plaintiff, and a master made the order that the suppliant should make discovery. The suppliant appealed to Field, J., by whom the matter was referred to the court.

The Exchequer Division set aside the order of the master.

The Crown appealed.

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.

*C. Bowen for the Crown.*—Procedure on petitions of right is now regulated by the Petitions of Right Act, 23 & 24 Vict. c. 34 (Bovill's Act), and the real question here is, whether the Crown is entitled to discovery against the subject. It is objected on the part of the suppliant that in a petition of right there is no right of discovery. This depends on the construction of sect. 7 of Bovill's Act (23 & 24 Vict. c. 34).

So far as the same may be applicable, and except in so far as may be inconsistent with this Act, the laws and statutes in force as to pleading, evidence, hearing and trial, security for costs, amendment and arbitration, special cases, the means of procuring and taking evidence, set-off, appeal and proceedings in error in suits and equity, and personal actions between subject and subject, and the practice and course of procedure of the said courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right. Provided always that nothing in this statute shall be construed to give to the subject any remedy against the Crown, in any case in which he would not have been entitled to such remedy before the passing of this Act.

The Act was passed not to extend the number of cases in which a petition of right would lie, but to simplify the proceedings. Discovery is included in the words "means of procuring evidence." The difficulty raised in the court below was, that discovery in a petition of right is one-sided, as discovery cannot be had against the Queen, and therefore it was argued that discovery is not one of the matters in which proceedings in a petition of right are assimilated to an action. Proceedings between the Queen and the subject never can be the same as proceedings between subject and subject; for there are masses of documents in the possession of the Crown which it might be most injurious to public policy to produce, being meant for the advice of Her Majesty only, and, so to say, confidential. Refusal of discovery has always been insisted on on the part of the Crown:

*Thomas v. The Queen*, 31 L. T. Rep. N. S. 428; L. Rep. 10 Q. B. 31, 44.

*Tobin v. The Queen* (14 C. B. N. S. 505) shows that in spite of the Petitions of Right Act it is competent to the Crown without leave to plead and demur. This is an authority to show that the rights of the Crown are different to those which one subject has against another. The rule under which discovery is here applied for is rule 12 of Order XXXI. of the Judicature Act. [BAGGALLAY, L.J.—*Prima facie*, the right to discovery would be reciprocal.] Yes, just as rules of pleading on the Petition of Rights Act would seem to be. Sect. 9 says, "so far as applicable," and rule 12 ceases to be applicable where the Queen is defendant, for she cannot be made to give discovery, but in every other case it is applicable and she can obtain discovery.

*English Harrison (Herschell, Q.C. with him) for the respondent.*—The statute must apply *in toto* or not at all. The Judicature Act has only altered the existing state of practice by dispensing with an affidavit. If the Crown is a party for the purpose of applying for discovery, why not for the purpose of replying on oath? The Crown is a corporation:

See Bacon's Abridgment, vol. ii. p. 2;  
Grant on Corporations, p. 626;

and if this is so, then the provisions of the Judicature Act apply, and it ought to make discovery by

its proper officers. It is not necessary to contend that every proceeding between subject and Crown need be reciprocal; no doubt some matters may be applicable to one and not to the other. The question is, whether in matter of taking evidence they are not reciprocal. This is an application within the discretion of the court, and there is no reason for making us give discovery here unless your Lordships will put the Crown upon terms and make them give us discovery.

BRAMWELL, L.J.—I think that this appeal must be allowed. I do not quite understand the judgment of the court below, but it seems to be a very plain case. Sect. 7 of the Petition of Rights Act makes the procedure on petitions of right similar to that in an action, with the qualification "so far as it is applicable." There is not the least doubt that here it is applicable; that is the whole of the matter, and there is no more to be said about it. Whether an application to obtain discovery against the Crown, if made, will be successful, I do not say. Suppose it fails, the practice is still applicable against a suppliant. It may be that the Legislature left this difference intentionally. Any way it seems to me this plaintiff must make discovery, and the appeal must be allowed.

BAGGALLAY, L. J.—I am of the same opinion, and for the same reasons.

THESIGER, L.J.—I am of the same opinion.

Solicitor for plaintiff, *W. F. Stokes*.

*W. T. Perkins*, agent for Treasury, for the Crown.

Wednesday, March 21.

(Before BRAMWELL, BAGGALLAY, and THESIGER, L.JJ.)

TURQUAND AND OTHERS v. FEARON.(a)

Practice—Pleading—Pleading agreement—Order XIX., rr. 4, 24, 27.

*In an action upon a guarantee, a paragraph of the statement of claim alleged that it was agreed between defendant and W. and Co., who were bankers, that in consideration that W. and Co. would discount the acceptances as therein mentioned of one D., the defendant would guarantee and be responsible to plaintiffs for payment of the acceptances. Defendant obtained production of the alleged guarantee, which proved to be one in favour of D., and not of W. and Co., through whom plaintiffs claimed.*

*The Court of Appeal (affirming the decision of the Q. B. Div.) refused to strike out the paragraph, as not complying with the provisions of Order XIX., r. 4.*

*Semble, it is not sufficient, when an agreement is relied upon, for the party pleading it to state generally that "it was agreed, &c." He should also, in order to comply with Order XIX., state whether the agreement was in writing or not, and generally the facts which support the allegation of an agreement.*

THIS was an appeal from a decision of the Queen's Bench Division (Cockburn, C.J. and Lopes, J.).

The action was brought by the trustees under the liquidation of Messrs. Willis, Percival, and Co., bankers, and the Capital and Counties Bank, to whom the estate and effects of Willis, Percival, and Co. had, subsequently to the liquidation, been assigned, and it was to recover sums of money

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alleged to be due on a guarantee given to Messrs. Willis, Percival, and Co., by the defendant.

The facts relating to the alleged guarantee were stated in the statement of claim as follows :

1. In and subsequently to the year 1874 one Henry Darling kept a banking account with the firm of Willis, Percival, and Co., who then carried on the business of bankers.

2. The said firm previously to Aug. 1874 had been in the habit of, from time to time, discounting for the said Henry Darling bills drawn by him on a certain firm of Shearer, Smith, and Co., upon receiving in the case of each acceptance so discounted a guarantee from the defendant for the due payment of the same.

3. On or about the 26th Aug. 1874 it was agreed between the said Willis, Percival, and Co., and the defendant, that in consideration that the said Willis, Percival, and Co. would for the future discount such acceptances without requiring a separate guarantee for each of the same from the defendant, the defendant would guarantee and be responsible to the said Willis, Percival, and Co. for payment of such of the said acceptances discounted by the said Willis, Percival, and Co., as should be from time to time current to the amount of 1500*l*.

The statement of claim further alleged that Willis, Percival, and Co. accordingly afterwards discounted bills for Henry Darling, and that sums amounting to 752*l*. 0*s*. 11*d*. were due at the commencement of the action in respect of the bills; that Willis, Percival, and Co. afterwards went into liquidation, and the plaintiff William Turquand was appointed trustee; and that before the commencement of the action he absolutely assigned to the plaintiffs, the Capital and Counties Bank, all the estate and effects of the firm of Willis, Percival, and Co., including the guarantee. The plaintiffs claimed 752*l*. 0*s*. 11*d*. and interest.

The defendant obtained production of the agreement referred to in paragraph 3 of the statement of claim, and it then appeared that the guarantee in question was a guarantee by the defendant to Darling, and not to Willis, Percival, and Co.

The defendant thereupon obtained a summons to strike out paragraph 3, on the ground that the plaintiffs had not complied with Order XIX, rr. 4, 18, and 24.

The Master refused to make the order, and Denman, J. in chambers affirmed his refusal. On appeal to the Queen's Bench Division the court affirmed the decision of Denman, J.

The defendant appealed.

*Cohen, Q.C.* and *Lamaison*, for the defendant, argued that, in view of the document which had been produced by the plaintiffs, which was a guarantee to Darling, and not to Willis, Percival, and Co., paragraph 3 of the statement of claim was embarrassing, as it did not state the material facts upon which the plaintiffs relied. They referred to

*Phillips v. Phillips*, 39 L. T. Rep. N. S. 329, 556; L. Rep. 4 Q. B. Div. 127; 48 L. J. 185, Q. B.

*Gore* for the plaintiffs.

BRAMWELL, L.J.—I am afraid that this appeal must be dismissed. In my opinion there is really no pretence for an appeal on the grounds put forward here. It comes to this, that because a man makes an untrue statement, or what is supposed to be an untrue statement, in his pleadings, that statement is to be struck out as embarrassing. His remedy is clearly to take issue upon it. But I take the opportunity of saying that, in my judgment, the statement of claim ought to have stated that the agreement was in writing, and to have set forth the

writing, and that not having done so, it is embarrassing. The plaintiff ought to state whether the agreement was by word of mouth (if that is his case), or to be collected from documents. The intention of the rules with regard to pleadings was that, instead of going down to trial and there having to state a special case, the actual facts should be stated so that the special case should be raised on the pleadings. I am sorry that this appeal must be dismissed with costs.

BAGGALLAY, L.J.—I agree in thinking that this appeal should be dismissed for the reasons given by Lord Justice Bramwell. I also think the statement of claim should have stated that the agreement was in writing.

THESIGER, L.J.—I agree also that the appeal should be dismissed. I think there is no foundation for saying that the defendant is embarrassed, because, after production of the guarantee has been obtained, the statement in the statement of claim seems to be incorrect. At the same time, but for what has already taken place in chambers, I think the third paragraph ought to be struck out, on the ground that it does not comply with the rule in stating the material facts on which the plaintiff relies. The paragraph states merely that "it was agreed," &c. It is clear to demonstration that under Order XIX. it was intended that a fuller statement of the facts should be made. When an agreement is relied upon, whether under the Statute of Frauds or not, it is for the person relying upon it to state whether the agreement is in writing or by parol, or partly in writing and partly by parol, or to be collected from a variety of documents or letters. The matter becomes clear when that 4th rule is looked at, which states that "every pleading shall contain, as concisely as may be, a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved," &c. Now, an agreement is not, strictly speaking, a fact; it is an inference of law from facts. What the rule requires to be stated are the "material facts." The other rules under Order XIX. make the matter infinitely more clear. The 24th rule says that "wherever the contents of any document are material it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document, or any part thereof, are material." The reasonable inference from that rule is, that if an agreement is relied upon, as contained in one or more documents, the effect of those documents must be set out; and the 27th rule of the same order provides, that when the contract is to be gathered from a series of letters, conversations, or circumstances, it is enough to allege such contract as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail. The obvious intention of the rules is that, where a document or agreement in writing is relied upon, that document or agreement shall be set out in the pleadings, but, as an agreement may be embodied in a number of documents, it is sufficient in that case to refer to them generally, and if there is a doubt whether the writing constitutes a complete agreement or merely a memorandum to satisfy the Statute of Frauds, the rule provides that if the "person so pleading desires to rely in the alternative on more contracts or relations than one as to be implied



from such circumstances, he may state the same in the alternative." It appears, therefore, to me that, as a general rule, it is not sufficient to state merely that there was an agreement, but the party pleading it must give such particulars as will enable his opponent to meet the case set up. I wish to add that, although the forms given in the Judicature Acts are not absolutely binding, they are still of assistance as illustrating the meaning of the Act, and in appendix C. the statement of an agreement in the forms of pleading is that "by an agreement in writing, &c." I think the agreement should have been stated more fully in the present case.

*Judgment affirmed.*

Solicitors for plaintiffs, *Kimber and Co.*

Solicitors for defendants, *Herbert and Kent.*

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

*Thursday, March 27.*

(Before JESSEL, M.R.)

SEVENOAKS, TUNBRIDGE, AND MAIDSTONE RAILWAY COMPANY v. LONDON, CHATHAM, AND DOVER RAILWAY COMPANY. (a)

*Railway company—Working agreement—Line to be maintained and worked by working company—Exclusive possession in working company—Injunction.*

*The plaintiff company by their Act were authorised to construct a railway, and by a working agreement scheduled to, and confirmed by, the said Act, the line, when completed, was to be maintained and worked by the defendant company. After the line had been constructed, and worked for some time by the defendant company, the plaintiff company erected some steps on a station on the line, which were removed by the defendant company. In an action by the plaintiff company to compel the defendant company to restore the steps, and for an injunction restraining the defendant company from interfering with them:*

*Held, that, under the working agreement, the defendant company was entitled to the exclusive possession of the line, and the action was dismissed with costs.*

THE plaintiff company were, by virtue of the provisions of the Sevenoaks, Maidstone, and Tunbridge Railway Act 1872, authorised to construct a line from Otford to Maidstone, and terms of arrangement, which were scheduled to the said Act and were confirmed thereby, were entered into between the plaintiff company and the defendant company for the working of the said line. The terms of arrangement, so far as the same are material to be stated, were as follows:

1. The company shall forthwith construct and complete their authorised line from Otford to Maidstone with the authorised deviations (in these terms called the Maidstone line) as a single line, but with double works, at points to be agreed between the two companies, and also with all necessary stations, sidings, turn-tables and other works and conveniences to the satisfaction of the Dover Company, and the same, when so completed, shall be maintained and worked by the Dover Company in perpetuity under and according to these terms, and so as fully and fairly to develop the traffic thereon.

4. The Dover Company shall provide, and, if need be, annually pay the sum of 9000*l.* for the payment of interest

on the stock issued by the Sevenoaks Company in accordance with these terms, and such sum of 9000*l.* (referred to afterwards in the agreement as the contribution of the Dover Company) shall be payable and be paid from the day on which the said Maidstone line shall be completed as aforesaid.

7. The contribution of the Dover Company shall be repaid to them out of the net earnings of the Maidstone line, and any deficiency in that behalf of these earnings in any year shall be a charge on the net earnings of that line in every subsequent year until the same is fully paid.

8. The Dover Company shall be entitled to retain out of the gross earnings of the Maidstone line the actual cost of working the same, including the expense of maintenance and management, payment for passenger duty, and other taxes, rates, and tithes.

9. The gross earnings of the Maidstone line shall be applicable and applied in the manner and with the priorities following and not otherwise. (1.) In payment to or retention by the Dover Company of the actual cost of working the same as hereinbefore provided. (2.) In repayment to or retention by the Dover Company of their contribution and of any sum or sums which may for the time being be due to them under art. 7 of these terms. (3.) In payment of the residue then remaining to the company for their own benefit.

10. If and whenever the development of the traffic upon the Maidstone line shall be such as to require any extension or enlargement of the station or other necessary accommodation thereon, the Dover Company will execute such works as, failing agreement between them and the company as to the nature and extent thereof, may be determined by arbitration in manner hereinafter provided, and they shall be entitled to deduct from the gross earnings of the line, and as part of the actual cost of working, a sum equal to 5 per centum per annum on the capital expended by them for such purposes.

The Maidstone line was constructed in accordance with the said terms, and had been at the time this action was commenced for some years worked by the defendant company. In the month of April 1878 the plaintiff company, in consequence as they alleged of complaints by the inhabitants of Maidstone and other persons using the Maidstone line as to the access to the Maidstone station, and in pursuance of an arrangement with the Maidstone Local Board, caused certain stone steps leading to the station yard, to be erected on their own land; the cost of which was contributed partly by the plaintiff company and partly by the Maidstone Local Board. On the 9th Aug. 1878 the defendant company sent a gang of men who removed and destroyed the steps. The plaintiff company then brought this action, and asked for a declaration that the plaintiff company were, as between themselves and the defendant company, entitled to erect the stone steps, and that they were entitled to the reasonable and proper user thereof, without any obstruction or interference on the part of the defendant company, and for an order upon the defendant company to restore the steps, and for an injunction restraining the defendant company from removing or obstructing the steps when restored.

*Chitty, Q.C.* and *Whitehorne*, for the plaintiff company, contended that they had a right to construct the steps on the land belonging to them, and that the defendant company were not entitled to the exclusive possession of the line. They referred to

*Carr v. Benson*, L. Rep. 3 Ch. 524;

*Hall v. Seabright*, 1 Mod. Rep. 14;

*Foster's case*, 11 Co. Rep. 107;

*Beman v. Rufford*, 1 Sim. N. S. 550;

*Winch v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company*, 5 De G. & Sm. 562.

*Bagshawe, Q.C.* and *Hornell*, for the defendant company, were not called on.

CHAN. DIV.] SEVENOAKS, &amp;C., RAILWAY CO. v. LONDON, CHATHAM, &amp;C., RAILWAY CO. [CHAN. DIV.]

JESSEL, M.R.—The question I have to decide is one of considerable importance, because I cannot doubt for a moment that agreements similar in form to this are very common indeed, and have been in very many cases confirmed by Act of Parliament. I regret that the framers of these agreements have not taken a little more trouble to express their meaning clearly, and they might have avoided such a case as this coming before a judicial tribunal. The real question I have to decide is this: whether, under what I will term for this purpose the ordinary working agreement (for it differs but slightly from the agreements I have seen in great numbers) between one railway company and another, the working company is entitled to the exclusive possession of the railway works, and to the exclusive right of maintenance of the works of the company. It arises in this way: The plaintiffs, who I call for shortness the Sevenoaks Railway, are a small railway which was made with the assistance and support of the London, Chatham, and Dover Company, and the London, Chatham, and Dover Company entered into a working agreement with the Sevenoaks Company, which was confirmed by the very Act of Parliament which authorised the making of the present Sevenoaks railway. After the line was completed, pursuant to the terms of the working agreement, it was actually handed over to the London, Chatham, and Dover Company, which has ever since been in undisturbed possession of the line of railway and the works. The Sevenoaks Company, at the instance of some of the inhabitants of the terminal station at Maidstone—they representing to them that the access to this station at Maidstone was inconvenient—improved or wanted to improve that access, and for that purpose erected some steps, which, as far as the present action is concerned, were in the station yard, that is, within the railway proper, which was to be worked by the London, Chatham, and Dover Company. The London, Chatham, and Dover Company asserted that the Sevenoaks Company had no right whatever to enter upon the station yard for any purpose, and had no right whatever to alter the station steps; and that is really the question I have to decide. The London, Chatham, and Dover Company thereupon removed the steps, and this action is an action asking for a declaration that, as between the Sevenoaks Company and the London, Chatham, and Dover Company, the Sevenoaks Company still possesses the right of entering into possession of the railway, and also still possesses a right of maintaining the railway, because it is agreed on both sides that these works, whatever they are, must be works of maintenance, the power of constructing the railway having expired by effluxion of time. Now I have no doubt that these are fairly works of maintenance. It is very difficult to define what works of maintenance are. It is a very large term, and useful or reasonable ameliorations are not excluded by it. For instance, if a company had power to maintain the banks of a river on one side, might they put in a facing to the banks in a particular way—supposing that they were restricted under the words of maintenance to keeping up the banks in precisely the same way and precisely the same mode which might have been very good when the banks were originally formed, but which had been very much improved on by the subsequent advance of science? So, where a railway company has to maintain a railway, I should not at all doubt for a

moment that in maintaining it they might use any reasonable improvement. If, for instance, the railway was originally fenced with wooden palings, and it were sought when they decayed to replace them by an iron structure, I should say that was fully within their powers. If the railway originally was made in a deep cutting, and it was thought desirable to face the cutting with brick, so as to make it more secure, I should say that was fair maintenance. And if the railway station were found inconvenient, and it was desirable when you came to repair it to alter the arrangement of the rooms, or to alter the access or form of access, and so to ameliorate at the same time that you repair, I should say all that is within the powers of maintenance given by the Legislature. That is, that you may maintain by keeping in the same state, or you may maintain by keeping in the same state and improving the state; always bearing in mind that it must be maintenance, as distinguished from alteration of purpose. I have no doubt, therefore, that this work is authorised by the power to maintain. I now come to the question as to the effect of the wording of the agreement. It has been urged on the part of the Sevenoaks Company that, inasmuch as the London, Chatham, and Dover Company has only the right to maintain the railway in perpetuity, that is in law a mere licence empowering the licensees to do all things necessary for the working and maintaining, but not interfering with the rights of the Sevenoaks Company, and it is said that the powers of the Act of Parliament to make and maintain the railway subject to the provisions of the Act, that is, subject to the agreement, do not interfere with the power of maintenance as incident to that. I have come to an opposite conclusion, and I am by no means going to determine what the effect of the agreement would be if it were not enacted by Act of Parliament, or what it would be if a pure contract between individuals. An Act of Parliament has power to create interests which are unknown to the common law, and which could not be created between individuals by contract. Now we have not by law any such thing as a lease in perpetuity. We have a fee simple subject to a rent charge, and we have a lease for years, but we have no such thing as a lease in perpetuity; and, therefore, when we find a perpetuity of this kind, which could not be properly described as a lease, nor could it be described as a fee simple—because it was not intended to vest in the London, Chatham, and Dover Company any of the soil, only the right of possession or occupation—I can well understand why the term lease was not used; but it is to my mind equivalent to a lease so far as regards the possession of the surface and adjuncts necessary for the working of the line. The way to look at it is this: The Sevenoaks Company is to construct and complete their line, and then to hand it over. The Dover Company is to work it in perpetuity—to work it and to maintain it. It cannot be contended for a moment that it was intended that the London, Chatham, and Dover Company were not entitled to possession of the line, or that they could have worked it and maintained it without such possession. It is obviously impossible, and no such argument was put forward. They must have possession. Having possession, is it to be exclusive possession; having the obligation to maintain thrown on them, is it an exclusive obligation to maintain, and does it prevent the

other company maintaining? Now, first of all, we must consider what the object of the two companies was. As I said before, the wording alone must not be considered, but the substance. Now the circumstances were these: There had been an arrangement carried out between the two companies imperfectly, and it had been referred to arbitrators to decide what the arrangement was. That is recited in the Act of Parliament, and I find this, that it had been agreed, among other things, that the actual cost of maintenance and working should be deducted from the aggregate amount of the traffic receipts aforesaid to be allotted to the company, and the balance should be paid to them by the Dover Company at the times and in the manner by the award provided. Then when I come to look at the agreement which was confirmed by the Act of Parliament, I find this, that they first of all state what the cost of making the line of the Sevenoaks Company will be; then the above company is bound to pay interest on the stock issued by the Sevenoaks Company in accordance with these terms a sum of 9000*l.* a year. Then the agreement provides as follows: the Dover Company's contribution shall be repaid out of the net earnings of the Maidstone line, and any deficiency is to be a charge upon the net earnings of that line in every subsequent year until the same is fully paid. Then the 8th section is this: the Dover Company shall be entitled to retain out of the gross earnings of the Maidstone line the actual cost of working the same, including the expense of maintenance and management. Now here I get the word "management," showing that working includes management. No doubt it would have done so without the words being found in the 8th section. After the payment of the passenger duty the gross earnings are to be applicable and to be applied, first, in payment to or retention by the Dover Company of the actual cost of working; secondly, in repayment to them of the sums they have paid for their contribution, and of any sum or sums which may for the time being be due to them under art. 7; and lastly, in payment of the residue then remaining to the company, that is, the Sevenoaks Company, for their own benefit. Then the 10th section says that if the development of the traffic on the Maidstone line requires any extension or enlargement of the station or other necessary accommodation, the Dover Company is to execute the works which will be settled by arbitration, and then they are to be entitled to deduct from the gross earnings 5 per cent on the cost of such works. Now, when that agreement is looked at and the financial arrangement between the two companies is considered, it appears to me plain that it was never intended that there should be any power reserved to the Sevenoaks Company to maintain the line, that is to expend money on it in keeping up the works, because, if they did so, they could not get it back again. All the expense of maintenance done by the Dover Company is to be repaid out of the gross earnings, and then the net surplus goes into the pockets of the Sevenoaks Company; but to imagine that they were entitled to maintain the line at their own cost, that is, at the cost of the shareholders, for the benefit of the Dover Company, would be rather an extraordinary result, and therefore it does appear to me from the financial arrangements that the whole maintenance was to be done by the Dover Company. But that is not my only reason for saying so; there is another reason.

You cannot have a line of railway worked by two companies at the same time. It is to be observed that the maintenance and the working are dealt with together. The working must be exclusive from the nature of the business to be done, and I think the same reason applies to the maintenance of the works. If it were otherwise, just consider the consequences that would result. A railway moves, and it is necessary to relay the plates. A gang of platelayers is sent down by the working company. According to the argument of the plaintiffs, the Sevenoaks Company is also entitled to send down at the same time another gang of platelayers, and I suppose they are to settle the question as to which gang is to relay the plates by a free fight, without the possible interference of any court. It is quite obvious that that cannot be, and the same thing applies to every case of repair and maintenance of the line. We know how they are conducted in practice. There is a superintending engineer—in this case he is the officer of the London and Dover Company—who is to have the management of the line. He is the person to direct what kind of repairs are done. He prefers steel rails to iron rails; whenever the old rails are worn out, he directs them to be relaid with steel. As I said before, that is maintenance with an improvement. The engineer of the Sevenoaks line prefers iron. He will send down his engineer and gang of workmen to repair the rails, and again there would be a fight between the men sent down to relay with steel, and the others. It is absolutely impossible to my mind to imagine that the Legislature intended that two companies should be authorised at the same time to do that to the railway, any more than that two companies should be authorised at the same time to work the railway. It seems to me that the working and the maintenance, and the consequent possession, must be exclusive, and therefore that the Sevenoaks Company after this agreement, had no right to enter at all, and had no right to interfere with the construction of any part of the works. I may mention, in corroboration of the view I have taken of the working agreement, two cases which seem to me to have some bearing on the matter. The first is the case of *Beman v. Rufford* (*sup.*). The material terms of the agreement, which were the subject of the litigation in that case, are to be found at page 555: "The Oxford, Worcester, and Wolverhampton Railway to be completed"—it is very much like this—"ready for efficient working in all respects from the Bucks line at Oxford. The whole concern without incumbrance, when completed, to be worked by the London and North-Western and Midland Companies, who shall have perfect control and exercise all the rights of the Oxford, Worcester, and Wolverhampton Company, and who shall find stock, and work the concern for twenty-one years." No doubt the words were "to have perfect control and exercise all rights," but there were no words to say it was exclusive. Now upon that Lord Cranworth says at page 569: "In my opinion this is neither more nor less than a contract on the part of the Oxford, Worcester, and Wolverhampton Company, that, when their line is completed, they will hand it over to be worked by the London and North-Western Company and the Midland Company. I put the question several times to the various gentlemen who appeared in the different interests, and I do not think that any of them construed it quite in the same way; but,

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in my opinion, it is just the same thing practically as if they had leased the line to the two other companies." He said "leased" there, because it was for a term of twenty-one years. As I said before, being in perpetuity, an agreement to work is practically the same thing as a lease. There is another well-known case, that of *Winch v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company* (sup.). The agreement is to be found at page 566, it is very short: "The London and North-Western Railway Company for a term of ninety-nine years to work the lines of the Birkenhead Railway Company, using the property and plant of the latter company." They were to run as many trains as the traffic might require, and were to deduct the working expenses, and it provided that the property and plant should be valued, and restored at the termination of the agreement of the same working value. Now that had one favourable circumstance which does not exist here. The plant taken was the plant of the Birkenhead Company, so they did not find the plant, which they do in this case; but the agreement was to work, using the plant. Now Knight Bruce, V.C. considers, at page 579, what is the effect of such an agreement: "The agreement expresses that the London and North-Western Railway Company are to run the trains, with an express provision as to working expenses; pointing out, therefore, that what is meant by working is the maintenance of the way, and making good the depreciation of the way, of the works, and of the plant." The word "maintenance" was not expressed there, but it was inferred; the working includes maintenance of way. "The company who work the other railway are to have the use of the property and plant of that railway, and that must mean the exclusive use of it, as between themselves and the Birkenhead Railway Company, because it is clear that, if the London and North-Western Railway Company are to work under this agreement, the Birkenhead Railway Company cannot work it; they must part with the use of their property and plant." As I said before, it appears to me, on both those authorities, that the agreement for working means the exclusive use; and being under agreements not only similar in words, but similar in purpose, I think they are guides to me in showing that, in construing this agreement, I ought to arrive at the same conclusion, and therefore I dismiss the action with costs.

Solicitors: *Newman, Stretton, and Hilliard; J. White.*

April 7 and 9.

(Before FRY, J.)

ELLIOTT v. DEARSLEY. (a)

*Will*—Direction to pay debts out of a mixed fund—17 & 18 Vict. c. 113 (*Locke King's Act*)—30 & 31 Vict. c. 69—*Legacies payable out of mixed fund.*

*A testator devised and bequeathed his residuary, real and personal estate upon trust for sale and conversion into money, and declared that the trustees should stand possessed of such money, as follows: "Upon trust thereof, in the first place, to pay any debts, including debts due upon mortgage of any of the lands, hereditaments, or other property, the enjoyment whereof is hereinbefore*

*secured to my wife during widowhood." There were mortgages on the residuary real estate.*

*Held, that there was no declaration of a contrary intention under Locke King's Act, with regard to the mortgages on the residuary real estate, and that they must be borne by the produce of sale of the residuary real estate exclusively.*

*A testator, after devising and bequeathing his residuary real and personal estate upon trust for sale and conversion into money, and declaring that his trustees should stand possessed of such money in trust to pay debts and funeral and testamentary expenses, gave a legacy of 250*l.* to each of his executors who should accept the trusts of the will.*

*Held, that the principle of Greville v. Browne (34 L. T. Rep. O. S. 8) applied whether the legacies were given before or after the gift of the residue, and that the legacies were charges on the real and personal estate pro rata.*

CYRUS ALEXANDER ELLIOTT, late of Munster-house, Fulham, died on the 7th March 1874, having made a will by which, after devising and bequeathing certain portions of his real and personal estate in trust as to part thereof for his wife Anne Maria Elliott during her widowhood, he gave and bequeathed all the residue of his real and personal estate of or to which he should be seised or entitled unto the said Anne Maria Elliott, Henry Dearsley, Henry Pawle Ree, and Thomas Hoskins, their heirs, executors, administrators, and assigns, as follows:

Upon trust that they the said trustees, or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, shall sell, collect, or otherwise convert into money, according to the nature of the same premises, all such parts of the same premises as shall not consist of ready money; and I declare that the trustees or trustee shall stand and be possessed of and interested in the moneys which shall arise from the sale of the said several establishments called Munster House Asylum and Effra Hall Asylum, and the effects therein, hereinbefore bequeathed in trust for sale, and of the moneys which shall arise from the sale, conversion, or collecting in of my residuary real and personal estate. Upon trust thereof in the first place to pay any debts, including debts due upon mortgage of any of the lands, hereditaments, or other property, the enjoyment whereof is hereinbefore secured to my wife during widowhood, also my funeral and testamentary expenses and the costs and charges of proving and executing this my will.

Another and subsequent part of the will was as follows:

And I do hereby nominate and appoint the said Anne Maria Elliott, Henry Dearsley, Henry Pawle Ree, and Thomas Hoskins, executors of this my will, and I give to each of them the said Henry Pawle Ree and Thomas Hoskins, the sum of 250*l.* if he shall accept the trusts of this my will.

The will was proved by all the executors on the 24th April 1874.

In May 1874 a suit in Chancery was commenced for the performance of the trusts of the will and the administration of the testator's real and personal estate, which suit was transferred to Fry, J., and now came on before him on further consideration.

It appeared that there were mortgages on the testator's residuary real estate, and one question was whether such real estates included in the residue were to bear the mortgage debts with which they were charged, or whether the testator had, with regard to them, shown "any contrary or other intention" within the meaning of *Locke King's Act* (17 & 18 Vict. c. 113).

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

*Glasse, Q.C. and Samuel Dickinson* for the plaintiff, the widow of the testator, who had subsequently to his death intermarried with one Webb.

*Bigby*, for the Attorney-General, interested under a trust for a charitable purpose of part of the testator's residuary estate.

*John Pearson, Q.C. and Simmonds* for the second husband.

*Bristow, Q.C. and Cracknall* for the trustees of Mr. and Mrs. Webb's marriage settlement.

*Higgins, Q.C., North, Q.C., and Laing* for other parties.

*Glasse, Q.C. and S. Dickinson.*—The only estate secured to the wife during widowhood is the property not on mortgage. Does the direction in the will mean that the mortgages upon the estate which forms the residue are to be paid? [FRY, J.—The words are "the enjoyment whereof is hereinbefore secured to my said wife." Nothing was thereinbefore secured to the wife. [FRY, J.—Then only the residue was charged on mortgage.] Any debts are to be paid. You could not treat as clear residue the produce of the real estate till you had paid the mortgage on it.

*Bigby.*—If the real estate is left unsold, as it is now, and I am to pay the mortgage debts out of the mixed fund it is reversing the rule of Locke King's Act. There is nothing in that Act to limit the rule there enacted to specific devises. The persons entitled under the will are to take the estate *cum onere*. [FRY, J.—Here the persons take the interest in the residue after payment of the debts.] But this is a question between two persons interested in different parts of the residue. Assume that there had been no debt at all except a debt on the real estate, are they to take a part of my personal estate to pay a part of that debt or the whole of it? There must be no apportionment. The person entitled to the real estate takes it as it stands. By the amending Act (30 & 31 Vict. c. 69), s. 2, a general direction that the debts shall be paid out of the personal estate does not include mortgage debts. Debts are debts whatever takes place; Locke King's Act does not alter that. Every creditor is entitled to be paid out of the personal estate and out of the real estate. It is only for the purposes of calculation and finding out how the persons interested, the one in personality and the other in realty, are to have their rights adjusted, that Locke King's Act is applicable. [FRY, J. referred to the Act (a) and to

*Greated v. Greated*, 26 Beav. 631;

*Allen v. Allen*, 5 L. T. Rep. N. S. 737; 30 Beav. 395.]

(a) When any person shall, after the thirty-first day of December 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will, or deed, or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof (17 & 18 Vict. c. 113, s. 1).

The words of the testator in *Greated v. Greated* are "mortgage debts." I do not deny that when he says mortgage debts his intention must prevail.

*North cited*

*Newmarch v. Storr*, 39 L. T. Rep. N. S. 146; L. Rep. 9 Ch. Div. 12.

*Glasse* in reply.—You must find an intention to charge the real estate. What the testator has directed is the payment of his debts. Locke King's Act does not apply. [FRY, J.—The difficulty arises apparently on the words "But the lands, &c." You are a person claiming through the deceased person. The question is whether this is a blended fund or not.] It is unless I can show a contrary intention. And I get it from the words "Upon trust, &c." The testator shows that his attention was directed to mortgage debts. Those are mortgage debts outside the residue. [FRY, J.—Then the residue is still to bear its own mortgage debts. The question is whether there is a direction as between the two parts of the residue.] Locke King's Act has not hitherto been applied to persons claiming the general residue. It may be that as to persons claiming one real estate, and another personal estate, that some question might possibly arise, but you have a question here disposed of, which cannot arise, and cannot be got at till the debts are paid. The testator has provided a fund out of which debts, including mortgage debts, are to be paid. Until the trust for that purpose is satisfied there can be no residue, and how can you say that when the residue is constituted you are to ascertain between the parties entitled to the residue what are to be mortgage debts and what not?

FRY, J.—The question I have now to decide arises under the statute usually known by the name of Locke King's Act. In this case the testator gave the produce to arise from the sale of two particular establishments, and the moneys which should arise from the sale, conversion, and getting in of his residuary real and personal estate upon trust thereout, in the first place, to pay any debts, including debts due upon mortgage of any of the lands, hereditaments, or other property, the enjoyment whereof was thereinbefore secured to his wife during widowhood, and also his funeral and testamentary expenses, and the costs of proving and executing his will. Then the trustees were to invest; and after the death of the widow the trusts of the pure personality were separated from those of the impure personality and the produce of the real estate. Now that being the state of devolution of the property the question arises whether the persons who claimed the produce of the real estate are exclusively liable to pay the mortgages which existed upon that residuary real estate, or whether, on the contrary, they are entitled to a contribution from the pure personal estate. That question subdivides itself into two. In the first place, is this provision of the testator within the operation of Locke King's Act; and, in the second place, if it be, has he shown an intention to exclude the operation of that Act? The case appears to be one not covered by authority. No decision has been cited to me which really controls it, and, therefore, I have to apply the Act according to the best lights I can to show how I ought to construe it. I am bound to say the Act appears to me, as it has appeared to other judges, to be one not

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very easy of construction. But I find that after it is enacted that the heir or devisee of real estate shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate, it is enacted that the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged. I find here that there are two classes of persons, both claiming under the testator—one who claimed the produce of the mortgaged real estate, and the other who claimed the produce of the pure personal estate. I think the words I have read apply, and say that of the two classes of persons who both claim through the testator those who claim the produce of the real estate shall be liable to pay the mortgage on that real estate. The next question is, has the testator shown a contrary intention? What he has directed is this, that his debts, including mortgage debts on any property given to his wife, shall be paid out of the common fund. Now, in the first place, I think a direction to pay debts is not a sufficient indication of a contrary intention. It is quite true that this is not a case coming within the precise terms of the amending statute of the 30 & 31 Vict. c. 69, because that only applies to a direction to pay debts out of personal estate. But this is a direction to pay debts out of a mixed fund. I think the principle of that Act does apply, and that it is not a sufficient description of mortgage debts. Then it is said that in this case debts must have included mortgage debts, because the testator says that debts are to include debts due on the mortgage of the property bequeathed to his wife. It is said that it must include other debts. I am unable to follow that. Debts include mortgage debts of class A, saying nothing about class B. It does not seem to me that you can safely conclude from that that debts include mortgages on class B. Therefore I think there is no such indication of a contrary intention, and that Locke King's Act must apply. Therefore the produce of the real estate must bear the mortgage debts exclusively.

Another question was whether the legacies to the executors were payable out of the personal estate of the testator, or out of the mixed fund of realty and personalty created by him.

*Rigby.*—The words are “rest and residue of realty and personalty.” They are thrown together, and according to the rule in *Roberts v. Walker*, 1 R. and M. 752, are liable and rateable. The legacies to the trustees follow the devise to them of the residue. [FRY, J.—Is there any question whether the words “rest and residue of my real and personal estate” have been held to be a charge when that bequest is applied in payment of specific charges excluding the legacies?] I think it would follow. Suppose a man gives 250*l.* to A. and 250*l.* to B., the rule, as I understand, is, that when the residue of realty and the residue of personalty are thrown together as one fund, all legacies are chargeable, quite irrespective of anything more than that all legacies are chargeable out of that fund, and the fact that the testator goes on to say, “I direct that debts shall be payable out of that fund,” cannot in any way interfere with the generality of the principle. The only

distinction that occurs is that the gift of residue is antecedent in point of position in the will to the legacies, but that can make no difference. The testator, by throwing the two estates together, has shown that he intended to leave them in like manner.

*Glasse and S. Dickinson.*—If the legacies had been given first, and then there had been a gift of the residue of real and personal estate, there might have been reason for contending that the legacies were charged on the freeholds, but when the gift of residue comes first, and then a simple gift to the executors, if they should accept the executorship of 250*l.* each, there is no pretence for saying that it is a charge on the real estate. Personal estate is the natural fund out of which a legacy is payable. You require some extraordinary words to make the legacies chargeable on the real estate, and the word “residue,” is the only word here which you can make use of for the purpose. The principle laid down in the case decided, seems to be that you must collect the intention on the part of the testator to make a charge on his real estate, and the courts have been in the habit of presuming such an intention, when there being first a gift of legacies, then a disposition of the residue of the testator's real and personal estate, the position of these two gifts is such as to show an intention that they should become a charge on the real estate. They cited

*Parker v. Fearnley*, 2 Sim. & St. 592;

*Warren v. Davies*, 2 M. & K. 49;

*Kightley v. Kightley*, 2 Ves. jun. 328;

*Greville v. Browne*, 34 L. T. Rep. O. S. 8; 7 H. L.C. 689.

*Judgment on this point reserved.*

*April 9.*—FRY, J.—The question upon which I reserved my judgment was as to whether or no the various legacies given by the testator were charged upon the real and personal estate. In this case, the testator after giving certain legacies, gave all the rest and residue of the real and personal estate in a certain manner which I need not now pursue, and subsequently to that, he gave two legacies to his executors. It was suggested that those legacies were not charged upon the real estate as well as the personal estate. It was said that the effect of the words “rest and residue” was to charge the property, because the legacies were given before all the rest and residue was given. That was given afterwards. It appears to me that that is not the sole ground on which the court has proceeded in holding that a mixed fund is charged with legacies. I may refer to the case of *Greville v. Brown*, which Mr. Glasse was good enough to mention, in which the Lord Chancellor addressing the House, laid down the rule in this way: “For nearly a century and a half this rule has been laid down and acted upon, that if there is a general gift of legacies and then the testator gives the rest and residue of his property, real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass, that part of that mass is represented by legacies and that what is afterwards given is given *minus* what has been given before and therefore given subject to the prior gift. In other words, the rule seems to be this, that that which in its nature is a charge has become a charge or a deduction from the entire mass, and that principle appears to me apply, whether the legacies given are given before or after the residue.” I hold,



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therefore, that the two legacies are charges on the real and personal estate *pro rata*.

Solicitor for the plaintiff, *W. H. Oliver*.

Solicitors for the Attorney-General, *Hare and Fell*,

Solicitor for the second husband, *Dubois*.

Solicitor for the trustee (under Mr. and Mrs. Webb's marriage settlement) *F. C. Greenfield*.

Solicitors for the next of kin, *Withall and Compton*

Solicitors for trustees under will of testator, *Wyatt, Hoskins, and Hooker*.

Saturday, April 26.

(Before FRY, J.)

*Ex parte* THE SWANSEA ROYAL AND SOUTH WALES UNION FRIENDLY SOCIETY; *Re* THE WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK. (a)

*Incapacity of a corporate body to be an officer of a friendly society—Friendly Societies Act 1875 (38 & 39 Vict. c. 60), s. 15, sub-sect. 7; s. 20, sub-sect. 1.*

*Seemle, that a corporate body cannot legally be appointed an officer of a friendly society.*

*The committee of management of a friendly society which had power, in certain events, to elect officers of the society, on the happening of one of such events, passed a resolution that a bank which had been registered as an unlimited company under the Companies Acts of 1862 and 1867 should be appointed treasurers of the society. The manager of the bank accepted the office on behalf of the bank, and certain moneys belonging to the society were paid to the bank as treasurers. An order having been made to wind-up the bank:*

*Held, that the society had no preferential right under sect. 15, sub-sect. 7, of the Friendly Societies Act 1875, as against other creditors of the bank, to be paid the moneys received by the bank as treasurers.*

*Quere, as to the effect of an omission, by an officer of a friendly society, to give security when required by the rules of the society and the 20th section of the Friendly Societies Act 1875.*

THE Swansea Royal and South Wales Union Friendly Society was established in 1867, and was afterwards registered under the Friendly Societies Act 1875 (38 & 39 Vict. c. 60). The rules of the society were duly registered under the Act. By the 7th rule the business and affairs of the society were to be conducted by a committee of management, consisting of five members, which had power to remove an officer for gross neglect, improper conduct, or incompetency; and, in case of such removal, the committee of management were to elect a successor, who should continue in office until the next annual general meeting of the members of the society, when his appointment was to be confirmed, or another person was to be appointed in his place.

The 8th rule was as follows:

A treasurer shall be appointed at any general or special meeting of the members of the society, by a majority of the members present and voting, and shall continue in office during the pleasure of the members. He shall be responsible for all sums of money from time to time paid into his hands by any persons on account of the society, and for the investment or application of the same under the authority of the trustees in such a manner

as they and the committee of management of the society shall direct. He shall render his cash account monthly and as often as the society or trustees or committee of management shall direct, and supply them with duplicates thereof, and shall, if required, attend every general meeting of the members, and all meetings of the committee of management. He shall, before taking upon himself the execution of his office, give security pursuant to the 38 & 39 Vict. c. 60, s. 20. (a)

In the early part of 1877 the then treasurer of the friendly society became insolvent, and in consequence of the difficulty encountered in recovering from his estate the moneys in his hands belonging to the friendly society, it was resolved that in future a bank should be appointed treasurer, and at a meeting of the committee of management, held on the 18th June 1877, a resolution was passed that the West of England and South Wales District Bank should be the treasurer of the friendly society. Shortly afterwards three members of the committee of management called on the manager of the Swansea branch of the bank (which was registered as a company with unlimited liability under the Companies Acts of 1862 and 1867), and he then, on behalf of the bank, accepted the office of treasurer. An account in the name of the friendly society was then opened at the bank, and the prospectuses of the friendly society were reprinted. On the first page of the prospectus, as reprinted, appeared the names of the trustees, committee of management, &c., and the following words, "Treasurer: West of England Bank;" "Bankers: West of England and South Wales District Bank." The manager of the bank continued to act as treasurer of the friendly society from the time when he accepted the office on behalf of the bank until an order to wind-up the bank was made by Malins, V.C.; and, at the date of the winding-up order, the balance standing to the credit of the friendly society in their account with the bank amounted to the sum of 496l. 11s. 9d. After the winding-up order had been made the solicitors of the friendly society applied to the official liquidators for payment of the 496l. 11s. 9d., as being a preference debt, within sect. 15, sub-sect. 7, of the Friendly Societies Act 1875. (b)

(a) "Every officer, if the rules of the society require, shall, before taking upon himself the execution of his office, become bound with one sufficient surety at the least in a bond according to one of the forms set forth in the third schedule to this Act, or give the security of a guarantee society, in such sum as the society directs, conditioned for his rendering a just and true account of all moneys received and paid by him on account of the society at such times as its rules appoint, or as the society, or the trustees, or committee of management thereof require him to do so, and for the payment by him of all sums due from him to the society:" (38 & 39 Vict. c. 60, s. 20, sub-sect. 1).

(b) "Upon the death or bankruptcy or insolvency of any officer of a society, having in his possession by virtue of his office any money or property belonging to the society, or if any execution, attachment, or other process be issued, or action or diligence raised against such officer or against his property, his heirs, executors, or administrators, or trustee in bankruptcy or insolvency, or the sheriff or other person executing such process, or the party using such action or diligence respectively, shall, upon demand in writing of the trustees of the society, or any two of them, or any person authorised by the society, or by the committee of management of the same, to make such demand, pay such money, and deliver over such property to the trustees of the society in preference to any other debts or claims against the estate of such officer.

"Bankruptcy or insolvency in the present section in-

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.



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The liquidators having refused payment on the ground that the bank was not a treasurer within the meaning of the Act, the trustees of the friendly society took out a summons before Fry, J., to whom the winding-up of the proceedings had been transferred, for an order that the official liquidators might be directed to pay to the applicants as such trustees the sum of 496l. 11s. 9d., money in the possession of the bank, by virtue of their office as treasurer. The summons was adjourned into court.

*F. Brisson*, Q.C. and *H. B. Buckley* for the friendly society.—The effect of sub-sect. 7 of sect. 15 is, that when there is a properly constituted officer, and that officer has in his hands any money belonging to the society, that officer must, on the demand of the trustees, pay back that money in preference to all other demands upon him. By the 8th rule the treasurer is to give the security pursuant to the 20th section of the Friendly Societies Act 1875. By that section the security is only to be given "as required" by the society, and in this case the society had not demanded the security. By the resolution of the 18th June 1877 the bank became treasurer of the society. [Fry, J.—The appointment must be made at a "general or special meeting of the members of the society," not by the committee.] They were appointed *ad interim* till the next general meeting, which was held on the 21st May 1878. [Fry, J.—Then the appointment terminated on the 21st May 1878.] No; they remained until the appointment was confirmed or someone else appointed, and, no one else being appointed at the next meeting, there was a tacit confirmation of the appointment. [Fry, J.—The alternative is that the appointment of treasurer is confirmed or someone else is appointed. By virtue of the general meeting he goes out of office.] The bank as treasurers were indirectly confirmed in their appointment because everyone would receive notice of what had taken place before the meeting, and no opposition was afterwards made. [Fry, J.—There is a difficulty as to the words "bankruptcy or insolvency" in the 15th section.] The bank was clearly in a state of bankruptcy or insolvency—they had ceased to pay their debts. It has been said that twenty shillings in the pound will ultimately be paid, but it could not be paid when demanded. Then the section applies if any execution, attachment, or other process be issued, or action raised. Winding-up is a prejudicial proceeding by which the assets of the company are made liable for its debts. The winding-up order may be said also to be a "process" within the meaning of the section. Winding-up is something additional to what is expressly mentioned in the section, and it is difficult to name anything else additional which would come within the section. The society would have had a right against the bank if no winding-up order had been made, and such order gives no new rights. [Fry, J.—How can a large body like this act as a treasurer?] The appointment was a *de facto* appointment, and the money came into the hands of the bank as treasurers, and not as bankers only. [Fry, J.—

cludes liquidation of a debtor's affairs by arrangement in England, *cessio bonorum* of a debtor in Scotland, and a petition for arrangement with creditors in Ireland, and a trustee in bankruptcy or insolvency includes an assignee in Ireland and a judicial factor in Scotland." (38 & 39 Vict. c. 60, s. 15, sub-sect. 7.)

Had the bank any power to accept the office? The manager of the bank had power to accept on behalf of the bank. They cited

*Ex parte Harris*, 1 De Gex, 162;

*Ex parte Orford*, 1 De G. M. & G. 483.

*Glassey*, Q.C. and *Romer*, for the liquidators, were not called upon.

Fry, J.—I am of opinion that the claimants in this case have not substantiated their claim. They claim that a sum of 496l. 11s. 9d. standing to the credit of their account at one of the branches of the bank should be paid to them in priority to any other creditors, by virtue of a provision, which is contained in the Friendly Societies Act, and which follows similar provisions which have been contained in similar Acts for a long series of years. The bank, it appears from the statement of counsel, is a company incorporated under the Companies Acts 1862 and 1867, and is therefore a corporation. It appears that, before the 18th June 1877, a treasurer had been appointed by this society, and that defalcations had been made by him, and that, at a meeting, held on that day, of the committee, the bank were appointed treasurer of the society. Now the rule of the society which regulates that appointment is the 7th, and it is there provided that in the event of any vacancy occurring by the resignation or death of any officer, the committee of management shall elect a successor, who shall continue in office until the next annual general meeting of the members of the society, when his appointment shall be confirmed, or another person shall be elected in his place. On the 21st May 1878 a general annual meeting of the society was held, and it does not appear that at that meeting the appointment of the bank as treasurer was confirmed, or that any other person was elected in its place. Upon that a question might arise whether the court is to imply that the bank was to continue in the office. I should have a difficulty judicially in coming to the conclusion that that is a necessary inference. Then the 8th section of the rules provides that, a treasurer is to be appointed, and is to continue in office during the pleasure of the members. He is to be responsible for money from time to time paid into his hands on account of the society, and for the investment or application of the same. Then he is to render cash accounts monthly and supply duplicates, and if required, attend every general meeting of the members, and all meetings of the committee of management. And he shall, before taking upon himself the execution of his office, give security pursuant to the 38 & 39 Vict., c. 60, s. 20. It appears that that security has never been given, and it may be, upon the authority of the case of *Ex parte Ross* (6 Ves. jun. 803a), before Lord Eldon, considered doubtful whether a person who has been appointed to the office of treasurer, and has not given the security which the Act requires, is a treasurer against whom the society can claim a preferential right. Then, further than that, the question arises whether a corporation can fill the office of treasurer according to the rules of the society. It is evident that a treasurer is bound to perform certain public duties. He is to attend the meeting of the members, and all the meetings of the committee of management. It is said that that can be done by the manager or clerk of the bank, but it appears to me that the scope and object of these

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rules with regard to the officer is the appointment of a natural person, who is to be an officer of the society within the ordinary meaning of that expression, and that great difficulties would be involved in the performance of the duties of that office by a corporation instead of by a natural person. When I turn to the clause of the existing Act regulating friendly societies, which gives the preferential right upon which the applicants are now insisting, I find similar words, indicating to my mind a similar intention, namely, the officer against whom, or whose estate, the preferential claim is to subsist is to be a natural person, and not a body corporate. The whole scope of that clause appears to me to refer to a private individual, who takes upon himself an office, and it gives certain rights in the event of his death, bankruptcy, insolvency, or execution of an attachment or other process to be issued, or action or diligence raised against his property or himself, and it is very remarkable that if it were in the mind of the Legislature that an incorporated company could be an officer, and that the priority should be given in the event of a winding-up, that this Act, which was passed long subsequent to any of the winding-up Acts, is entirely silent with regard to the liquidation of a company, or the winding-up and the distribution of the assets of the company. It appears to me that I am bound to read this clause somewhat strictly, and for the reason which has been pointed out by Lord Eldon, to which I have already referred, and by Knight-Bruce, L.J., when Chief Judge of the Court of Bankruptcy, in the case of *Ex parte Harris*, that the right given is one against the common right of Her Majesty's subjects, and therefore those who claim that right must bring themselves within the express provisions of the statute. Now, the only words which can be relied upon here are the words "other process" against "the property" of the debtor who is said to be liquidating. That appears to me to be a very doubtful proposition, but I conclude against it, because it appears to me that the Legislature has considered that the officer against whom the statute has given that benefit is a private person, and not a body corporate. If I were to extend the words of the section to a body corporate in liquidation, I think I should be going beyond the words, and the fair intent and meaning of the Act, the intent of the Act being addressed, I repeat, to the case of a natural person and not a body corporate. For these reasons, to which I must add the fact that it appears very doubtful whether the manager had any authority on the part of the bank to accept the office of treasurer on the part of the bank, so as to bind the bank, although the bank might become bankers of the society, I must reject the claim made before me, with costs.

Solicitors for the society, *Tamplin, Taylor, and Joseph*, agents for *Strick and Bellingham*, Swansea.

Solicitors for the liquidators, *Clarke, Woodcock, and Ryland*, agents for *Fussell, Pritchard, Swann, and Henderson*, Bristol.

## QUEEN'S BENCH DIVISION.

Friday, March 28.

(Before MELLOR and LUSH, JJ.)

STACEY (app.) v. LINTELL (resp.). (a)

*Bastardy—Married woman living with her husband—Justices' jurisdiction—35 & 36 Vict. c. 65, s. 3.*

*A single woman, after being delivered of a bastard child, got married, and, whilst living with her husband, applied for an affiliation summons against the putative father.*

*Held, upon a case stated by justices, that the 3rd section of the Bastardy Laws Amendment Act 1872 does not apply to such a case, and that the justices rightly refused to make an order.*

THIS was a case stated by justices, under 20 & 21 Vict. c. 43, for the opinion of the court.

At a petty sessions for Chipping Wycombe an information was preferred under 35 & 36 Vict. c. 15, s. 3, by Sarah Stacey, formerly Sarah Cogdell, against Charles Lintell, charging him with being the father of her bastard child. Upon the hearing the justices dismissed the information, and stated the following case:—

1. Upon the hearing of the said information and application it was proved that the appellant at the time of the birth of the child mentioned in the said information, namely, in Jan. 1876, was a single woman, and she deposed on oath that the respondent was the father of the said child, and that his wife, within twelve months next after the birth of the said child, paid her money, which the appellant considered was intended for its maintenance. In cross-examination it was admitted by the appellant, and proved to the satisfaction of the justices, that since the birth of the said child, but previous to the filing of the said information—namely, on the 6th Feb. 1878—the appellant had intermarried with and become the wife of Edward Stacey, and was at the date of the said hearing the wife of the said Edward Stacey, and living with him as his wife.

2. It was therefore contended by Mr. Daniel Clark, the solicitor for the respondent, that the appellant was not a single woman within the meaning of sect. 3 of 35 & 36 Vict. c. 65, and that an order to affiliate the said child could not, under the circumstances before stated, be made on her application. The following cases were referred to, namely, *Rex v. Luffe* (8 East 193); *Reg. v. Collingwood* (12 Q. B. 681); *Ex parte Grimes* (2 E. & B 547). The solicitor for the respondent contended that those cases were distinguished, because there the woman was not living with her husband at the time the order was made; and, further, that the cases were decided on the ground that if an order could not be made the child would be unprovided for, and he pointed out that such would not be the case with regard to the child of the appellant, as by sect. 57 of 4 & 5 Will. 4, c. 76, the husband of the appellant would be liable to maintain it.

3. The said justices, in the absence of any decision as to the words "single woman" applying to a married woman living with her husband at the time of the application and hearing, dismissed the said information, as before mentioned, without going into further evidence as to the respondent being the father of the said child, or having paid monthly, as alleged in the said information.

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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mation, on the ground that the appellant was not entitled to prefer the said information, or to obtain an order thereon, because she was a married woman and living with her husband at the time the said information was preferred and came on for hearing.

4. The question of law arising on the above statement for the opinion of the court was, whether an order to affiliate the child named in the said information could be made on the application of the appellant, assuming that the paternity of the child could be proved by the mother and the necessary corroborative testimony could be given, and the payment by or on behalf of the alleged father of money for the child's maintenance within twelve months of its birth and before the marriage of the appellant could be proved to the justices' satisfaction.

*Graham* for the appellant.—The words of this 3rd section—which are that “any single woman who may be with child, or who may be delivered of a bastard child, after the passing of this Act may either before the birth, or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance,” apply for an affiliation order—can be satisfied by reading the words “single woman” as applying only to the time of the child's birth. This interpretation is supported by the fact that the previous statute, 7 & 8 Vict. c. 101, contained a proviso in sect. 5 that no order for the maintenance or support of a bastard child should have any force or validity after the mother's marriage. That proviso has now no existence, the previous statute being repealed by the present one; therefore an order will now continue to have effect, notwithstanding the marriage. This being so, there is no reason why the order should not be made after the marriage. Under the earlier Bastardy Acts, before 7 & 8 Vict. c. 101, marriage was held to be no objection to an order (*Rea v. Luffe*, 8 East, 193); so also under that Act in the case of a woman living apart from her husband (*Reg. v. Collingwood*, 12 Q. B. 681; and *Reg. v. Pillington*, 2 E. & B. 546). The case of *Lang v. Spicer* (1 M. & W. 129) was decided under an early statute, and was based only on the ability of the husband to maintain the child.

*Crooms* for the respondent.—The repeal of 7 & 8 Vict. c. 101, merely restores the previous law under which *Lang v. Spicer* was decided; it is therefore a distinct authority against any affiliation order in this case. There is a marked distinction between the other cases cited and the present, in that the married women were in both the cases, under the 7 & 8 Vict. c. 101, living apart from their husbands, and were therefore held to be single women.

*Graham* in reply.

MELLOR, J.—I am of opinion that the decision of the justices was right, and that the appellant did not come within the definition of a single woman. It appears to me that the reasoning in the case of *Lang v. Spicer*—although this case is not actually governed by the decision there—shows us that we ought not to hold that a woman who is married at the time of her application for an order is within the contemplation of the 3rd section of 35 & 36 Vict. c. 65. By her marriage

her husband becomes liable to maintain her bastard child; and, if she were at liberty also to apply and obtain an order against the putative father, there would be a double liability in reference to the maintenance of the same child. The reason of the thing is thus against the argument of Mr. Graham founded upon the Acts; but I think also that we are within the strict meaning of the words in the section. I think that the intention is that the woman throughout should be a single woman, or at least that she should be so in the sense of those cases where a woman separated from her husband has been held to be a single woman for the purpose of obtaining an order of affiliation. Those cases, however, only show that for the purposes of the Poor Law Acts a married woman might come within the provision throwing the cost of the maintenance of the bastard of a single woman upon the putative father.

LUSH, J.—I am of the same opinion. The policy of the law is to assist the mother in maintaining the child, and to insure that she shall not throw the cost of it upon the parish; and so the word single woman has received an interpretation which enables us to say that it does not necessarily mean “unmarried,” but may include a woman separated from her husband, who, during such separation, has had a bastard child, and who by such separation has been reduced as it were to the position of a single woman. But the woman here was living with her husband at the time of her application, and by sect. 57 of the Poor Law Act (4 & 5 Will. 4, c. 76) “every man who shall marry a woman having a child at the time of such marriage shall be liable to maintain such child as part of his family.” Therefore, as soon as the woman married, the child had a father, a person bound to maintain it. Now, it has been observed that in the Act 7 & 8 Vict. c. 101, there was a proviso that no order for the maintenance of a bastard child should be of any force after the marriage of the mother, and that that proviso is purposely omitted in the later Act, whence it is contended that the Legislature intended that her subsequent marriage should not invalidate the order. I, however, do not so read the Act. I think the effect is this, that the order does not now become *ipso facto* void upon the marriage of the woman; but, if the order has been made while she was single, it may be continued after her marriage, under the order of the justices, until the child is thirteen—that is, whether she marries or not, the order may be kept alive and in force up to that time. That is not this case. The question then is, When she applied was she in the position of a single woman? I think not; she was not therefore capable of applying, for to be within the Act she must be either single or separated from her husband.

*Judgment for respondent.*

Solicitors for appellant, King and M'Millin, for James Batting, Great Marlow.

Solicitor for respondent, D. Clarke, High Wycombe.

Q.B. Div.]

REG. v. GREENLAW TURNPIKE TRUSTEES.

[Q.B. Div.]

Monday, March 31.

(Before COCKBURN, C.J. and MELLOR, J.)

REG. v. GREENLAW TURNPIKE TRUSTEES. (a)

*Turnpike tollhouse—Purposes of the road—Used as a dwelling-house—Encroachment—3 Geo. 4, c. 126, ss. 89, 118—4 Geo. 4, c. 95, s. 57.*

*A tollhouse had been used for the residence of a man employed to keep the road in repair ever since the tolls had ceased to be collected there, twelve years ago. The adjoining landowner applied for a mandamus to compel the road trustees to pull down the house, under 4 Geo. 4, c. 95, s. 57, in order that he might purchase the site, under 3 Geo. 4, c. 126, s. 89.*

*Held, that the house, being situated within forbidden distance from the centre of the road for a dwelling-house (under 3 Geo. 4, c. 126, s. 118), it was, under the circumstances, no longer required for the purposes of the road; and that the applicant was entitled to this remedy.*

THIS was a rule for a mandamus obtained on behalf of the proprietor of land adjoining, by which the trustees of the Greenlaw Turnpike Trust were commanded to pull down a tollhouse which, it was alleged, was no longer required for the purposes of the road, and to sell or remove the materials.

The tollhouse was erected in 1851, and was used for about sixteen years afterwards for collecting tolls. In 1867 it was resolved to remove the bar, and since that time the house has been used only as a residence for a workman, employed by the trustees, to keep the road in order. The tollhouse stood by the side of the road within less than 30 ft. from the middle of the road, which is forbidden, with respect to a dwelling house, by sect. 118 of 3 Geo. 4, c. 126.

By 4 Geo. 4, c. 95, s. 57 it was enacted

That where any tollhouse or tollhouses standing on or adjoining any turnpike road, and which shall have been erected by or vested in the trustees or commissioners of such road, shall become useless and be no longer required for the purposes of such road, it shall not be lawful for the trustees or commissioners of such road to sell or dispose of such tollhouse or tollhouses, but in every such case the trustees or commissioners of the road, on which such tollhouse or tollhouses no longer required, shall stand, shall cause such tollhouse or tollhouses, with the outhouses attached or belonging thereto, to be pulled down, and the materials thereof to be sold or removed, and the site of such tollhouse or tollhouses so pulled down, together with the gardens and appurtenances thereunto belonging may then be sold by the said trustees or commissioners, in the same manner as and under the regulations in the said recited Act and this Act contained, with respect to any land or ground not wanted for the purposes of the road.

The provision in the recited Act referred to is contained in sect. 89 of 3 Geo. 4, c. 126

That where the trustees or commissioners of any turnpike road shall have purchased, or shall be possessed of any piece or pieces of ground not wanted for the purposes of such road, it shall and may be lawful for such trustees or commissioners to sell and dispose of the same: provided always that the said trustees or commissioners, before they shall sell and dispose of any such piece or pieces of ground not wanted for the purposes of such turnpike road as aforesaid to any other person or persons of whom the same shall have been purchased, or to the person or persons whose lands shall adjoin thereto.

Candy showed cause for the trustees.—This is an appeal to the discretion of the court by a landowner for the purpose of becoming possessed of a

piece of land adjoining his own. The duty of the trustees is to pull down these tollhouses only when they become useless and are no longer required for the purposes of the road. Because this tollhouse has not been used for collecting during the last twelve years, it does not follow that it may be no longer required for that purpose again. Moreover, it is a sufficient exemption from the application of the section, if the tollhouse is required for the purposes of the road. Here the house is used for the residence of the person who keeps the road in repair, which may well be included in the purposes of the road. Under the Lands Clauses Act, "superfluous land" has been held to be inapplicable to land used for other purposes of a railway than that of bearing the rails.

Ridley supported the rule.—The adjoining owner has a right of pre-emption, and this is the only means by which he can enforce his right. When used as a dwelling, the tollhouse became an obstruction within the 118th section of 3 Geo. 4, c. 126, and its continued existence is forbidden by that section, and cannot therefore be a purpose of the road. As to its future use, the definition of the word "required" with respect to superfluous land was given by Bramwell, L.J. in *Hooper v. Browne* (L. Rep. 3 Q.B. Div. 258, 274). Land is required by a railway company where they have actually used it for laying down the rails over which the trains carrying their traffic pass and re-pass, or for erecting works necessary in conducting their business. I think also that land is required where, although it is not at the moment used by the company, it will be wanted within a definite ascertained time." It is not suggested here that the house will again be required for collecting tolls.

COCKBURN, C.J.—This rule must, I think, be made absolute. The first question is, whether the tollhouse has become useless, and is no longer required for the purposes of the road? and the decision of this question turns on what is the proper construction of the words "required for the purposes of the road?" It is quite clear that this has ceased to be useful as a tollhouse, and I do not think that the turnpike trustees have shown anything to lead us to believe that they seriously contemplate setting up a toll again at this place. As an inference of fact from their statement I do not believe there is any intention to use this again as a tollhouse. I start therefore with the assumption that this is useless as a tollhouse. Then it is said that it is still required for road purposes, because it is occupied by one of the men employed in the road. We must therefore consider whether such occupation can come within the meaning of sect. 57. In order to determine that, we were very properly referred to sect. 118 of the 3 Geo. 4, c. 126, forbidding encroachments by means of dwelling-houses or other buildings being made on or at the sides of any turnpike road so as to reduce the breadth, which seems to me to make all the difference in the case. It is clear that if the trustees had erected this, not as a tollhouse but as a dwelling-house, they would have obstructed the road, and gone in direct contravention of this section. If they had done so, then the neighbouring landowner, who it must be presumed uses the road, would have a right to call upon them to pull the house down, or to proceed by information as prescribed. Turning again

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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to sect. 57, and reading the purposes there as meaning lawful purposes, we see that the use of the house otherwise than as a tollhouse is not within it. The only other question is, whether the neighbouring proprietor is entitled to call upon the turnpike trustees by *mandamus* to proceed under the Act and pull down the tollhouse, and sell or remove the materials. I think that he is. He has the right to have the road unobstructed, and we may, as I before said, assume that, being a neighbouring owner, he uses the road. That being so, he has, in my opinion, a right to call on the trustees to proceed so soon as it is established that the tollhouse has become useless.

MELLOR, J.—I am of the same opinion. For some little time I hesitated as to whether this might not still be said to be required for the purposes of the road, but I am satisfied now that it has become useless within the meaning of the section. The object of that section is to deal with tollhouses, and their removal when useless for toll purposes. Furthermore, it is clear, in view of the other sections about the erection of houses, that the trustees would have no right to erect any such house except for a tollhouse, and it is only as such that it can be continued. Otherwise it is a nuisance and obstruction on the road; and sect. 57 is express that the land shall not be sold with the obstruction on it. The rule for a *mandamus* must therefore be made absolute.

*Rule absolute.*

Solicitors for prosecution, *Shum, Crossman, and Co.*, for *Fenwick and Manisty*, Newcastle-on-Tyne.  
Solicitor for defence, *Adam Burn*.

## COMMON PLEAS DIVISION.

Wednesday, March 12.

(Before DENMAN and LOPES, JJ.)

DAUN v. SIMMINS. (a)

*Principal and agent—Limited authority—Manager of public house—Liability of licensed owner for acts of—Practice—Entering judgment on motion for a new trial—Judicature Act 1875, Order XL., r. 10—Appellate Jurisdiction Act 1876—Rules of Dec. 1876.*

*The licensed owner of a public house is not liable for spirits supplied to the person whom he has left in possession of the premises to manage the business for him, and to whom he has entrusted the custody of the licence, although the invoices are made out in his name, if he has only authorised such manager to deal with particular persons, and the spirits were not supplied by one of them. In such a case, there is no evidence of liability on the part of the owner to be left to the jury.*

*The rules of Dec. 1876 have not altered Order XL., r. 10, Judicature Act 1875, and therefore, on a motion for a new trial, where the court has the necessary materials before it, it may still give final judgment.*

THIS was an action by a spirit merchant against the owner of a public house for 88l., the price of spirits supplied to the defendant's manager. It appeared from the evidence that the defendant, Simmins, had taken out a spirit licence for certain premises, and put one Clarke in to

manage the business, telling him only to order spirits of two persons, neither of them being the plaintiff, Daun. Clarke, however, ordered spirits of Daun, who subsequently wrote to Simmins for the money; whereupon Simmins repudiated the transaction. Daun thereupon brought an action against Simmins for the price of the spirits. This action had been tried twice; and the jury on each occasion found a verdict for the plaintiff for 88l. A rule nisi for a new trial had been obtained on the ground that there was no evidence to go to the jury, and that the verdict was against the weight of the evidence. The question was whether there was any evidence of Clarke's authority to bind Simmins.

*Bompas, Q. C. and Walpole* for the plaintiff.—A general manager has authority, as regards the public, to bind his principal, although he may have been told not to deal with certain persons. That the invoices were made out in the defendant's name is *prima facie* evidence that he was liable:

*Fox v. Clifton*, per Tindal, C.J., 6 Bing. 794.

Clarke was a general manager for the defendant. The licence was taken out in Simmins's name. Daun, before supplying the spirits, was bound by law to see the permits, which would show him that Simmins was the owner of the public house; he cannot therefore set up now that he did not know it. They cited

*Edmunds v. Bushell and Jones*, L. Rep. 1 Q. B. 97;

*Pickering v. Buik*, 15 East, 38;

*Runquist v. Ditchell*, 3 Esp.

*Harrison, Q. C. and Moullon* in support of the rule.—There was no authority given to Clarke to show the licence. The acts of holding out another person's authority, so as to bind such other upon an order of a third person, must be prior to such order, and done with the cognisance of the person to be bound. Clarke is admitted not to be the general agent of the defendant, and not to have had a particular authority to give this order.

DENMAN, J.—During a considerable part of the argument, I thought that it was very difficult to say that there was no evidence to go to the jury. But I now think that there was no evidence. It is put by Mr. Bompas in two ways. First, he says that the defendant Simmins put Clarke into the business as his general manager to carry on the business. If that was so, I do not think that it at all follows that he would be liable for everything that Clarke chose to order. I think there ought to have been some evidence on the part of the plaintiff, of actual authority given to Clarke by the defendant to order spirits from the plaintiff. The evidence was, on the contrary, that Clarke was forbidden to order spirits from any but two specially named persons. On that ground, therefore, the plaintiff fails. The second ground, which was the one chiefly relied on at the trial, was that, Clarke being left in possession of the premises, there was a holding out of him as having authority to make binding contracts by the defendant, which estops the defendant from proving that he had no authority. That was put a good deal on the ground that the licence was left in his possession. It appears to me that that is carrying that fact a great deal too far. The house cannot be carried on without a licence; and that licence would ordinarily be in the possession of a man carrying on business for the licensed person. The mere fact, therefore, that Clarke

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

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had the licence is not evidence of a holding out by the defendant that he had authority to make this contract. If the evidence had been, that the defendant let Clarke have the licence to enable him to order goods, that would have been a very different case. I think that, if there had been a nonsuit in this case, it would have been impossible to have set it aside. *A fortiori*, in my opinion, the verdict was against the weight of evidence.

LOPES, J.—This case has been tried twice; once before myself. I doubted whether the case ought to go to the jury. I had a strong opinion in favour of the defendant, and let the jury know it; but they found for the plaintiff. I, for some time, thought that there was evidence in support of that finding; but I have changed my opinion. It is said that there was a holding out that Clarke had authority to make this contract. In order to make that binding upon the defendant, it must be a holding out at the time the credit is given; and it must be a holding out that is shown to be brought to the knowledge of the defendant. Then, directly the defendant is applied to, he repudiates Clarke's authority. The rule must be made absolute.

*Moulton* applied, under Order XL., r. 10, for the court to give judgment for the defendant instead of directing a new trial.

*Bompas, Q.C. contrâ.*—Since the Appellate Jurisdiction Act 1876 (39 & 40 Vict. c. 59), and the rules of December 1876 made under the authority of that Act, the Divisional Court has only power to grant a new trial, and cannot give judgment. [LOPES, J.—In *Milissich v. Lloyds* (36 L. T. Rep. N. S. 423; 46 L. J. 404, C. P.) Brett, L.J. said: "It seems that the new rules of 1876, though they altered rules 4 and 6, did not alter rule 10, under which I think we can enter judgment according to law if we think it should be entered."] The Appellate Jurisdiction Act and rules of 1876 provide for the determination of all the proceedings subsequent to the trial, down to and including the final judgment by the judge who tries the cause.

DENMAN, J.—The 17th section of the Appellate Jurisdiction Act 1876 states that "all proceedings in an action subsequent to the hearing or trial, and down to and including the final judgment or order except as aforesaid," that is, except as thereafter provided, "shall, so far as is practicable and convenient, be had and taken before the judge before whom the trial or hearing of the cause took place." Then there is this proviso, "that Divisional Courts of the High Court of Justice may be held for the transaction of any business which may for the time being be ordered by rules of court to be heard by a Divisional Court." Now rule 10 of Order XL. still remains in force, and therefore, where, as in this case, on a motion for a new trial, the court has before it all the materials necessary for finally determining the question in dispute, it may give judgment accordingly. Judgment will therefore be entered for the defendant.

*Judgment for the defendant.*

Solicitors for the plaintiff, *Wright, Bonner, and Wright.*

Solicitors for the defendant, *S. R. Lewin and Co.*

Friday, March 14.

(Before BRAMWELL, L.J. and LOPES, J.)

DAVIS (app.) v. BROWNE (resp.). (a)

APPEAL FROM INFERIOR COURT.

*Locomotive—Highway*—To be in charge of three persons—One in charge of horse and cart also—28 & 29 Vict. c. 83, s. 3—41 & 42 Vict. c. 77, s. 29.

*A steam locomotive, while in motion on a highway, is to be in charge of three persons, one of whom, by 41 & 42 Vict. c. 77, s. 29, shall precede the locomotive on foot, and "shall in case of need assist horses and carriages drawn by horses passing the same."*

*Held, that the fact that the man preceding the engine was leading a horse and cart of his own was not sufficient to support a conviction for a breach of the above provision.*

SPECIAL CASE stated, under 20 & 21 Vict. c. 43, by the justices for the parts of Kesteven, in Lincolnshire.

At a petty sessions held at Bourne, in and for the said parts, on the 10th Oct. 1878, the said justices heard and determined a complaint by the respondent preferred against the appellant, that the appellant on the 25th Sept. 1878, at the parish of Careby, in the said parts, then being the driver of a certain locomotive engine on a highway there situate, unlawfully had not any person preceding such engine by at least twenty yards on foot, contrary to the statute.

It was proved before the said justices by the evidence of a police constable, as follows:

That on the 25th Sept. 1878 a locomotive engine was seen by him travelling in the day time upon a public highway, in the parish of Careby aforesaid, and that the appellant was the driver of such engine, and that another man was with and assisting him upon the engine.

That at about sixty yards preceding such engine was a third man, on foot, leading a pony, which was drawing an empty light cart, and upon such cart was a red and white pocket handkerchief, by way of a flag, attached to a pole fastened to the said cart.

That the appellant, on being asked by the policeman if the said last-mentioned man was his signalman, replied in the affirmative, and thereupon the policeman said that such man had no right to be in charge of a horse and cart. The appellant then added that they had come some distance to fetch the engine, and had brought the cart to ride in, and that if any accident occurred they would pay for it. The policeman said that there should be a flag and a person on foot not leading a horse and cart.

It was not proved in evidence before the said justices, or suggested, that any case arose in which horses and carriages drawn by horses passing the said engine needed assistance.

At the close of the case for the complainant the defendant's solicitor submitted that no offence had been proved against the appellant, and contended that the appellant had only been shown to be the driver, and not the owner of the locomotive, and that, in the absence of proof of his being the owner, he was not liable to be convicted under the 3rd section of 28 & 29 Vict. c. 83. It was further contended that there was (as the fact was) a person preceding the locomotive on foot by at least

(a) Reported by A. H. BIRTLESTON, Esq., Barrister-at-Law.

C.P. Div.]

THE SWANSEA BANK (LIMITED) v. BARTLETT PHELPS THOMAS.

[Ex. Div.]

twenty yards, for the purpose of warning the riders and drivers of horses, and that if occasion for assistance such as that contemplated by the last-mentioned section had arisen, such person would, and that the justices were bound to assume that he would, have rendered the necessary assistance, and if he had done so no offence under the Act would have been committed. That, had a case of need occurred, and proper assistance not have been given by such man, then and then only, under the circumstances, would an offence have been committed. That the fact of a man leading a horse did not cause him the less to be a person complying with the said 29th section of the Act 41 & 42 Vict. c. 77.

It appeared to the justices that a person necessarily engaged in attending to his own horse and cart was certainly unable to comply with the said 29th section of 41 & 42 Vict. c. 77, since he could not render the assistance mentioned in this section of the Act without himself committing a breach of the law, by leaving his own horse and cart on the highway beyond his control; and the said justices were of opinion that it could not be said that three persons were employed "to drive or conduct the locomotive" whilst one of them was engaged in leading a horse attached to a cart. They therefore convicted the appellant of the offence with which he was charged, and sentenced him to pay a fine of 5s. and 11s. 6d. costs.

The question of law is, whether or not, upon the evidence above stated, the said justices were justified in so convicting and fining the appellant. 28 & 29 Vict. c. 83, s. 3, is as follows:

Every locomotive propelled by steam or any other than animal power on any turnpike road or public highway shall be worked according to the following rules and regulations, viz.:

First, at least three persons shall be employed to drive or conduct such locomotive, and if more than two waggons or carriages be attached thereto an additional person shall be employed, who shall take charge of such waggons or carriages.

Secondly, one of such persons, while any locomotive is in motion, shall precede such locomotive on foot by not less than sixty yards, and shall carry a red flag constantly displayed, and shall warn the riders and drivers of horses of the approach of such locomotives, and shall signal the driver thereof when it shall be necessary to stop, and shall assist horses, and carriages drawn by horses, passing the same. . . . In the event of a non-compliance with any of the provisions of this section, the owner of the locomotive shall, on summary conviction thereof before two justices, be liable to a penalty not exceeding 10l.; but it shall be lawful for such owner, on proving that he has incurred such penalty by reason of the negligence or wilful default of any person in charge or in attendance on such locomotive, to recover summarily from such person the whole or any part of the penalty he may have incurred as owner.

Sect. 7 is as follows:

The name and residence of the owner of every locomotive shall be affixed thereto in a conspicuous manner. If it is not so affixed the owner shall, on summary conviction, be liable to a penalty not exceeding 2l.

41 & 42 Vict. c. 77, s. 29, is as follows:

The paragraph numbered "secondly" of sect. 3 of the Locomotive Act 1865 (28 & 29 Vict. c. 83) is hereby repealed so far as relates to England, and in lieu thereof the following paragraph is hereby substituted, namely, "Secondly, one of such persons, while the locomotive is in motion, shall precede by at least twenty yards the locomotive on foot, and shall in case of need assist horses, and carriages drawn by horses, passing the same."

Graham for the appellant.—The conviction is wrong on two grounds. First, the only person who

can be convicted under the Act is the owner of the locomotive, and the appellant has been convicted as the driver. There was no evidence before the magistrates that he was the owner. Secondly, there is no reason why the man on foot in front of the locomotive should not be quite as well able to give the assistance required by the Act when he has a pony with him as he would be without it. It does not appear that the pony was not properly under his control, even when not held by him, so that in case of need he could have safely left the pony on the road, or have taken it back to the locomotive and fastened it to the engine, or left it in charge of the appellant and the other man there while he went and assisted any other horse or carriage in passing the locomotive. The case of *Morris v. Jeffries* (L. Rep. 1 Q. B. 261) is an instance of horses, while grazing on the side of a turnpike road four or five yards from the person in charge of them, being deemed to be under the control of such person, and therefore not liable to be impounded under 4 Geo. 4, c. 95, s. 75, as being horses found "wandering, straying, or lying about" the road, within the meaning of that enactment. That the man in front was leading a horse and cart does not prevent him, therefore, from being a person preceding the locomotive on foot, as required by the statute.

No one appeared for the respondent.

BRAMWELL, L.J.—I think this conviction cannot be sustained. The statute says that one person shall precede the locomotive on foot, and shall in case of need assist horses and carriages passing. The magistrates thought that the man in front here was in such a position that he could not assist passing horses lawfully. I think that cannot be. It seems to me impossible to say that he could not assist passing horses. It is said that he could not, because he could not without leaving his own horse and cart unattended. But I do not think that follows. Indeed, it is obvious that he need not leave his own horse and cart unattended; as Mr. Graham suggests, he might ask a passer-by to mind them, or lead them back to the engine driver, or tie the horse to the fence, or in many other ways keep it under control. The conviction therefore must be quashed on the merits.

LOPES, J.—I am of the same opinion.

*Judgment for the appellant, with costs.*

Solicitors for the appellant, *Whyte, Collison, and Pritchard*, agents for *J. E. Atter*, Stamford.

## EXCHEQUER DIVISION.

*Monday, March 17.*

(Before KELLY, C.B. and HUDDLESTON, B.)

THE SWANSEA BANK (LIMITED) v. BARTLETT PHELPS THOMAS. (a)

*Assignment of term—Broken quarter—Appportionment between assignor and assignee—Appportionment Act 1870.*

*Where the trustee in liquidation of a lessee, under a lease for a term of years with covenant to pay rent quarterly, assigns the term to another in the middle of a quarter, he is liable for rent, as accruing due de die in diem, from the commence-*

(a) Reported by W. WILLS, Esq., Barrister-at-Law.



E.C. DIV.]

THE SWANSEA BANK (LIMITED) v. BARTLETT PHELPS THOMAS.

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ment of the quarter to the time of the assignment over.

*J. W. and S. M. in 1875 demised to J. L. W., his executors, administrators, and assigns, certain premises for a term of twenty-one years at a certain rent payable quarterly on the 25th March, 24th June, 29th Sept., and 25th Dec., and J. L. W. covenanted not to assign or underlet without licence in writing; proviso for re-entry on breach of any of the covenants. J. L. W. entered into possession, but in April 1876 proceedings were taken for the liquidation of his affairs, and defendant was appointed trustee. The reversion in the premises subsequently became vested in the plaintiffs. After an unsuccessful application to disclaim, the defendant, who had entered into possession of the premises, assigned the same on the 6th Dec. 1877, to one Edward Thomas for the residue of the term.*

*In an action for rent from 29th Sept. to the assignment on the 6th Dec. 1877:*

*Held, that the defendant was liable; the case being within the provisions of the Apportionment Act 1870 (33 & 34 Vict. c. 35), and that the proviso in sect. 4 of that Act did not apply.*

THIS was a special case stated for the opinion of the court by consent of the parties; the material facts as they appeared from the special case were as follows:—

By an indenture of lease dated the 16th April 1875, John Williams and Samuel Miles demised to John Lewis Williams, his executors, administrators, and assigns, certain premises in Swansea, in the county of Glamorgan, for the term of twenty-one years from the 25th Dec. 1874, yielding and paying the yearly rent of 120*l.* during the first seven years of the said term, and certain other increased rent during the residue of the said term, to be paid by equal quarterly payments on the 25th March, the 24th June, the 29th Sept., and the 25th Dec. in every year; and by the same indenture the said John Lewis Williams the lessee covenanted that he would not during the term thereby granted assign, underlet, or part with the possession of the said premises, or any part thereof, for all or any part of the term thereby granted without the previous licence in writing of the said John Williams, his executors, administrators, or assigns, during the continuance of the said term of twenty-one years, and also of the said Samuel Miles, his executors, administrators, or assigns. There was also a proviso for re-entry on nonpayment of rent for thirty days after it should become due, or on breach of any of the covenants and determination of the term. The said John Lewis Williams upon the execution of the said indenture entered into possession of the said house and premises.

On the 1st March 1876 the said John Lewis Williams, being insolvent, instituted proceedings in the County Court of Glamorganshire at Swansea for the liquidation of his affairs by arrangement or composition with his creditors, and on the 10th April 1876 the creditors of the said John Lewis Williams resolved that his affairs should be liquidated by arrangement.

The defendant was thereupon appointed trustee under the liquidation in April 1876.

In the month of Aug. 1877 the reversion in the said premises immediately expectant on the said term of twenty-one years, and all the estate

and interest therein of the said John Williams and Samuel Miles the above-mentioned lessors, became and has ever since been vested in the plaintiffs.

In the month of April 1876 the defendant entered into possession of the said premises, and he paid, or caused to be paid, the rent reserved by the said indenture of lease up to the 29th Sept. 1877.

On or about the 3rd Nov. 1877 the defendant applied to the said County Court under the provisions of the Bankruptcy Act of 1869 and the rules made thereunder, for leave to disclaim the leasehold interest in the said premises, vested in him as trustee. The Court, however, refused the application.

On the 6th Dec. 1877 the defendant by deed assigned the said premises to one Edward Thomas for the residue then unexpired of the said term of twenty-one years.

Neither the plaintiffs nor their predecessors in title have ever given any licence for the said assignment by the defendant to the said Edward Thomas, nor have they accepted the said Edward Thomas as their tenant of the said premises.

The question for the opinion of the court was: Whether the plaintiffs were entitled to recover from the defendant the whole of the rent payable in respect of the said premises for the quarter ending on the 25th Dec. 1877, or an apportioned part thereof for the portion of the quarter ending on the 6th Dec. 1877, or any and what part of such rent.

The sections of the Apportionment Act of 1870 (33 & 34 Vict. c. 35) which applied to this question are:

#### Sect. 2 :

From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

#### Sect. 3 :

The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment when the entire portion of which such apportioned part shall form part, shall become due and payable, and not before. And in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before.

#### Sect. 4 :

All persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law or in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively; provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments, of any tenure, and the same lands or other hereditaments shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or

EX. DIV.] THOMAS BOUCH, THE SEVENOAKS, MAIDSTONE, AND TUNBRIDGE RAILWAY CO., &C. [EX. DIV.]

other person by the executors or other parties entitled under this Act to the same by action at law or suit in equity.

*C. James* for the plaintiff.—The only question is as to the operation of the Apportionment Act of 1870. Without the operation of the Act the plaintiff could not recover the portion of the quarter's rent from the 29th Sept. to the 6th Dec. But the effect of the Act is to enable the plaintiffs to recover an apportioned part of the rent down to the time of the assignment. The only condition is that imposed by sect. 3 to wait till after the expiration of the whole quarter; and this the plaintiffs have done. The action was not brought till after Christmas-day.

*Alfred Wills, Q.C.* (with him *Brynmor Jones*) for the defendant.—The Act was intended to deal with apportionment between persons entitled, and not as between persons liable. It appears from sect. 4 that there was to be one action for the recovery of rent; and then the parties who were ultimately liable for the rent may apportion the payment made among themselves as they choose. The Act never contemplated the bringing of two actions for a quarter's rent. It is clear that the incoming tenant would be primarily liable for the whole quarter's rent; he and his assignor can make their own apportionment of the quarter's payment of rent. This case comes within the proviso of the 4th section.

*KELLY, C.B.*—The proviso is intended for the case where there is a succession of interest in the reversion; here there is none. The words of the Act are very wide, and I think the plaintiffs are clearly entitled to recover from the defendant the rent accruing due from the 29th Sept. to the 6th Dec.

*HUDDLESTON, B.* concurred.

*Judgment for the plaintiffs with costs.*

Solicitors for the plaintiffs, *Brown, Collins, and Woods, Swansea.*

Solicitors for the defendant, *Charles Henry Glascofine.*

*Tuesday, March 17.*

(Before *KELLY, C.B.* and *HUDDLESTON, B.*)

Between *THOMAS BOUCH* (Judgment Creditor); *THE SEVENOAKS, MAIDSTONE, AND TUNBRIDGE RAILWAY COMPANY* (Judgment Debtors); *THE LONDON, CHATHAM AND DOVER RAILWAY COMPANY*, *Garnishees*; and *GEORGE HERBERT PEMBER*, on behalf of himself and others. (a)

*Creditor of company—Preferred shareholders—Debentures and express charges—Priority.*

*By an arrangement between the S. Railway Company and the D. Railway Company, the S. Company was to construct an extension line (being a distinct section of their undertaking) advantageous to both companies, and to issue for the purpose stock to the amount of 200,000*l.* The D. Company was to work the line, and agreed to provide and if necessary pay from the date of the completion of the line an annual sum of 9000*l.* for the payment of interest at  $4\frac{1}{2}$  per cent. on the 200,000*l.* stock. The D. Company was by the arrangement to apply the gross earnings of the extension line first to the repayment to themselves of the actual expenses of working it; and,*

*secondly, to the repayment of the amount of the annual contribution of 9000*l.*; any surplus then remaining to be paid over to the S. Company, any deficiency to be a charge in favour of the D. Company on the net earnings of the extension line in every subsequent year until fully paid.*

*The 200,000*l.* was afterwards increased to 211,000*l.*, and the 9000*l.* to 9500*l.**

*The arrangement was confirmed by statute and carried out, and half-yearly payments of 4750*l.* were regularly made by the D. Company to the S. Company. These amounts were paid by the S. Company to their bankers, and by them transferred to the account of the holders of the stock. There was never any surplus from the earnings of the extension line in the hands of the D. Company after repayment to themselves of the working expenses and of the annual contributions of 9500*l.**

*A judgment had been obtained by a creditor of the S. Company against them for 1556*l.* 18*s.* 3*d.*, and in July 1878, the judgment being still unsatisfied, an order of attachment was made at his instance on all debts due or accruing from the D. Company to the S. Company. There was at that time a half-yearly instalment of the contribution, i.e., 4750*l.*, due from the D. Company to the S. Company, but it had not been actually paid.*

*The S. Company and the holders of the 200,000*l.* resisted the attachment of this sum, and on a special case stated to raise the question whether this sum was subject to attachment to satisfy a creditor:*

*Held, that, in the absence of an express charge or trust created in favour of shareholders on property of a company, the creditors are entitled to have their debts first satisfied before payment of any dividends:*

*That there was no such express charge or trust created by the statutes in this case, the position of the stockholders being that of preferred shareholders.*

*This was a special case stated under the following circumstances:—*

*The judgment creditor was a civil engineer, and in an action in the High Court of Justice, Exchequer Division, commenced on the 28th July 1876 for engineering services in the construction of the portion of the judgment debtors' (hereinafter called the Sevenoaks Company's) line of railway, called the "Maidstone Extension," he, on the 5th Dec. 1876, obtained judgment against the Sevenoaks Company for a sum of 1556*l.* 18*s.* 3*d.**

*Such judgment being still unsatisfied, on the 16th July 1878 an order was made on the ex parte application of the judgment creditor, that all debts owing or accruing due from the London, Chatham and Dover Railway Company (hereinafter called the Dover Company) to the Sevenoaks Company should be attached to answer the said judgment debt, and that the Dover Company should appear before the master to show cause why they should not pay to the judgment creditor the amount of the said judgment debt.*

*On the 19th July 1878 the Dover Company accordingly attended before the master and admitted that they held a sum of 4750*l.* or thereabouts payable under the terms of the arrangement hereinafter mentioned, and professed themselves to be willing to abide the order of the court; but the Sevenoaks Company and certain of their*

(a) Reported by *W. WILLS, Esq., Barrister-at-Law.*

stockholders hereinafter described also appeared and claimed that the amount so held by the Dover Company could not be attached to answer the said judgment debt. An order was made, which as subsequently varied on appeal by Field, J., was to the effect that the Dover Company should pay over to the Sevenoaks Company all moneys so held by them as aforesaid beyond the sum of 2500*l.* (which was taken as a round sum sufficient to cover the plaintiff's claim and costs, if he were entitled to recover), and that a special case should be stated between the judgment creditor on the one hand as plaintiff, and the Sevenoaks Company and the said George Herbert Pember on behalf of himself and others the said stockholders on the other hand as defendants, and that the sum of 2500*l.* should abide the judgment of the court as hereinafter mentioned, and the following case was accordingly stated for the opinion of the court:

## CASE.

1. On the 3rd June 1872 the Sevenoaks Company entered into certain terms of arrangement under seal with the Dover Company for the purpose of providing for the construction of a line of railway from Otford to Maidstone in the county of Kent, forming a distinct and separate section of the undertaking of the Sevenoaks Company, and called the Maidstone Extension, which the Sevenoaks Company had been previously authorised to construct, but had not constructed.

2. The said deed of arrangement, after providing that the Sevenoaks Company should forthwith construct and complete the said line, that the Dover Company should work it when completed, and that the Sevenoaks Company should from time to time issue such an amount not exceeding 200,000*l.* of a certain authorised capital of 300,000*l.* as should be requisite for the construction of the line and for other specified purposes, provided further by clauses 4, 5, 6, 7, and 9, as follows:

(4.) The Dover Company shall provide, and if need be annually pay the sum of 9000*l.* for the payment of interest on the stock issued by the Sevenoaks Company in accordance with these terms, and such sum of 9000*l.* shall be payable and be paid from the day on which the said Maidstone line shall be completed as aforesaid.

(5.) The sum provided for by the last preceding clause to be from time to time provided and paid by the Dover Company (in these terms called the "contribution of the Dover Company") shall be deemed to become payable from day to day, but shall be paid at the same time as the interest on the Dover Company's Arbitration Debenture Stock is paid.

(6.) The contribution of the Dover Company shall be a charge on the undertaking of the Dover Company next after the interest on their existing Debenture Stocks.

(7.) The contribution of the Dover Company shall be repaid to them out of the net earnings of the Maidstone line, and any deficiency on that behalf of those earnings in any year shall be a charge on the net earnings of that line in every subsequent year until the same is fully paid.

(9.) The gross earnings of the Maidstone line shall be applicable and applied in the manner and with the priorities following, and not otherwise: (i.) In payment to or retention by the Dover Company of the actual cost of working the same as hereinbefore provided. (ii.) In repayment to or retention by the Dover Company of their contribution, and of any sum or sums which may for the time being be due to them under article 7 of these terms. (iii.) In payment of the residue then remaining to the company for their own benefit.

3. The said terms of arrangement were confirmed by an Act passed in the same year called Vol. XL., N. S., 1024.

"The Sevenoaks, Maidstone and Tunbridge Railway Act 1872," in the following terms:

(15.) The terms of arrangement set forth in the schedule to this Act are hereby confirmed, and the same shall be in all respects as fully as if the same were set forth at length and enacted in the body of this Act, binding on the company and their stockholders, and on the Dover Company, their debenture stockholders, creditors, preference stockholders, and ordinary stockholders, and shall be carried into effect.

4. The said Act also contained in its 21st section provisions for the realisation and distribution of the assets of the Sevenoaks Company in the event of its being wound-up on the transfer (which was authorised by the said Act) of its undertaking to the Dover Company, and the said section enacted that subject to the payment or satisfaction of all their debts and liabilities, the company should pay and distribute its assets among its registered shareholders.

5. The 23rd and 24th sections provided that after the debts, liabilities, and engagements of the company should be paid, satisfied, or discharged, and their net moneys distributed, the company should be dissolved, but that everything done before the dissolution should be as valid as if the dissolution had not happened, and should not be prejudiced or affected thereby.

6. The said terms of arrangement were modified by the Sevenoaks, Maidstone, and Tunbridge Railway Act 1873 to this extent, that the sum of 200,000*l.* hereinbefore referred to was increased to 211,000*l.*, and the sum of 9000*l.* increased to 9500*l.*

7. Either party shall be at liberty to refer to the said Act of 1872, and to the said terms of arrangement, which were scheduled in the said Act, and also to refer to the said Act of 1873 and the Acts therein recited, and also 38 & 39 Vict. c. 203, as if the same were incorporated in this case.

8. The said deed of arrangement, as so modified, was carried into effect, and the Sevenoaks Company issued the prospectus hereinafter (so far as is material) set out, inviting subscriptions to the said stock to the said amount of 200,000*l.*

Sevenoaks, Maidstone, and Tunbridge Railway Company  
Extension from Otford to Maidstone.

Part of working system of London, Chatham, and Dover  
Railway Company.

Issue of 200,000*l.* stock.  
Guaranteed 4*l.* 10*s.* per cent. by London, Chatham, and Dover Railway Company from the completion of the line, and entitled to 1*l.* 10*s.* per cent. additional interest from profits of line.

The line from Otford on the Sevenoaks line, which under the Arbitration Act of 1869 was made a portion of the working system of the London, Chatham, and Dover Railway Company to a station in the town of Maidstone is fifteen and a half miles in length, and also forms part of the same system.

The Act authorising the construction of the railway was originally obtained in 1862, and a considerable portion of the works have already been executed at a cost for works and land of about 60,000*l.*, which sum represented in stock will, however, rank after that proposed to be issued.

The capital now to be raised under the Act of last session and the agreement with the London, Chatham and Dover Company confirmed by that Act, will be entitled in perpetuity to the payment of 4*l.* 10*s.* per cent. per annum by the London, Chatham, and Dover Company from the completion of the line. This guarantee, which is absolute, and not dependent on the profits of the line itself, will rank after the arbitration and B. debenture stocks of the London, Chatham, and Dover Company not exceeding in the whole 5,999,000*l.*, and before its preference capital and ordinary stock.

This guarantee is therefore certain, and when payable on the completion of the line the stock will yield 4l. 10s. per cent., irrespective of the contingent additional interest of 1l. 10s. per cent. for the payment of which an estimated gross receipt of 34l. per mile per week will suffice.

This additional interest of 1l. 10s. per cent. has been attached to the stock by the Sevenoaks, Maidstone and Tunbridge Railway Company under the Act of last session, and will be payable out of the net earnings of the line after payment and recoupment to the London, Chatham, and Dover Company of working expenses, and the amount of the guaranteed interest paid by them.

The guarantee as authorised last session is limited to 9000l. or 4l. 10s. per cent. on a sum of 200,000l. In consequence, however, of the great increase in the price of material and cost of labour since the original estimate was made, the directors of the London, Chatham and Dover Company have by resolution agreed (subject to Parliamentary sanction and to the approval of their proprietors) to extend the guarantee for the completion of the line by an additional 500l. per annum, so as to cover the sum of 211,000l., and a Bill is now before Parliament for this purpose.

The 200,000l. capital now to be raised will therefore be part of a sum of 211,000l.

The money raised will be solely applicable to the completion of the line under the provisions of the Act of 1872.

Dated the 1st Feb. 1873.

The Dover Company caused to be published and circulated with the above prospectus, the following letter :

London, Chatham and Dover Railway Company,  
Victoria Station, 1st Feb. 1873.

Sir,—I am authorised by the directors of the London, Chatham and Dover Company to call your attention to the accompanying prospectus issued by the Sevenoaks, Maidstone and Tunbridge Railway Company for the capital to complete the latter company's line to Maidstone, and I am also authorised to say that the board of the London, Chatham and Dover Company feel justified in recommending the proposed issue of stock to the favourable consideration of their proprietors.—I am, your obedient servant, G. W. Brooke, Secretary.

The said stock, and also the said additional 11,000l. of stock was subscribed for and allotted on the terms set forth in the said prospectus, and (by consent of all parties) the said George Herbert Pember represents the said stockholders in the present proceedings.

9. The said stockholders are registered members of the Sevenoaks Company, having like qualifications and rights of voting with the other members.

10. Ever since the completion of the said line the Dover Company have in execution of the said deed of arrangement every half-year, viz. on the 15th Jan., and the 15th July each year, paid to the Sevenoaks Company the sum of 4750l. being half the said sum of 9500l. Such payment has been made out of the profits of the Dover Company next after the interest on their debenture stock by cheque in the following form :

London Chatham and Dover Railway Company.  
No. (Revenue) London. (date.)  
London and County Bank, 3, Victoria-street,  
Westminster, S.W.

Pay to the Sevenoaks, Maidstone, and Tunbridge Railway Company or Order  
shillings, and pence.  
£ pounds

A. B. } Directors.  
C. D. }  
E. F.—Secretary.

The Sevenoaks Company, upon receipt thereof, have, after indorsing the same, paid it into an account at their bankers opened in the names of two directors of the Sevenoaks Company by whom the same has been transferred to another account being wholly separate and distinct at the said

bankers entitled the "Interest Warrant Account;" from the said "Interest Warrant Account" the interest warrants were paid by the said bankers to the said stockholders in respect of the said stock, and the said "Interest Warrant Account" was employed solely for the payment of the said interest warrants. The interest warrants were headed as follows:

No. . . . .  
Sevenoaks, Maidstone, and Tunbridge Railway Company.

No. . . . .  
Warrant for interest on Maidstone Extension Guaranteed Stock for half-year ending . . . . .

The Sevenoaks Company have never paid any interest other than the above in respect of the Maidstone extension.

11. On the 16th July 1878, when the garnishee order was served, one of the said half-yearly payments of 4750l. was due and payable by the Dover Company to the Sevenoaks Company (viz., on the 15th July 1878), and a cheque in the above form had actually, viz., on the 10th July 1878, been drawn and signed ready to be paid to the Sevenoaks Company, but it had not been handed to them. In consequence of these proceedings, and the orders herein, this cheque was afterwards cancelled.

12. According to the accounts as rendered by the Dover Company, there have never been any surplus earnings payable by the Dover Company to the Sevenoaks Company, or to the said stockholders over and above the said annual sum of 9500l. The earnings in respect of the said Maidstone extension, after providing for the working expenses for the half-year ending the 30th June 1878, according to the said accounts, amounted to 230l. 5s. 10d., and the whole earnings, after providing for working expenses since the opening of the line in June 1874, to 2624l. 10s. 9d.

The question for the opinion of the court is whether the sum of 4750l., or any part thereof, was on the 16th July 1878 liable to be attached by the judgment creditor to answer the said judgment debt.

If the court shall answer the above question in the affirmative, the Dover Company shall pay to the judgment creditor, out of the said sum of 2500l., the said judgment debt of 1556l. 18s. 3d., and such interest and costs, if any, as shall be ordered by the court, and shall, after reimbursing themselves their taxed costs in relation to these proceedings, pay the residue to the Sevenoaks Company for distribution to the said stockholders.

If the court shall answer the question in the negative, the Dover Company shall pay the sum of 2500l. to the Sevenoaks Company for distribution as aforesaid, and the judgment creditor shall (if the court shall so order) pay the costs of the Sevenoaks Company and the Dover Company.

R. E. Webster, Q.C. (with him Bray) for the judgment creditor.—Since there is no charge or equitable assignment to defeat the rights of a creditor, the sum of 2500l. must be considered as ordinary assets. The right of the judgment creditor could only be defeated by one of two means, either by a contract between him and the Sevenoaks Company, or by express terms in an Act of Parliament, enacting that this money shall be protected from creditors. Now, here there is no such contract; the only question, therefore, is

whether there is any Act of Parliament by which the judgment creditor is disentitled to have this money attached. Although, as between the several classes of shareholders in the Sevenoaks Company, the terms of the arrangement made between the companies make the holders of the 200,000*l.* preference stockholders, there is nothing in the Acts and arrangement to interfere with the ordinary rule that the creditors must first be paid before any of the shareholders or to show that these dividends are transferred so ear-marked as to be appropriated absolutely to the payment of dividends to the preferred stockholders. The payment by the Dover Company of the 9500*l.* is to cease when the earnings of the Sevenoaks Company are large enough to make the payment unnecessary (see sect. 4), and it is clear that when the payments do cease, these stockholders cannot be considered anything but shareholders of the Sevenoaks Company. They are, in fact, not creditors, but partners; and partners cannot make any arrangement among themselves by which their creditors shall be defeated:

*Lindley on Partnership*, 2nd edit. 682;  
*Re Stuart's Trusts*, 4 Ch. Div. 213.

*Herschell, Q.C.* (with him *Jones*), for the Sevenoaks Company, and for G. H. Pember.—In a question arising on a garnishee order all rights of the parties in equity as well as law will be considered. It has been assumed throughout in the argument on the other side that this sum of money is a debt from the Dover Company to the Sevenoaks Company. That assumption is incorrect. This money is to be paid over for a specific purpose and nothing else, and it would be a fraud and a breach of trust to apply it to any purpose but that to which it is specifically appropriated. It is, moreover, payable to the Sevenoaks Company in any case, and is not only then due when the earnings of the Sevenoaks Company are insufficient. It is money appropriated to the payment of the dividends of these stockholders, and is passed through the accounts of the Sevenoaks Company, because for purposes of administration it is found convenient to do so. This is not an ordinary case of a preferential shareholder or of a guaranteed shareholder; the Legislature was competent to make a different arrangement, and has done so. The Legislature has secured these moneys for a specific purpose, and has thereby created a trust in the Sevenoaks Company.

*R. E. Webster* in reply.—Although it is admitted that these shareholders are not debenture-holders, it is nevertheless attempted to give them the privileges of debenture-holders in respect of these funds. But where the Legislature intended to create a charge they have expressed it. (See sect. 2, sub-sect. 6.)

*Kelly, C.B.*—This money is clearly attachable. It appears (apart from any consideration of the statute) that it has always been paid over to the Sevenoaks Company. They indeed immediately indorsed the cheques to their bankers, who transferred the amount to the stockholders, but before the indorsement and payment over to the bankers, the money was in their hands, and there would then seem to be no ground for interfering in any way with the ordinary rights of creditors. There is nothing in the Act to prevent creditors from attaching the money so in their hands. It has been urged that they held the money subject

to a duty or trust, but they cannot supersede the rights of creditors, except in favour of persons who are debenture holders; and here the holders of stock are only entitled as ordinary preference shareholders in railway companies; they cannot defeat the claims of creditors unless they can show an express charge or assignment in trust of the property they claim to receive. Here that is not the case. The judgment must therefore be for the judgment creditor.

*Huddleston, B.*—The position of the persons who advanced this money is not that of debenture holders; they are only preferred shareholders. It is claimed, indeed, that they are entitled to supersede the creditor as respects this sum of money. I cannot accede to that contention. They are shareholders, and as such they are liable for the debts of the concern. I agree that judgment must be for the judgment creditor.

*Judgment for debt, interest, and costs, according to the terms of special case.*

Solicitors for the judgment creditor, Messrs. *Margrave and Co.*

Solicitors for the judgment debtor, *George H. Pember*, Messrs. *Newman, Stratton, and Hilliard*.

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT LINCOLN'S INN.

Thursday, May 8.

(Before JAMES, BRETT, and COTTON, L.JJ.)

*Es parte PAYNE; Re CROSS.* (a)

*Bill of sale—Consideration—Forbearance to seize under prior bill of sale—Assignment of whole of grantor's property—Act of bankruptcy—Bill of sale declared void as against trustee in bankruptcy—Rights of holder of subsequent valid bill of sale—Practice—Cross notice of appeal—Correspondents—Rules of Court 1875, Order LVIII., r. 6—Bankruptcy Act 1869, ss. 6, 94, 95—Bills of Sale Act 1854, s. 1.*

*The forbearance of a creditor to seize under a bill of sale is not a sufficient equivalent for a second bill of sale, so as to prevent it from being an act of bankruptcy and void as against the trustee in bankruptcy as an assignment of the whole of the grantor's property for a past debt.*

*Es parte Stevens* (33 L. T. Rep. N. S. 135; L. Rep. 20 Eq. 786) approved.

*A farmer, who had executed a bill of sale of his furniture, farming stock, and growing crops (being the whole of his property) in favour of P. to secure a past debt, subsequently executed a bill of sale of the same property to C. who had no notice of the prior bill of sale, as security for a present advance. Neither bill of sale was registered. P.'s bill of sale was declared void as against the trustee in the bankruptcy of the grantor, as being an act of bankruptcy, and to it the title of the trustee related back. Both P. and C. took possession of the property comprised in the two bills of sale before the adjudication, but too late to exclude the operation of the Bills of Sale Act:*

*Held, that, as to the growing crops, in respect of*

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

which the bill of sale did not require registration, *O.* was entitled to them by virtue of the 94th and 95th sections of the Bankruptcy Act 1869, but that the trustee was entitled to the chattels comprised in the bill of sale to *O.*

The County Court judge had, on the application of the trustee, declared both bills of sale entirely void as against the trustee. The Chief Judge affirmed the decision as to *P.*, but held that *O.*'s bill of sale was valid as against the trustee in respect of all the property comprised in it. *P.* gave two notices of appeal, as against the trustee and as against *O.* The trustee gave no original notice of appeal, but gave notice under Order LVIII., r. 6, that he should on the hearing of *P.*'s appeal against *O.* contend that the order of the Chief Judge ought to be varied:

*Held*, that the notice was sufficient.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

The hearing in the court below is reported *ante*, p. 296, *sub nom.* *Ex parte* Cochrane, *Re* Cross, where the facts of the case are sufficiently stated.

The Chief Judge held that Payne's bill of sale of the 2nd May 1878 was void as against the trustee in the bankruptcy, but that Cochrane's was valid because he had no notice of the act of bankruptcy committed by the execution of Payne's bill of sale.

From this decision Payne gave two notices of appeal, one as against the trustee, and the other as against Cochrane.

The trustee gave no original notice of appeal, but he gave a notice, under rule 6 of Order LVIII. of the Rules of Court 1875, that he should on the hearing of Payne's appeal against Cochrane contend that the order of the Chief Judge ought to be varied in his (the trustee's) favour.

Roxburgh, Q.C. and Finlay Knight for Payne.—As regards the growing crops comprised in the bill of sale of the 2nd May, the omission to register does not invalidate it:

*Brantom v. Griffiths*, 36 L. T. Rep. N. S. 4; L. Rep. 2 C. P. Div. 212.

The forbearance to enforce the prior bill of sale was a sufficient consideration to prevent it from being an act of bankruptcy. It is true that *Ex parte Stevens* (33 L. T. Rep. N. S. 135; L. Rep. 20 Eq. 786) is adverse to us, but that is a decision of the same judge who decided the present case, and is not binding on this court. [COTTON, L.J.—The decision of this court in *Ex parte Cooper*, *Re Baum* (39 L. T. Rep. N. S. 523; L. Rep. 10 Ch. Div. 313) is very similar to that of the Chief Judge in *Ex parte Stevens*.] They also cited

*Ex parte Allen*; *Re Middleton*, L. Rep. 11 Eq. 209; *Ramsden v. Lupton*, 29 L. T. Rep. N. S. 510; L. Rep. 9 Q. B. 17.

*De Gex*, Q.C., *E. C. Willis*, and *Redman*, for the trustee, were not called upon.

JAMES, L.J.—With regard to the question which has been argued on this appeal, it appears to me that the case of *Ex parte Stevens* is exactly in point. It is true that that is a decision of the same judge who decided the present case, but there is also a decision of this court which has been referred to (*Ex parte Cooper*, *Re Baum*), which is in substance this case, and is not distinguishable from it. The only consideration which Mr. Roxburgh suggests is this. He says, "I had a right to seize the goods under my former bill of sale"

(which for this purpose I assume to be good); "I did not exercise that right, and therefore I gave a consideration for a new bill of sale by not seizing the goods under the other." In *Ex parte Cooper*, the claimant said that he had a right to seize the goods under an execution. Now the right to seize goods under an execution, and the right to seize the goods under a former bill of sale, are only in terms different. They are exactly the same thing. The former was held not to be a sufficient consideration to support the new bill of sale. These devices are merely attempts to escape the operation of the Bills of Sale Act and the bankruptcy law. In substance this is a bill of sale for a past debt and nothing else, and upon the whole of the debtor's property.

BRETT, L.J.—It is admitted by Mr. Roxburgh, that, if the bill of sale of the 2nd May was given for a past debt, then it was an act of bankruptcy and he must fail. But he says it was not given for a past advance, and he says that, inasmuch as there was a previous bill of sale by virtue of which on the 2nd May the holder of it might have seized the goods, the fact that he did not seize the goods, but instead of seizing them took a second bill of sale, was equivalent to the giver of the bill of sale handing over the money and then taking it back by way of new advance, and therefore the second bill of sale ought to be held as given for a new advance. If there were no authority in the matter, I confess I should not adopt that view, because the distinction between the cases is this, that in the case to which Mr. Roxburgh likens this transaction the money would be there, the debtor would have the money and be in a position to pay off the first bill of sale. If he had the money, and was in a position to pay off the first bill of sale, it may be that it would be useless for him to hand the money over the table and then take it back again; but the distinction is that in the transaction in the present case the debtor has not the money and cannot get it. He is a debtor who cannot pay. He gets further credit by giving the second bill of sale. In the one case you might say there was a new advance, and in the other you cannot, the position of the debtor being wholly different. I should have thought so in the absence of authority. Then you come to the case of *Ex parte Cooper*. I put it to Mr. Roxburgh whether he would say that the same result would follow if there had been a judgment instead of a previous bill of sale, and of course he was obliged to say, for the purpose of argument, yes. Then try the case of *Ex parte Cooper*. There a bill of sale was given. It was said that the consideration was not a past advance, because there had been a judgment obtained, and therefore the judgment creditor could have issued execution and seized the property, but instead of doing so he had agreed to take a bill of sale, and he afterwards did take a bill of sale. The agreement to take the bill of sale at a time when he could have seized the goods under the judgment by virtue of the execution was relied upon as showing that the new bill of sale was given on a fresh advance. It was answered, No; it was given because the debtor was not in a position to pay and did not pay anything; he only gave the bill of sale in respect of the judgment debt which he owed, and there was no new advance. It was precisely the same as the present case, except that there was a previous judgment instead of a pre-

vious bill of sale. *Ex parte Cooper* was a case in the Court of Appeal, and therefore would be binding upon us. Then comes *Ex parte Stevens*, which was before the Chief Judge, and that is not binding on this court. But there a previous bill of sale was relied upon in precisely the same circumstances as the previous bill of sale is relied on now. The Chief Judge held that the subsequent bill of sale could not be treated as having been given for a new advance, but for a past advance. Unless we are prepared to overrule it, that is an authority to which we must have regard. So far from doing that, I respectfully think it was right, and that this appeal must fail.

CORROX, L.J.—It was argued that the bill of sale was not an act of bankruptcy because there was adequate consideration or benefit given to the debtor by the claimant giving up his right which he then had to seize or take away all the property comprised in the bill of sale. Now I need not go through what has been already gone into, but it seems to me that *Ex parte Cooper*, which is a decision of this court, in principle decides the case; but that depends on the bill of sale which was in existence at the time when this other bill of sale was executed being a valid and effectual one, and the registrar has found as a fact that that bill of sale of the whole of the property was given not for a present, but for a past advance. As far as I have seen the evidence, I think that is the right conclusion. Mr. Roxburgh's argument depends on the existing bill of sale being valid, by means of which as against the creditors in bankruptcy the property could have been taken away. But if the former bill of sale on the whole of the property was for a past advance, it is defective and would not avail the person taking the second bill of sale to enable him to withdraw the whole property from the creditors. It appears on the evidence that there had been previous advances, and that bills of sale were given from time to time, and it is stated that the last of those bills of sale immediately preceding the one in question was given in Dec. 1878. At any rate, if it had been intended to suggest that there was a present advance of money at that time, there might have been evidence to show that that was the case. That is the foundation of the title of Mr. Roxburgh's client. I am of opinion that this appeal cannot be sustained.

JAMES, L.J.—I ought to add that I have given my judgment on the assumption that the first bill of sale—and I say this in order that there may be no dispute in other cases—was a good bill of sale, just as in that other bill of sale case before the Chief Judge (*Ex parte Stevens*). I should be quite prepared to affirm the judgment of the Chief Judge on the point.

BRETT, L.J.—I may say that my judgment was given upon the same assumption also.

CORROX, L.J.—I considered that the point which has been discussed was governed by authority, but I thought it right to state that on the evidence the registrar seemed to be right.

Roxburgh, Q.C. and Finlay Knight.—As regards the second appeal, the matter must be fought between the trustee and Cochrane, and, if Cochrane succeeds, we claim the property as against him.

De Gez, Q.C., E. C. Willis, and Redman, for the trustee, proposed to open the cross appeal.

Winslow, Q.C. and Robson, for Cochrane, argued that the notice given by the trustee under Order LVIII, r. 6, was not good as between correspondents.

De Gez, Q.C.—The Chief Judge held that Cochrane was entitled to the property; Payne appealed from that decision and made us respondents, and as we gave notice of our intention to question the decision of the Chief Judge, the court can now decide the question as between us and Cochrane. [JAMES, L.J.—You say that the money is in the possession of the court, and that the court ought to determine to whom it ought to go, and in the presence of all these parties the court determined that it should go to Mr. Cochrane.] Yes; to the extent of his bill of sale. [JAMES, L.J.—Then Mr. Payne says, that the money should go to him instead of to Mr. Cochrane. You are respondent to that appeal. It is a question of priority, and as you have given notice in time, we must hear the whole case upon that point.]

De Gez, Q.C., E. C. Willis, and Redman, then proceeded to argue the appeal.—As Payne's bill of sale was set aside on the ground that it was void as against the trustee by virtue of the Bills of Sale Act and the Bankruptcy Act, Cochrane can derive no advantage from that, but the trustee ought to stand in the position of Payne, and succeed to the right of priority which he would have had against Cochrane if there had been no bankruptcy. But even if Cochrane is protected as to the growing crops by the 94th and 95th sections of the Bankruptcy Act 1869, because he had no notice of the prior act of bankruptcy of the 2nd May, that does not apply to the chattels, which are within the Bills of Sale Act. As to the chattels, *Ex parte Attwater*, *Re Turner* (35 L. T. Rep. N. S. 917; L. Rep. 5 Ch. Div. 27), shows that the absence of notice of the act of bankruptcy is immaterial. They also cited

*Cracknell v. Janson*, 37 L. T. Rep. N. S. 118; L. Rep. 6 Ch. Div. 735;

*Ex parte Leman*; *Re Barraud*, 35 L. T. Rep. N. S. 422; L. Rep. 4 Ch. Div. 23.

JAMES, L.J.—Upon the bill of sale, as far as the bankruptcy law is concerned, I think it is impossible to distinguish this case from those cited. But what have you to say, Mr. Winslow, about the decisions under the Bills of Sale Act?

Winslow, Q.C. and Robson for Cochrane.—*Ex parte Attwater* does not apply, for there the bill of sale itself was executed before, but the grantee did not take possession till after, the secret act of bankruptcy; but Cochrane did not advance his money or take his bill of sale till after the execution of Payne's bill of sale, of which he had no notice.

JAMES, L.J.—This point does not seem to have been considered by the Chief Judge at all, for there is nothing in his judgment dealing with the distinction as to the chattels. It seems to me utterly impossible to distinguish this case from that of *Ex parte Attwater*, *Re Turner* (*ubi sup.*), where every point was considered. That case, I recollect, was argued with great ability and perseverance by Mr. Crump as to the policy of the law. He said, what a cruel case it was where the man had lent the money, and the prior act of bankruptcy was kept perfectly secret. We thought we could not escape the plain words of the statute; that is to say, that if a man will take a



bill of sale and not register it, he is liable to the consequences, one of which is that it is void as against assignees in the bankruptcy of the grantor, unless possession is actually taken before the bankruptcy. That means the commission of an act of bankruptcy followed by an adjudication. That was my view in that case, and the other judges agreed in that view. It was said that this transaction was protected by the 94th section of the Bankruptcy Act 1869, and that we should mix up the Bills of Sale Act and the Bankruptcy Act, so as to protect what would be protected under the bankruptcy law. It appears to me that the matter is *res judicata*, and that it has been decided by authority which is binding upon us that the chattels belong to the trustee in bankruptcy.

BRETT, L.J.—The first point is expressly decided by *Ex parte Leman* (*ubi sup.*); and the refined distinction which has been taken in argument is too fine for anybody to comprehend; and the second point, I think, is expressly decided by the case of *Ex parte Attwater*.

COTTON, L.J.—I think the contention of the trustee fails on the first point. His contention was, that the effect of making void the security of Payne was to give him the benefit of that security as against the second assignee. In my opinion that cannot be maintained. We held on the former argument that Payne's assignment was bad, as being an assignment of all the property without any present advance, and bad as an act of bankruptcy; and the title of the trustee relates back to the act of bankruptcy. Now that does not vest in the trustee in bankruptcy the mortgage title of Payne, but it vests in him the property, and he will take it without any subsequent charge, except so far as that subsequent charge is protected by the Act itself. But the Act does give effect as against the title of the trustee to the transaction in favour of Mr. Cochrane, and that being so the trustee in bankruptcy takes the property he gets by relation back to the void security—the act of bankruptcy—but subject to the charge in favour of Cochrane, that assignment being protected by the statute which makes it a valid charge on what was on the 2nd May, and as from the 2nd May, the property of the trustee. That therefore, subject to the Bills of Sale Act, which is another point, disposes of that contention. Then as regards the Bills of Sale Act, in my opinion the trustee is quite right as to that. We have nothing to do with the effect of the Bankruptcy Act or relation back of the title of the trustee, as against which, no doubt, the 95th section of the Bankruptcy Act 1869 protects the claim of Mr. Cochrane. We have simply to deal with the Bills of Sale Act, which requires every one to register his bill of sale within twenty-one days. If he does not do so, then the bill of sale is bad as against the assignee in bankruptcy as regards the chattels which at or after the time of such bankruptcy, and after the expiration of the period of twenty-one days, shall be in the possession of the person giving the bill of sale. Here the statute seems to me to point to such a case as this; it says, "at or after the time of such bankruptcy," and the only question we have to consider is what is the meaning of "the time of such bankruptcy." Now interpretation has been given to that in the case of *Ex parte Attwater*, in which I perfectly

concur. "At the time of such bankruptcy" must mean the act of bankruptcy to which the title of the trustee relates back. There is no hardship in the matter. The person claiming under the bill of sale had twenty-one days to register. He did not do that, and it is not because he did not register the bill of sale before the act of bankruptcy, but because for twenty-one days he did not choose to register it, and left the property in possession of another person, that his bill of sale is void.

Solicitors: *W. A. Holcombe; Clarke, Woodcock, and Ryland, agents for O. Chandler, Shrewsbury; J. I. Irving.*

Thursday, May 8.

(Before JAMES, BRETT, and COTTON, L.JJ.)

*Ex parte* KIRKWOOD; *Re* MASON. (a)

*Bankruptcy—Liquidation petition—Description of debtor—Registration of resolutions—Locus standi—Withdrawal of proof—Bankruptcy Act 1869, s. 82—Bankruptcy rules 1870, rr. 208, 252, 273, 295—Bankruptcy forms 1870, No. 106.*

*A farmer who occupied a farm at M., in the county of L., filed a liquidation petition, in which he described himself as "of M., in the county of L., cattle dealer":*

*Held (affirming the decision of Bacon, C.J.), that the description was not misleading, so as to invalidate the liquidation resolutions.*

*Seemle, that a creditor who has withdrawn his proof at the first general meeting has not, under rules 273 and 295 of the Bankruptcy Rules 1870, any locus standi before the registrar on the registration of the resolutions.*

*So held by Bacon, C.J.*

THIS was an appeal from a decision of the Chief Judge in Bankruptcy, reversing a decision of the judge of the Nottingham County Court.

The facts of the case were briefly as follows:—

On the 2nd Dec. 1878 the debtor, who was a farmer occupying a farm of 300 acres at Marston, in the county of Lincoln, filed a petition for the liquidation of his affairs by arrangement, in which he described himself as "George Draper Mason, of Marston, in the county of Lincoln, cattle dealer."

On the 3rd Dec. John Kirkwood, a registered bill of sale holder, took possession of the debtor's effects comprised in his bill of sale.

Kirkwood attended at the first meeting of the creditors, which was held on the 21st Dec., and put in his proof, and then withdrew it again. Resolutions for a liquidation were passed at this meeting, and subsequently confirmed.

On the 23rd Dec. Kirkwood gave notice of his desire to be heard in opposition to the registration of the resolutions; and at the hearing, on its being objected that he had no *locus standi*, as there was no proof of his debt on the file, he put in a proof stating the debt due to him to be 316*l.*, and the value of his security, the bill of sale, to be 315*l.* 19*s.* 11*d.* This proof was objected to, but the registrar overruled the objection, and declined to register the resolutions on the ground that the debtor was misdescribed in his petition as a "cattle dealer," when he was really a farmer. This decision was confirmed by the County Court judge.

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

On appeal this decision was reversed by the Chief Judge.

BACON, C.J. delivered judgment as follows:—This is a very singular case. A meeting of the creditors of an insolvent debtor was held in the manner prescribed by the law. One of them appears at that meeting and says, "I am a creditor for 368<sup>l</sup>," and he tenders his proof. He afterwards withdraws his proof, and then when the resolutions passed at the meeting were about to be registered, he presents himself before the registrar and says, "The debtor owes me a penny, and therefore I object to the resolutions. He owes me one penny, therefore the resolutions of the creditors shall be set aside." I am not going to decide the case upon any such ground; but I say it is singular, and it is a thing that cannot escape my observation. Mr. Winslow has suggested to me what is the real meaning of the case. The creditors mean to contest the validity of the bill of sale held by this creditor. He knew that very well when he withdrew his proof, and when he raised his objection; but he says he is a person aggrieved, and that he has a right to dispute the validity of the proceedings under the liquidation petition. The first question presented to me is whether he has any *locus standi*. In my opinion he has none. The rules about the subject are very clear and distinct. The scheme, which is most carefully prepared and expressed in the rules, gives the creditors an opportunity of appearing and making their proofs, and the 271st rule provides that any objection shall be marked thereon by the chairman, and shall be dealt with by the registrar on the resolution being presented to him for registration. That has not been done. There is no such thing here. Then the 272nd rule provides for the secured creditors, and the 273rd rule provides that "where any creditor shall desire to retire from any meeting, and not to be considered as present, he may withdraw his proof without prejudice to his again proving his debt upon any subsequent occasion." Now what does "any subsequent occasion" mean? An occasion upon which debts can be proved, a meeting such as the statute prescribes. It does not mean any other occasion. It does not mean the occasion of the resolutions being registered before the registrar. Then the 284th rule prescribes the proceedings to be taken by the person entrusted with the registration. He shall file the same in court together with the debtor's statement of affairs, and all proofs and proxies, within three days, and shall verify the resolutions and so on. And when the registrar is to hear, he has jurisdiction to hear the objections which are then taken. Well, then, as to the creditor who has exercised that right which the 273rd rule gives him of withdrawing from the meeting, and who has a right to prove upon any future occasion, is the occasion of the registration that at which he could be allowed to prove his debt? In my opinion it is not. In my opinion he was bound to give notice—proper notice—of his objection to the registration that it might be properly met. He did not do that, and therefore, in my opinion, he had no *locus standi* to prove for his penny, although his object—I do not say it was an unjust one, for I know nothing about the merits of the case—was at some other time, in some other shape to dispute the validity of all the liquidation proceedings. That is not the meaning of the statute.

That is not the meaning of the rules. The course by which he might have proceeded is very plain. The case is wholly different from that of *Ex parte Jerningham* (39 L. T. Rep. N. S. 186; 1<sup>st</sup> Rep. 9 Ch. Div. 466) which has been referred to, where a creditor objected, for there he was a creditor who had objected to the resolutions at the meeting at which they were passed. It is so stated most distinctly. That was, therefore, only a renewal of this objection. Well, now, what are the objections raised by the creditor in the present case? The objections are that the debtor is described as a cattle dealer, being a farmer; his evidence that he was a cattle dealer, I say (with the greatest possible respect to the learned judge whose order is appealed from) seems to me to be unquestionable. There are several men who prove (the debtor himself amongst them, whose statement is not impeached) that he was in the habit of attending at Grantham and Newark markets; that he did there deal upon occasions as a cattle dealer, though at the same time he was a farmer; that he did carry on a substantive distinct business as a cattle dealer. And what is said against it? Several persons in the habit of attending the markets say that they never knew him to be a cattle dealer. Is that disproof? Is that negative statement that they did not know he was a cattle dealer an answer to the depositions of the several witnesses who prove that he was a cattle dealer, that he acted as a cattle dealer? Is there anything inconsistent with it? This is not like the case of an attorney who took a shed, or a shop, or a room, and pretended to be a bookseller—a plain fraud upon the face of it. The business of a cattle dealer and that of a farmer are so cognate that a man may very well carry on both businesses. The 82nd section of the Bankruptcy Act 1869, which enables the court to amend any inaccurate description, seems to me to apply directly to this case, for the provision is that the amendment shall not be made if injustice is thereby done to anybody: "No proceeding in bankruptcy shall be invalidated by any formal defect, or by any irregularity, unless the court before which an objection is made to such proceedings is of opinion that substantial injustice has been caused by such defect or irregularity, and that such injustice cannot be remedied by any order of such court." What injustice can be done here? The bill of sale holder, this penny creditor under the liquidation, says that he has got a perfectly good bill of sale, and he says that, the debtor being a farmer, his bill of sale cannot be invalidated upon the ground of his being a trader. But how would that position be remedied? By adding to the description of the debtor that he was a farmer as well as a cattle dealer? If he was a cattle dealer he was a trader, and the order and disposition clauses of the Act apply. If he was also a farmer, that could not make any sort of a difference in that respect. If it is necessary, the description may be amended, and he may be described as a farmer "as well as"—I use the very phrase of the learned judge—"as well as a cattle dealer." But unless the evidence is clear that he never was a cattle dealer, that his pretence to be a cattle dealer—which went on for two years according to his evidence—was a fraud upon the creditors, I can see no reason in the world why these proceedings in the interest of the general creditors

[Ct. OF APP.]

*Ex parte* KIRKWOOD; *Re* MASON.

[Ct. OF APP.]

should be set aside at the instance of Mr. Kirkwood, who says that he has a valid bill of sale: whether he has or not remains to be tried. The cases referred to, where an erroneous description was likely to mislead, where there were reasons to believe that it was resorted to fraudulently, have no application to this case, because no one of these witnesses who says that he did not know George Draper Mason to be a cattle dealer, doubts that George Draper Mason, the farmer, would have been recognised under that description. The letters addressed to him come to their proper destination; the village, not a large one, in which he lives, is properly described. The fact of his being a cattle dealer is, in my opinion, established; and if this penny creditor had, as I consider he had not, a *locus standi* before the registrar, still there would be no ground upon which he could ask that these proceedings should be avoided. In my opinion, therefore, the resolutions must be registered.

From this decision Kirkwood appealed.

WINSLOW, Q.C. and *Northmore Lawrence* for the appellant.—The debtor admits that his neighbours would know him better by the description of "farmer" than by that of "cattle dealer," which at least is but a partial description. *Ex parte Jerningham* (39 L. T. Rep. N. S. 186; L. Rep. 9 Ch. Div. 466) shows that the debtor must give a full description of himself, so as to give notice to all his creditors. The onus is on the debtor to show that he gave a sufficient description of himself, and it is not for the objecting creditor to prove that anyone was actually misled. As for the question of *locus standi*, the County Court judge, we submit, was right.

*E. C. Willis* and *Seward Brice*, for the respondent, were not called upon.

JAMES, L.J.—I am of opinion that it is not necessary to decide the second point (namely, whether the appellant, who had withdrawn his proof at the first general meeting, had any *locus standi* before the registrar on the registration of the resolutions), upon which, as at present advised, I am quite clear. I think it would need a great deal to satisfy me that the Chief Judge was not right upon that point. But it is not necessary to decide that point, and we have only to deal with the alleged misdescription of the debtor in his liquidation petition. In the case of *Ex parte Jerningham*, to which we have been referred, we were of opinion that the description was really misleading, because the debtor did not give his private residence so that his private creditors would not know that he was the person filing the liquidation petition. But here the Chief Judge was of opinion that there was no such case made out. No one really could have been misled by this man calling himself a cattle dealer, which was, in fact, a business that he carried on. He was a farmer really, but no one seems to have been misled. The appellant was not misled. I am as certain as I can be of anything that no human being would have been misled by this farmer describing himself as a cattle dealer, because everyone knows that it is one of the commonest things in the world for a farmer to be a cattle dealer. I am of opinion that the Chief Judge was right in ordering the liquidation resolutions to be registered.

BARR, L.J.—I am of the same opinion. I am perfectly certain that if any creditor of Mr. Mason,

of Marston, had seen an advertisement that "Mr. Mason, of Marston, cattle dealer" had filed a liquidation petition, he would have jumped in his shoes, and gone to look for a Mr. Mason, who was farmer as well as cattle dealer. This case is not at all like *Ex parte Jerningham*, where in point of fact the description was misleading.

COTTON, L.J.—The present objection which we are considering is that these resolutions ought not to be registered on the ground of a bad description of the liquidating debtor. Now there is no clause in the Bankruptcy Act, 1869 which in any way says what is to be given in the petition as the description of the person who applies for the liquidation of his affairs by arrangement, but the description is to be advertised, and the form given in the schedule to the rules supposes that there will be a description of the petitioner. And, as we laid down in *Ex parte Jerningham*, I am of opinion that it is necessary that the description should in no way be misleading, and that it should be such a description as will give fair notice to the creditors of all classes who it is that is applying for the benefit of the Act. The present case is very different from that of *Ex parte Jerningham*. There a man was carrying on business at one place and was residing at another. He described himself simply as of the place where he carried on his business; therefore it was no possible notice for those who did not know him as a trader, but dealt with him as a private gentleman at his private residence. But here we have simply this, that a man, being a farmer and cattle dealer, residing at a place called Marston, describes himself in his petition as "George Draper Mason, of Marston in the county of Lincoln, cattle dealer." Now I think that no one can say that any creditor who had dealings with Mr. Mason, of Marston as a farmer, would not receive full and sufficient notice that that person was applying to take the benefit of the Act, when he saw the advertisement of this petition. I put it to Mr. Winslow when he suggested that there could be a mistake or that there was not sufficient notice. It is perfectly legitimate to show that there has been any misleading or that any creditor has not got fair notice, but I think that the party taking the objection must show that there is a probability of some one not receiving sufficient notice, and in the present case the business of cattle dealer and farmer being so cognate, I think it is impossible for any creditor of this debtor as a farmer to say that he would not know on reading the advertisement that his debtor was the person applying to take the benefit of the Act. The description in the present case, though not entirely complete, was in my opinion one which gave from necessity a fair notice to all his creditors in whatever capacity.

*Appeal accordingly dismissed with costs.*

Solicitor for the appellant, W. F. Watson, agent for Newton, Jones and Champion, East Retford.

Solicitor for the respondent, G. F. Moreaby White.

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Re HAMILTON'S WINDSOR IRON WORKS COMPANY (LIMITED).

[Ct. of App.]

Tuesday, April 22.

(Before JESSEL, M.R. and BRETT and COTTON, L.JJ.)

Re HAMILTON'S WINDSOR IRON WORKS COMPANY (LIMITED). (a)

*Company—Winding-up—Leave to proceed with action—Foreclosure action by mortgagees—Companies Act 1862, s. 87.*

*In the winding-up of a company an order was made directing an inquiry what securities had from time to time been given by the company, and what were the priorities of the incumbrancers. A mortgagee, in whose presence this order had been made, and who had not appealed from it, but had subsequently obtained an order giving him leave to attend all proceedings in the winding-up, and directing that his costs of attending the proceedings should be costs in the winding-up, applied to the court, under sect. 87 of the Companies Act 1862, for leave to institute a foreclosure action, notwithstanding the winding-up order:*

*Held (reversing the decision of Fry, J.), that leave should be given to the mortgagee to bring such action as he might be advised to enforce his security, on his undertaking that, notwithstanding the order obtained by him in the winding-up, his costs of attending the proceedings in the winding-up should be in the discretion of the judge.*

*This was an appeal from a decision of Fry, J.*

The General Credit and Discount Company (Limited) were mortgagees of the business premises, the undertaking, the plant, &c., of Hamilton's Windsor Ironworks Company (Limited), under an indenture dated the 9th March 1877, to secure a debt of 45,794*l.* 10*s.* 6*d.*

On the 17th Sept. 1878 a petition was presented for the winding-up of Hamilton's Windsor Ironworks Company, and after this the company passed a resolution for a voluntary winding-up, on the hearing of the petition on the 18th and Nov. an order was made to continue the winding-up under supervision, and confirming the appointment as liquidator of one Whinney, who had been appointed provisional liquidator.

The General Credit and Discount Company applied to the court for an order that they might be at liberty to bring an action for the foreclosure of the equity of redemption in the mortgaged premises, notwithstanding the winding-up order.

This application was refused by Fry, J., on the grounds that the applicants were precluded from instituting a foreclosure action until certain inquiries in the winding-up to which they had assented had been completed.

Fry, J. delivered the following judgment:—In this case the company was ordered to be wound-up on the 18th Nov. 1878. On the preceding 20th Sept. an order had been made in presence of the present applicants, the General Credit Company, which enabled the provisional liquidator to go on with certain contracts, and it made certain provisions with regard to the moneys he was to find for the purposes of these contracts, and it reserved power to the General Credit Company to put an end to the arrangement embodied in that order so far as they were concerned, and therefore to leave the liquidator in the same position in which he would have been if that order had not been made in the presence of the General Credit Company.

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

Now the winding-up order adopted the previous order of September, and three or four subsequent orders were made, which gave liberty to the liquidator to enter into contracts, but placed all those new contracts on the same footing as they would have stood upon if they had been embodied by the order of the 20th Sept. So far, undoubtedly, it reserved the rights of the General Credit Company to determine with regard to any of those contracts. But on the 21st Dec. there was made in the presence of the General Credit Company an order to this effect, that an inquiry should be made as to what securities had from time to time been given by the company, and when, and to whom, and for what amounts, and how much remained due on each of these securities for principal and interest up to the 17th Sept. 1878, which I take to be the date of the commencement of the winding-up, and any party was to be at liberty to apply in chambers, as he might be advised, after the chief clerk should have made his certificate upon the question of the priorities, and the respective rights of the several creditors so to be found and certified as aforesaid. From that order the General Credit Company have not appealed. But, on the contrary, on the 13th Jan., they obtained an order giving them liberty to attend all the proceedings under the winding-up order, and that the costs of that application, and of the General Credit Company attending the proceedings from the date of the 13th Jan. should be costs in the winding-up. Now it appears to me that these two orders show that the General Credit Company at that time were minded to work out their rights in the winding-up. I am far from saying that these orders in any way preclude the General Credit Company from ultimately instituting a foreclosure action. But it does appear to me that, inasmuch as these accounts and inquiries have been directed in the presence of the General Credit Company to be taken in the winding-up, and they have availed themselves of the benefit of the winding-up and obtained an order that the costs of attending the proceedings shall be costs in the winding-up, it would be unjust now to allow them to commence independent proceedings which, to a certain extent, would cover the same ground as these inquiries before these inquiries have been answered. I perfectly agree that, as a general rule, the mortgagee is a man who stands entirely outside the winding-up, and that unless special circumstances are shown he ought to be at liberty to prosecute his rights as mortgagee, and therefore to institute a foreclosure action; but, having regard to the inquiries which in this case have been directed in his presence, I decline to give him that leave unless those inquiries have been answered, and therefore I order this application to stand over until the answers to those inquiries and the certificates are made under the order of the 21st Dec. Of course this may be drawn up as a substantive order.

From this decision the General Credit and Discount Company appealed.

Pearson, Q.C. and Whitehorne, for the appellants.—There are no special circumstances here to preclude us from instituting a foreclosure suit, nor does the liquidator offer us the same relief as we would obtain in the action. Therefore our case comes exactly within that of *Lloyd v. David Lloyd*

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and Company (37 L. T. Rep. N. S. 83; L. Rep. 6 Ch. Div. 339). They also cited

*Re Longdendale Cotton Spinning Company*, 38 L. T. Rep. N. S. 776; L. Rep. 8 Ch. Div. 150.

*Glassé, Q.C. and Romer* for the liquidator.—The inquiries directed by the order of the 21st Dec. will be thrown away if the foreclosure action be instituted. The appellants assented to that order, or at least did not appeal from it. The order of the 13th Jan. 1878 was obtained by them, and shows that they intended to work out their rights in the winding-up. They ought not now to be allowed to take independent proceedings.

*Buckley*, for creditors in the winding-up, also opposed the appeal.

*JESSEL, M.R.*—Mr. Pearson, we think you ought to submit to this, that your costs of the inquiry under the order of the 21st Dec. in the winding-up should be in the discretion of the court, so that they should not be wasted.

*Pearson, Q.C.*—Certainly, my Lord. I think that would be perfectly right, and I told Mr. Justice Fry, when I was putting this before him, that really those costs need not be thrown away, because there may be leave given to use those inquiries in the action.

*JESSEL, M.R.*—The appellants submitting to that condition as to the costs of the inquiries under that order, I think the order of the court below cannot be maintained. The matter really was decided in the case of *Lloyd v. David Lloyd and Co. (ubi sup.)*. There the Court of Appeal said that there were only two modes of dealing with such an application: either there was an equity entitling the respondents to restrain the action, or there was an offer to give to the appellant all that he was entitled to without suit. Now, that being so, in this case there is neither one thing nor the other. It is not suggested that there is any equity to restrain the action, because even the decision of the court below only delays the action until after the certificate is made, and, as Fry, J. noticed, it might be then necessary to apply for leave to bring an action of foreclosure, because of course the court could not foreclose in the winding-up. Now, on what ground is it suggested that this action can be restrained? The ground that the learned judge in the court below seems to have considered sufficient was an order made on the 21st Dec. last, directing inquiries as to priorities. It was followed, no doubt, by an order of the 13th Jan. last, giving certain costs, to which I will refer presently. Now, as regards the first order, it must be remembered that under the 60th rule every creditor and every contributory has a right to attend the proceedings under a winding-up, with proper provisions as to the costs of such attendance, and also as to extra costs occasioned by such attendance. If the creditor or the contributory avails himself of that 60th rule, he must be served with notice of the applications, and consequently the official liquidator is compelled to serve him with notice of any proper application. Now, nothing can be clearer than that the application by an official liquidator—in a case where there are difficult questions of law and of fact to be decided before he can ascertain the priorities of the incumbrancers—to the court to ascertain such priorities, is a proper application, and that no one who had liberty to attend the proceedings, and who was therefore neces-

sarily served with notice of the application, could have hoped to oppose such an application successfully, and, as for appealing, it would have been absurd; nobody would have dreamt of such a thing. The application was a perfectly right one, and the order, in my opinion, was also perfectly right: "The liquidator desiring the assistance of the court in ascertaining the priorities of the incumbrancers, let an inquiry go to ascertain such priorities." If that is so, what equity is raised against the respondent because the respondent was properly served with notice of the proceedings? It was not an application by the respondent for the inquiry, but by the liquidator. But the respondent says, "Although I cannot help the inquiry going, I wish to take proceedings in which a much simpler inquiry will be necessary, if any inquiry at all be found necessary, namely, whether I am not first mortgagee as against those persons whom I choose to make defendants, whom I wish to foreclose. I am not to be incumbered with this enormous inquiry as to all the priorities of all the incumbrancers on all the property of the company. I am entitled to foreclose, and that inquiry is not to stand in my way." It appears to me that it is impossible to say that such an order as that can raise an equity against the respondent, and in that respect it appears to me that there really is no ground whatever for staying the action. As regards the second order, I must say that I think that order should not have been made in the shape in which it was made. It was an application by the present appellants to attend the proceedings—not to attend them simply because they had a right to do so under the general rule, but at the cost of the liquidation, and not only as regards past proceedings in respect of which the court no doubt could exercise a judgment, but as to future proceedings, so that the creditor, the mortgagee, acting adversely to the company in every sense of the word, might take any proceeding he thought fit to vex, annoy, embarrass, and delay the liquidation, and then obtain the costs of those proceedings out of the fund which would be applicable to the claims of the other creditors, or possibly of the shareholders. Such an order as that must have been made, I should think, through some slip, for I really cannot understand it on any other principle. But there it is. Now, if that order had been part of a bargain proved, that in consideration of such an extraordinary order being made the appellants had contracted that they would not foreclose, of course that would have raised an equity. But there is no suggestion of the kind made to us. Nobody seems to know how this extraordinary order was obtained. It seems to have been asked for and granted. All that we can do with it, as it appears to me, is to put the appellants on fair terms as to that, namely, that they are not to get the costs of those inquiries relating to their security out of the funds of the liquidation and to render those inquiries abortive by taking other proceedings; but, on their submitting that those costs shall be in the discretion of the court, so that they may not be thrown away, the inquiries being adopted in the action, it appears to me that justice will be done, and that the leave asked for should be given.

*BRETT, L.J.*—It seems to me that, where an application is made in a winding-up by a mortgagee for leave to institute a foreclosure suit, the case of *Lloyd v. David Lloyd and Co.* has determined

the manner in which the judge must exercise his discretion. He is bound, according to the decision in that case, to allow the suit to be instituted, unless those who oppose the application can show that there is some equity to the contrary, or that the liquidator of the company is willing to do what is stated in the judgment. Now, here there is no pretence for saying that the liquidator is willing to fulfil the latter requirement. But it has been argued that there is an equity which should prevent the applicants from being allowed to institute the suit, at all events for a time. It seems to me that there could be no such equity unless they had consented to something which would give them an advantage, or which would put the liquidator under some disadvantage. With regard to the orders as to carrying on the contracts, it seems to me that they had no effect by reason of the provisions which were contained in all those orders, namely, reserving to the applicants, the General Credit Company, the right of putting an end to the contracts. Therefore, those orders gave no equity. The order of the 21st Dec., as it seems to me, gave no equity, because it gave no advantage to the one party, nor did it put the other party under any disadvantage. I had considerable doubt about the order of the 13th Jan., because it did seem to me that that gave an advantage to the General Credit Company—that is, the part of it which gives them the costs against the company at all events. But, as my Lords think that that order can be rectified, or at all events can be made non-effective by the consent of Mr. Pearson, then it seems to me that there is no equity at all which entitled the learned judge to refuse the application of the General Credit Company to be allowed to institute a foreclosure suit. The case is directly within the authority of *Lloyd v. David Lloyd and Co.*

COTTON, L.J.—The general principle applicable to this case is settled now—that is to say, that, although the 87th section of the Companies Act 1862 applies to a suit by a mortgagee, yet he stands in a different position, and has a right to have liberty given to him to take any proceedings in the ordinary way of an action to enforce his security which he thinks right, unless the parties opposing it can show some good cause to induce the court not to grant him that liberty. But *prima facie* he has the right. It can hardly be contended in this case that the two things pointed out in *Lloyd v. David Lloyd and Co.* exist, either that the liquidator now offers to give all that the mortgagee can get by his foreclosure suit, or that there is already an order in the winding-up giving him all that he could so claim. In the first place, the inquiry directed by the order of the 21st Dec. does burden the mortgagee with a great deal to which he would not be subject in a foreclosure suit, especially if he admitted that he was subject to certain prior mortgagees, and did not in any way therefore make them parties to his suit. But it is enough to say that it does not give him all he could get, or claim to get, by a foreclosure suit. Now, what is urged as a ground for depriving him of the liberty to commence an action to realise his security? What Mr. Glasse, as I understand him, stated is this: The effect of what the mortgagee wishes to do will be to put an end to all those contracts which were continued under the order of the 20th Sept. and the similar orders.

Now, if that had been so, if the mere effect of taking proceedings to realise the security had been without anything else to put an end to those contracts, and they could not otherwise have been put an end to, I should have thought that the argument was deserving of great weight. But in fact those orders for continuing the contracts were all of them made with a proviso that, although advances made for the purpose of continuing the contracts should, until notice was given by the mortgagee, have priority, the mortgagee might at any time give notice that he was dissatisfied with the arrangement, and then the liquidator was to make the required advances at his own risk. And in fact it is not any proceedings by the mortgagee to foreclose which will put an end to those contracts or the advances for the purposes of those contracts; but, as is admitted he has given due notice under those orders, as he had a right to do, and, as stated by the liquidator, as he cannot get priority for the advances to complete the contracts, he will not advance the money, nobody will, and the contracts must come to an end but for a subsequent order made in chambers that, notwithstanding the opposition of the mortgagee and the notice, some sort of priority should be given to advances for the purpose of completing the contracts, and as that liberty was reserved by the original order to the mortgagee, and it is not the foreclosure but the exercise of that option which puts an end to the contracts, subject to the order of the 4th March, in my opinion it cannot afford any sufficient ground for saying that the mortgagee is not to go on if he pleases with the foreclosure action. But then there comes the order of the 21st Dec., and it is said that that precludes the mortgagee from commencing any action. Now, all that there is in that order is this: the liquidator applies for what, if the judge thought it convenient, he had a perfect right to apply for, and what under the then circumstances, in my opinion, the judge was perfectly right in granting, an inquiry as to the different incumbrancers on the property which he had to administer and their priorities. All that the mortgagee did then was that, being served—whether he assented or not does not appear, but it was not a consent order—he did not, when the order was made, take any proceedings by way of appeal. I do not see how he could. He could not by appearing on the motion upon which that order was made give up any rights he would otherwise have, but, the liquidator having asked for his own benefit for this inquiry, he submitted; he could not do otherwise than submit. But then it is said that he has gone on for some time without disputing that order, or without doing anything else. That, as I understand, is the argument, because otherwise it comes to nothing. All it comes to is this—that so long as he was satisfied with the way in which the contracts went on, and therefore did not exercise his option of putting an end to the arrangement made by the order of the 20th Sept. and similar orders, he did not desire anything more than what was being done under that order of the 21st Dec. But circumstances have altered, and he, exercising the option which was reserved to him originally, has put an end to the priorities given by those orders to the advances obtained by the liquidator, and he then says, “I want to enforce my rights actively, and to realise my security;” and having

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given a reason for that—at first I was doubtful whether he ought not to have shown some reason, but I think he has shown some reason by the affidavit which was referred to by Mr. Pearson—he is reasonable in being no longer content with those inquiries, but wishing to actively enforce his rights. The only other point I need advert to is the order as to costs. I will deal presently with the question as to how far we ought to put the mortgagees under terms as regards those costs, but it was argued as if obtaining that order deprived him of rights which he would otherwise have. It is not said in that order in any way that he gives up, in consequence of getting those costs, the option reserved to him by the order of the 25th Sept. to put an end to the contracts, and therefore that option still remains. It seems to me that he might desire to attend, and that the judge might think it right that he should attend all the proceedings with respect to that order as to costs which, except so far as we have put the mortgagees upon terms, we cannot now deal with, for the purpose of satisfying himself whether or not he should exercise the option, but that not having taken away the liberty to put an end to the arrangement, it still existed, and the order giving him the costs of attending the proceedings cannot, in my opinion, of itself be taken in any way to prejudice his right so to exercise his option, or to give any greater effect to the order and the inquiries under the order of the 21st Dec. than they would otherwise have. No doubt, if expense had been incurred in prosecuting the inquiries under that order, which his proceeding by action will now render abortive, he ought not, in my opinion, absolutely to have the right to have those costs. That ought, in my opinion, to be left to the discretion of the judge, so that, when the foreclosure proceedings have been commenced and carried to an end, the judge may say whether or no inquiries have been prosecuted which have been rendered unnecessary and unavailing by the foreclosure suit, in which case of course the mortgagees must not have those costs. It may be that any inquiries which are to be prosecuted will be useful in the foreclosure proceedings, and in that case the judge may deal with the costs. Upon that I give no opinion. In my opinion the mortgagee, coming to exercise his undoubted right to bring an action, ought not to claim any longer to have the right to all the costs of the proceedings under the order of the 21st Dec. [*Glass, Q.O.*—That is to say, he is not to have those costs unless the judge shall so order.] It will be in the discretion of the judge. I wish to explain why, in my opinion—and I think in the opinion of all the other members of the court, although they did not advert to it—we do not impose any other terms upon the mortgagees. No doubt that order gave them the costs from the commencement of the winding-up. Those proceedings prior to the 21st Dec. cannot be in any way interfered with by his action of foreclosure, and therefore I see no reason, assuming that order to stand, why upon this occasion we should put the mortgagees under any terms as to giving up any right to costs they may have, except the costs of the inquiries under the order as to the priorities of incumbrances upon the property comprised in the security.

The order made by the Court of Appeal was as follows:—Discharge the order of the 6th March (the order appealed from). The Credit Company

to be at liberty to bring such action as they may be advised to enforce their security, they undertaking by their counsel that notwithstanding the order of the 13th Jan. 1879 their costs of attending inquiries directed by the order of the 21st Dec. 1878 shall be in the discretion of the judge. The costs of the appellants and of the liquidator, of the application to the court below and of this appeal, to be costs in the liquidation. No order as to the costs of the other respondents.

Solicitors for the appellants, *Norton, Rose, Norton, and Brewer.*

Solicitors for the liquidator, *Darley and Cumberland.*

Solicitors for the other appellants, *Pitman and Lane.*

April 2 and 8.

(Before JESSEL, M.R., and BAGGALLAY and BRAMWELL, L.JJ.)

Re SOUTH DURHAM IRON COMPANY; T. T. SMITH'S CASE. (a)

*Company—Director—Loan by a firm to the company—Partner in the firm a director—Omission to register security—Companies Act 1862, s. 43.*

*Where a firm, one of whose members was a director of a company in course of winding-up, had advanced money to the company on the security of a transfer of delivery warrants of iron, and the warrants were transferred to the director-partner, but it was established on the evidence that the security ensured to the benefit of the firm, and there was no entry of the transaction on the register of mortgages of the company as required by the 43rd section of the Companies Act, 1862; it was*

*Held by Jessel, M.R. and Bramwell, L.J. (affirming the decision of Hall, V.O.), Baggallay, L.J. dissenting, that the doctrine of Ex parte Valpy and Chaplin (L. T. Rep. N.S. 228; L. Rep. 7 Ch. Ap. 289), and Re Native Iron Ore Company (34 L. T. Rep. N.S. 777; L. Rep. 2 Ch. Div. 345) did not apply, and that the security was not forfeited.*

*Per Jessel, M.R. and Bramwell, L.J.: The personal incapacity of "a director, manager, or officer of a limited company" to enforce an unregistered mortgage of property of the company, does not prevent a firm, one of the partners in which is a director of the company, from enforcing an unregistered mortgage for securing a loan by them to the company.*

*Per Jessel, M.R.: Personal disqualifications are odious in equity, and ought not in any case to be extended further than actual decided law warrants, without absolute necessity.*

THIS was an appeal from a decision of Hall, V.C., dismissing a summons taken out by the liquidator of the South Durham Iron Company. The facts and arguments are fully reported *ante* p. 63. The case was shortly as follows:—A firm of Thomas Taylor Smith Brothers, in 1875, lent some money to the company, for which the company accepted a bill of exchange drawn upon them by the firm. The bill was afterwards renewed by the company's acceptance to a bill drawn by T. T. Smith alone, one of the partners in the firm, who was also a director of the company. Subsequently

(a) Reported by E. S. ROCHES, Esq., Barrister-at-Law.



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the company paid part of the amount due on this bill, and delivered T. T. Smith the warrants for 2500 tons of pig iron belonging to the company, by way of security for the balance due on the bill. The warrants were indorsed in blank, but the iron was entered in the name of the firm in the books of the owners of the warehouse in which it was placed. This charge was never registered in the company's register of mortgages. In 1876 a further payment was made on account of the loan, and some of the warrants were returned to the company. When the liquidation of the company commenced 3393*l.* remained due in respect of the loan, and the warrants for 1500 tons of iron remained in the possession of T. T. Smith. Upon an application by the liquidator for an order that T. T. Smith should deliver up the warrants, the Vice-Chancellor held on the evidence that the debt was still in fact due to the firm, though in form it was due to T. T. Smith alone, and that consequently, as no duty was imposed on the firm with regard to the registration of their charge, the previous decisions of the Court of Appeal did not apply, and the application must be refused. The liquidator appealed.

Sec. 43 of the Companies Act 1862 provides that:

Every limited company, under this Act, shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register, in respect of such mortgage or charge, a short description of the property mortgaged or charged, the amount of the charge created, and the names of the mortgagees or persons entitled to such charge. If any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company who knowingly and wilfully authorises or permits the omission of such entry, shall incur a penalty not exceeding 50*l.*

The Act contains no provision making a mortgage void for want of registration; but the Court of Appeal, in the cases of *Ex parte Valpy v. Chaplin* (26 L. T. Rep. N. S. 228; L. Rep. 7 Ch. App. 289); and *Re The Native Iron Ore Company* (34 L. T. Rep. N. S. 777; L. Rep. 2 Ch. Div. 345) held that, in the case of a mortgage to a director or officer of a company, it was his duty to see that his mortgage was registered, and that if he omitted to do so, he could not be allowed to set up his security against other creditors of the company.

O. Morgan, Q.C. and F. T. Proctor, in support of the appeal, cited

*Re Wynn Hall Coal Company*, 23 L. T. Rep. N. S. 348; L. Rep. 10 Eq. 515;

*Ex parte Valpy and Chaplin*, 26 L. T. Rep. N. S. 228; L. Rep. 7 Ch. App. 289;

*Re Native Iron Ore Company*, 34 L. T. Rep. N. S. 777; L. Rep. 2 Ch. Div. 345;

*Re General Provident Assurance Company*, 27 L. T. Rep. N. S. 433; L. Rep. 14 Eq. 507;

*Imperial Mercantile Credit Association v. Coleman*, 24 L. T. Rep. N. S. 290; L. Rep. 6 Ch. App. 538;

29 L. T. Rep. N. S. 1; L. Rep. 6 H. of L. 189;

*Re General South American Company*, 54 L. T. Rep. N. S. 202, 706; L. Rep. 2 Ch. Div. 337;

*Re Borough of Hackney Newspaper Company*, L. Rep. 3 Ch. Div. 689;

The Companies Act 1862, s. 43.

Dickinson, Q.C. and Caldecott, for T. T. Smith and Co., in support of the Vice-Chancellor's order, referred to

*Knowle's Mortgage*, 37 L. T. Rep. N. S. 351; L. Rep. 6 Ch. Div. 556;

*Burkshaw v. Nicholls*, 39 L. T. Rep. N. S. 306; L. Rep. 3 H. of L. 1004;

*Lindley on Partnership*, p. 472.

JESSEL, M.R.—This is an appeal from a decision of Hall, V.C., and the sole point we have to decide is, whether the circumstances of this case are such as to distinguish it from two decisions of the Court of Appeal by which we are bound. The first decision was given in the case of *The Patent Bread Machine Company, Ex parte Valpy and Chaplin*, in which a solicitor employed by the company took a charge on certain debts due to the company, which charge was not registered, and the court decided it, consisting then of James, L.J., sitting alone. When I say "alone," I merely mention the fact that he was alone, although that does not, in my opinion, detract from the value of the judgment. He says: "It is the duty of the officers of the company to see that every charge specifically affecting the property of the company is registered. I am of opinion that no director, manager, or other officer of a company can avail himself of a charge which is not registered, and everyone standing in a fiduciary position towards a company, is bound to see that the company obeys the directions of the Legislature, and I am of opinion that the failure of the appellant to do so is fatal to the case." Then he goes into the question as to the person not being their regular solicitor, which is not material. That, therefore, was a decision that an officer, as he was held to be, of the company, being owner of an unregistered charge, could not avail himself of it in the winding-up, for that was the only decision there was there. The next decision was given in the matter of the *Native Iron Ore Company*, and that was delivered by the full Court of Appeal. In that case there was a registration, but an imperfect one, not complying with the requisitions of the Act of Parliament. Mellish, L.J., in giving the final judgment, said, "It is an established rule that where a director or officer of a limited company advances money on the security of a debenture or mortgage of the company, and omits to register it in accordance with the Act of Parliament, the consequence is that he has no charge as against the creditors." Then he says, "The point was in the first instance so held by Malins, V.O., in the case of *The Wynne Hall Coal Company*, and by the Master of the Rolls in *Ex parte Valpy and Chaplin*, and that decision was afterwards affirmed on appeal." He is referring there to the rule, and then he goes into the question of the distinction between a mortgage imperfectly registered and one not registered at all, and he holds that there is none. Baggallay, L.J. says: "I entirely concur in the decision, and I adopt the language used by James, L.J., in the case of *Ex parte Valpy and Chaplin*," and then he quotes it, and James, L.J. concurs, and that is the whole of the authority we have got. The first question we have to consider is, whether the present case can be distinguished from those cases. I find that in the case of *Valpy and Chaplin*, James, L.J. said that there is a power to give such a mortgage as this, and it is not made void for want of registration, and in the subsequent case of the *General South American Company* the full Court of Appeal also held that the mortgage was not void for want of registration, and that shareholders, not being directors, who took the benefit of that mortgage, were entitled to enforce their security. Therefore you have these two points established: first, that a director, manager, or officer, cannot avail himself

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of the security; and, secondly, that the security is valid and is available to any person not occupying those positions. What is the result? The result, to my mind, is that the decisions establish that there is a personal disqualification in the director (I use that expression for the sake of shortness for the whole three) to avail himself of the security as holder—that is, if, when he comes forward to enforce the security, it can be shown that he was, at the time of the creation of the security, a director, &c., he cannot avail himself of it. If that is the true view of the decisions—and I can find no other which will reconcile the two series of decisions in the Appeal Court—is there not a rule of equity that you shall not extend personal disqualification and the forfeiture thereby resulting, to the prejudice of innocent persons? I have always considered that equity sets itself emphatically against forfeiture of every kind, and most emphatically against penalties being imposed, unless they are imposed in the most direct and unequivocal manner, and I have always considered it to be a principle of equity, that where there is a personal disqualification attaching to a man in relation to property, that personal disqualification is not, as a rule, to affect innocent persons, and that is really what the Appeal Court has determined. Now, ought we to apply that principle to the case of a partnership? If the security were originally given to a partnership in which the director was a partner, or if it were afterwards transferred to a partnership in which the director was a partner, how are you to work out the principle? In one sense, of course, all the partners are liable for the acts and defaults of their copartners in the course of the carrying on of the partnership business; in the other, it may be said you do not affect the interests of innocent parties, viz., the copartners, by attaching to them the consequences of the personal default of their partner, not as their partner in the course of the partnership business, but in another character, viz., that of managing partner of another partnership business. It appears to me that, inasmuch as if you apply the rule of forfeiture you affect the interests of the innocent partners, and if you do not apply it, you may, to some extent, benefit the partner who has been guilty of default, the rule of equity compels you to say that in that case you would rather give some benefit to the defaulter than enforce the forfeiture against those who are innocent; and therefore taking it in that broad way, simply as a personal disqualification, it appears to me that the rule of forfeiture ought not to apply in a case of partnership. There is another reason for that, which has weighed with me, and that is the argument of inconvenience. There are in this country not so many partnerships of the description I am about to mention as there were, but still there are a good many partnerships in joint-stock companies with unlimited liability and not incorporated. At one time they were very numerous, and we have still a great many insurance companies in that position, and a good many banks and other large companies. Those are ordinary partnerships. If one of those companies were to lend money to an incorporated company with limited liability, and it turned out that one of their shareholders was one of the directors of the borrowing company, it would strike one as very unjust that a man who held

perhaps a hundred thousandth part of the property of the lending company should by his omission as manager or managing partner of the borrowing company, destroy the security in the hands of the lending company. It appears to me that that argument from convenience is one which is not to be forgotten, and therefore I should be prepared to hold with the Vice-Chancellor, that these decisions with regard to personal disqualification are not to be extended to cases of partnership. The same question would arise in the case of ordinary joint-stock companies if the lending company had a director who happened also to be a director of the borrowing company. It would be a matter of inconvenience to extend the doctrine, which I think is established, to such a case as that, and therefore both on principle and as a question of convenience, I think it ought not to be so extended. I now come to consider the facts of the case to see whether the version of the matter adopted by the Vice-Chancellor is as correct as I think is the principle of his decision. The facts really do not appear to me, fairly considered, to admit of controversy as to their legal effect, but I speak for myself alone. I am not at all sure that my view on this part of the case is shared by both my learned colleagues. [After referring to the facts at some length his Lordship continued:] Now I cannot find any evidence whatever of any authority on the part of the firm to change the original debt due to the firm into a debt due to Mr. T. T. Smith. Of course, if the firm had brought an action against the Iron Company, the company must have pleaded either accord and satisfaction, or payment, and without evidence of authority from the firm, it appears to me they could not have succeeded in the action. The result therefore is that the debt at the moment of the security being given was still due to the firm. Whether the bill drawn by Mr. T. T. Smith is to be treated as a collateral security or not, it is not necessary to decide, but it appears to me it must be so treated in the absence of authority given by the firm. That being so, the security was intended to be a security for the debt, and that it was intended as a security for the debt due to the firm is evidenced by the ledger of the company, which has been produced, and in which the account headed originally "Taylor Smith Brothers" remains without alteration to the end, and credit is given in it for those very acceptances drawn in the name of Taylor Smith alone as being a credit against the firm of Taylor Smith Brothers. It was also stated to us and not denied, that there was an inspection of the books of the firm, and I think it is not an unfair inference that if anything advantageous to the appellants could have been found in those books we should have heard something of their contents. Under these circumstances it appears to me that the security was given for the debt of the firm, and was therefore originally a mortgage given to the firm. But I now pass to another point. Assume—which is the most favourable view for the appellants—that my previous opinion is not well founded. It was then a security given to Mr. Taylor Smith as trustee for his firm, for there is not a pretence for saying that there ever was any arrangement between the firm and Mr. Taylor Smith by which he became the owner of the debt. Well then he did, by indorsing the warrants, transfer the security to his firm in

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whose name it now stands. [*Dickinson, Q.C.*—I do not think there was an actual indorsement.] I thought they were indorsed back, but there was a handing of them over, which is the same thing as an indorsement, and we have it in evidence that there were directions given to the warehousing firm, which they complied with, to warehouse the goods in the name of the firm. That has been done, and the result is that in that case the firm would be transferees of the security. Now, as I understand the decisions, a transferee is not affected in the slightest degree. A director takes a security, perhaps in the name of a trustee for himself, perhaps in his own name, and then he transfers it to B., who transfers it to C. and so on. When you get to the twentieth man he cannot find out or know whether a year or two ago the man who originally took the mortgage was or was not a director at that time, and there is therefore a very good reason for saying, in the absence of a register, that he need not find out whether every shareholder of the mortgage was or was not a director. It appears to me that the disability is the personal disability of the holder at the time he comes to enforce his charge, and that unless that holder has been himself guilty of some default, that holder does not lose the benefit of his security. There is another observation which I should like to make about the position of a partnership. It was very much pressed upon me that a man could not, by taking partners, rid himself of a liability; but I think the answer to that is very simple. In the present case you can determine in what character the act was done. Mr. Taylor Smith, we will assume for this purpose, effected the loan, or rather took the security for the loan which had been previously made on behalf of his firm. His action, as agent for the firm, or as managing partner, ceases when the security is effected. The registration is the duty of the company, the neglect to register is by an officer of the company; and therefore the wrongful omission to register, which is what involves the personal disqualification, would be the act of Mr. Taylor Smith as an officer of the company. You can therefore see that it was not as a partner of his firm, but as a managing partner or director of his company, that he was guilty of the omission. Now, when it is an individual in his own behalf, it may well be that you cannot say that you can sever the two characters, but where you have a man acting as agent for two bodies, and you can sever the characters, it appears to me anything but just to say that the act of omission should be attributed to any other character than that alone in which it was possible for him to do it, viz., as an agent of the company; and therefore I think the result of that agency should fall upon the principal, viz., upon the company. There is one other observation to be made. If, by reason of any misfeasance of his, he has inflicted loss on the company, the company is not without remedy; but if he has inflicted loss on his partners, it does not appear to me at present that they would have any remedy. That also is an additional consideration, which ought to weigh with the court in deciding whether or not the doctrine of disqualification is to be applied to this case. There is one final remark I will make, and I hope it does not conflict with the decisions which I say I am bound by, and that is, that personal disqualifi-

cations are odious in equity, and that they ought not in any case to be extended further than actual decided law warrants without absolute necessity. I think in this case no such necessity exists, and therefore I am of opinion that the Vice-Chancellor's conclusion is correct, and ought to be affirmed.

BAGGALLAY, L.J.—At an early stage of the arguments on this appeal I suggested that there were but two questions to be decided, and I remain of the same opinion still. The first is whether the Court of Appeal, as at present constituted, is bound by the decision in *The Native Iron Ore Company*, and the other decisions which have been referred to, which preceded that case; and the next is, if the present court is so bound, whether the case now under consideration can be distinguished from that of *The Native Iron Ore Company*. With regard to the first question, the answer to it generally would certainly be in the affirmative, that the court, as now constituted, is bound by the previous decision in the same court. But I am far from saying that there are not exceptional circumstances under which the court would not be so bound. I may mention, by way of illustration, possibly where the decision has been recent, and the circumstances connected with it show that it was not very fully considered; secondly, where doubts are entertained by some of the judges themselves who have taken part in such decision; and, thirdly, where there is a concurrence of opinion outside the members of the court so constituted, to the effect that the decision was one which could not be supported. But, in my opinion, none of those reasons apply in the present case. The decision in the case of *The Native Iron Ore Company* may be simply stated in this way: If a director of a company advances money to the company, and takes as security for such advance a charge upon the property of the company, and omits to register such charge, he shall not be at liberty to avail himself of such security as against the other creditors of the company. That view was originally held by Malins, V.C., in *The Wynn Hall Company's* case, in the year 1870, and it was followed by Lord Romilly, at the Rolls, in *Valpy and Chaplin's* case, which afterwards came before the Court of Appeal, where it was adopted by James, L.J., sitting alone. It was again followed in *The Native Iron Ore Company* more recently, and in that case James, L.J. said to Mellish, L.J. and myself that inasmuch as that previous decision had been come to by himself sitting alone, he was anxious that we should fully consider the case and intimate to him whether we did or did not fully concur with him, and he abstained from giving judgment himself at length. Speaking for myself, and I think I may say for Mellish, L.J., we gave our best consideration to that case, and in the result we came to the conclusion that the Lord Justice had been right in *Valpy and Chaplin's* case, and therefore in *The Native Iron Ore Company* we followed that decision. Under these circumstances it cannot be said to be a recent decision, and it cannot be said to be a single decision, because it has been followed through a long course of years, and has never been appealed from. The next class of cases in which I think the Court of Appeal is not altogether bound by its previous decisions are those cases in which a doubt may be entertained by members of the court who were parties to the

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former decisions. I hope we are all open to conviction, and, if our attention is drawn to a decision previously given by us, and it is shown us that such decision is even doubtful, I think there would be a desire on the part of every judge sitting in this court to have such a case further considered and all doubt removed. But up to the present time there does not appear to me to have been any doubt whatever in the minds of the judges who took part in this decision. As regards the case of *The Native Iron Ore Company*, Mellish, L.J. and myself did not for the first time have the question under our consideration, for in the case of *The General South American Company*, in which the mortgages or charges had not been registered, but where the omission to register was not the fault of the parties who owned the charge, and where the persons who owned the charge did not stand in any fiduciary relationship to the company, the same argument was addressed to us which was subsequently used in the case of *The Native Iron Ore Company*, where the party omitting to register was a director. In that case we drew a distinction between the two classes of cases. Therefore, I may say that the second class of cases, in which the court of appeal is not necessarily bound by former decisions, does not include the present case. Then the third class of cases is where there is a concurrence of opinion amongst those whose opinions are deserving of consideration outside the court itself that the former decisions are questionable. Now I desire to pay every respect to any views entertained by the Master of the Rolls, but at the present time I am not aware that any expression of dissent from the decisions of the cases to which I am referring has been given by any other judge. I think, therefore, I am justified in saying that, having regard to the number of judges who have expressed their opinions with respect to the principles upon which these decisions proceeded, there is not that general concurrence on the part of others, whose opinions are most deserving of consideration, as would induce this court to depart from the decision previously given. In this case, if there had been sufficient reason for it, the difficulty could have been met by summoning an additional number of judges to sit in the Court of Appeal to rehear a question as to which there appeared to be a reasonable doubt. I assume we are bound now by the view which has been laid down by the Master of the Rolls, but as our former decisions have been somewhat severely criticised, I have thought it right to make these observations with regard to the extent to which those decisions are open to consideration by the present court. I now pass on to the consideration of the second question. I have said that those decisions have been criticised somewhat severely, but I do not suggest that such criticism was at all improper. On the contrary, I think it is highly desirable that decisions upon any important question should be made the subject of criticism by other judges. No doubt such criticism may eventually lead to the rectification of decisions which have been found to admit of doubt, and which may have been unfortunately given. The extent to which that criticism is carried will of course be regulated by the discretion of the particular judge who is called upon to make it. But I do not propose on the present occasion to enter into any consideration as to

whether the cases to which I have alluded were rightly decided or not. If it were necessary to say more, I might refer to the words of James, L.J. in *Ex parte Valpy and Chaplin*, which I adopted in the subsequent decision of *The Native Iron Ore Company*: "It is the duty of the officers of a company to see that every charge specifically affecting the property of the company is registered, and I am of opinion that no director, manager, or other officer of the company can avail himself of a charge which is not registered. Everyone standing in a fiduciary relation towards the company is bound to see that the company obeys the directions of the Legislature, and I am of opinion that the failure of the appellants to do so is fatal to the appeal." I do not think it necessary, neither do I consider it would be within the scope of my duty, to enter into controversial criticisms upon the objections which have been raised in the course of the present argument to those decisions. I adhere most distinctly to the principles enunciated in those cases, and, as far as my opinion is worth anything, I think they were rightly decided. Now the question is whether the present case can be distinguished from the decision in *The Native Iron Ore Company*. As at present advised, my impression is that it cannot be distinguished, and I am also bound to say that one or two arguments have been addressed to us here, which might have made me think it desirable to take further time for consideration to see whether my general impression was not wrong. But inasmuch as both of my colleagues are clearly of opinion that this case can be distinguished from the case of *The Native Iron Ore Company*, I do not think it necessary to postpone the delivery of the judgment in this case in order that I might satisfy my mind upon those one or two points, which, at the present moment, do not much affect me, but which I might have thought it desirable to inquire further into. At the present moment I need not say more than that I do not see my way to distinguish this case from that of *The Native Iron Ore Company*.

BRAMWELL, L.J.—I am of opinion that this order should be affirmed, and the appeal should be dismissed. I consider myself entirely bound by those two decisions, to which reference has been made, and if this case had been within the principle of them, it ought to follow, and have the same result, but I think it is distinguishable. I am quite aware of the difficulty which has been adverted to by the Master of the Rolls and Baggallay, L.J., that in this case, as in a great many others, it may happen that under a prejudice one has come to a wrong conclusion upon matters of fact. I have very often seen a witness in the box who was suspected of giving dishonest evidence, where the first thing he has done has been to deceive himself, and then honestly come forward and deceive others, and I think it is quite possible that a similar operation may have been going on in one's own mind where one does not agree with the decisions which are supposed to govern the case before us. Now, I should not like to say that one ought to proceed to overrule the decision of a court of co-ordinate jurisdiction on all the grounds put by Baggallay, L.J. I can conceive that it is possible in certain cases where an Act of Parliament has been overlooked, or a previous decision or some undeniable fact, but, as a rule, it is much better that the court should be

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governed by the decisions of courts of co-ordinate jurisdiction, leaving it to the higher court, if it has been wrong before, to set the matter right. And I think where that is so, it is better, as a rule, that you should not express dissent or doubt about decisions which are said to govern the case before you. For my own part I think it is a very unsafe thing to do so in this particular case. When I consider who the judges were who decided those two cases I feel that it is much more likely I should be wrong in differing from them than that I should turn out to be right. However, so much has been said in this case, and it is so extremely difficult to apply a case as an authority, without ascertaining the principle, and in endeavouring to ascertain the principle it is so difficult to avoid saying that you have not succeeded in it, and do not agree with the decision, that I should be uncandid if I were not to say that I do not accede to those two decisions. I cannot think that they were well founded. But I agree with Baggallay, L.J., that it is inexpedient to go into considerations for the purpose of showing that they were not well founded. I may deceive myself, but I think I have some cogent considerations in my mind to show that they were not; but, however, the only thing we have to in this particular case is to admit them as authorities and to extract the principle from them as well as we can, and see whether this case is distinguishable. I understand the principle is that which has been enunciated; a peculiar one which the Master of the Rolls and Baggallay, L.J. both describe in the same way, that where there is a director or officer of the company whose duty it is to see that the mortgages or charges are registered, and he has a mortgage or charge which is not registered, there is a personal disability on his part which prevents him setting up that mortgage or charge. To what extent that would go I really do not know; whether, if a creditor issued execution and seized the property alleged to be charged, it could be set up, it is not necessary now to discuss; but I understand that the principle of the decision is that which I have mentioned. In order to see whether it governs the present case, we must first of all ascertain what the facts are. It is perfectly clear that the shares that stood in the name of the particular respondent here, Thomas Taylor Smith, were the property of the partnership, Taylor Smith Brothers. Of that there is no doubt. In my opinion the debt due from the liquidated company was a debt due to Taylor Smith Brothers, and never was due to Thomas Taylor Smith alone. Now that is sworn to by Thomas Taylor Smith, and it is not improbable in itself; it is corroborated by the circumstance of the cheque being drawn in the way it was, and there is no cross-examination administered to him, and in the ledger of the company it is treated as a transaction between Taylor Smith Brothers and the company. Then an attempt is made, which I cannot but characterise as hopeless, to show that although the debt was originally due to Taylor Smith Brothers, yet somehow it had become a debt due to Thomas Taylor Smith alone, or at all events, that the security was given to him alone, on account of the debt due to Taylor Smith Brothers. Really, in order to suppose that the debt became due to him alone, you must suppose that his partners had agreed to give up the company as debtors,

either in consideration of his becoming personally liable to the partnership or for some other, or no consideration at all, and that Thomas Taylor Smith agreed to put himself in that situation of responsibility to the firm, and that the company agreed to be liable to him, when of this there is not one particle of evidence. I am not fond of referring to what juries say and do, because I do not think they say and do as wise things as judges, upon matters referred to them, but treat the question as a practical one, to be dealt with by men of the world conversant with commercial business, I undertake to say it would be scarcely possible to make a jury understand the proposition contended for here, that in some way T. T. Smith had become the sole creditor of this company. The only evidence relied upon is, that the original loan being undoubtedly, by the partnership, when the loan is renewed, T. T. Smith draws the bill in his own name alone. The thing is most intelligible. In the first place, he was the man who managed the business; in the next place, although his partnership had not ceased to exist in point of law, it had ceased to exist as a going, living, active partnership. I have known repeatedly that men have had a scruple about using a partnership name when practically the partnership had ceased to exist. It would have been perfectly competent to have drawn in their name, but he drew in his own name only, and he swears that he did so, because he was the person who managed the affairs of the partnership, and there is no cross-examination. But although he draws in his own name, yet in the ledger of the company the transaction is put under the name of Taylor Smith Brothers and Co. It is true that their book is not evidence, but the transaction is mentioned as with him, and speaks of the warrants as having been given to him. That means, physically given to him, and that the cash was physically received from him, but not that it was an alteration of the debt, making him the sole creditor and getting rid of the debt due to the partnership. Well, then, what happens when the warrants are handed over? He swears that they are immediately made use of for the purposes of the partnership—that is to say, the storekeepers who get the iron in their possession are directed to hold, and do hold, and register in their books this iron as property of the partnership. Really, under these circumstances, to suppose that the partnership is out of the concern, and that in some way or another Thomas Taylor Smith is alone concerned, seems to me to be absolutely impossible. The materiality of this thing, to my mind, is this: I am clearly of opinion, as a matter of fact, and as a matter of law consequent upon the fact, that if there had been any registering of this mortgage or charge, it ought to have been a registering in the name of Taylor Smith Brothers and Co. Having established that fact there is another matter of fact to which I ought to call attention, and that is, that the statute in sect. 43 says the mortgage shall be registered, and then it says: "If any property is mortgaged or charged with such entry as aforesaid being made, every director, manager, or other officer of the company, who knowingly and wilfully authorises or permits the omission of such entry shall incur a penalty not exceeding 50*l*." It is a remarkable thing that the penalty, subject to an allowance to be made to the informer, is to go

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to Her Majesty's Consolidated Fund; but what I want to call particular attention to is this, that if the liability or the disability, or whatever it is, that is sought to be enforced here, depended upon that section of the Act, I should say that Thomas Taylor Smith is not within it. In my opinion there is no evidence to show that he has knowingly or wilfully authorised or permitted the omission of such an entry, because those words, without saying what their precise meaning is, to my mind suppose a man's real culpable negligence—something wrong. I dare say, if Thomas Taylor Smith were asked the question, he would say "that he did not know this was a case within the Act of Parliament, if he knew anything about it at all; and that he supposed what was done was rightly done by the clerk who kept the books; and I do not think he would be liable to the penalty. But this case has been dealt with as though these words about the penalty were not there. And although that perhaps goes to the general merits of the question, it is a remarkable thing that the particular penalty of 50*l.* should be imposed by the Legislature, and that the judges should impose a penalty beyond and in addition to that. That is a thing which goes to what one may call "the correctness" of the decision which governs this case; but I think, supposing that decision to be right, it would have been as right, if those words about the penalty had not been there, because the words "every limited company under this Act shall keep a register and shall enter," and so forth are imperative and impose a duty upon the company. Whether a *mandamus* to compel registration would lie, I do not know, but the difficulty to my mind about a *mandamus* is to see who is to apply for it, because I cannot see who it is that would require the entry upon the register of the mortgage in order to perfect it under the Act. It would not be anybody who is not a director, because it is admitted that the mortgage is good without it, and it would not be anybody who is a director, because of course he could have it done. Therefore I see some doubt about getting the *mandamus* there. Still there is a direction that it shall be registered, but that is a direction to the court. It is a direction to the court which must be carried into execution by those who manage the company, that is, the directors. I do not see, if it had been the misfortune of a director that he had been ill and away, as is possible, what would have happened to his mortgage. I do not see that it would have been an obligation on him, the non-performance of which he would be in any way liable for; but supposing he is there, and acting and attending to the affairs of the company, it is a duty which is to be performed, or seen to by him. I think the decisions in the two cases which govern this would have been the same if only these words had been there without the clause as to penalty. That being so, those two cases would show a personal disability on the director or officer who neglects to see this done. But this is a case in which it is sought not to visit him only with the consequences of that personal disability, but to visit two other persons as well as himself, and possibly to visit them to the exclusion of himself. It may be that when the concern is wound-up not a shilling would be coming to him, and that, if these 2500 tons of iron are taken away for the benefit of the company, it is

his two partners alone who will suffer, and that he will not suffer to the extent of one shilling except in the sense of being under some liability to them for his quota, which he will not be able to pay, in the possible condition of things. The question is then, whether they are to suffer for this personal disability of their partner; and I cannot understand why they should. If I were to apply common law considerations in this case I think they certainly would not. I have asked whether, according to equitable considerations, where one person is connected with another, which other is under personal disability, that first one suffers; and, so far as I have been able to get an answer, it seems to me that the rule is not that, where two persons are conjoined with another who is under a personal disability these two suffer in consequence. I cannot see why, if there has been any wrongful omission which has done no injury to anybody, anybody should suffer; and I do not know why, if it has done injury to any one in particular, the wrong-doer should not be compelled to make amends, and not innocent persons connected with him. I am also at a loss to know why there should be this summary remedy given. Let us suppose it had not been given; what would then have been the course of the liquidator in this case? He has called upon this particular respondent, and I do not see that any other party is necessary; according to the rule it is not, because the liquidator says "It is your property alone." But the respondent comes in and says, "It is not my property alone; it is the property of myself and two other persons as my partners." Supposing there had not been that summary process, what would have happened? I suppose the liquidator would have brought what used to be called an action of trover, an action for the wrongful conversion of the estate, and the defendant would have said, "The property is not in you." The liquidator's case would have been, "The property is mine." The defendant's case would have been, "No, the property is not in you; it is in two other persons and myself." Could the liquidator have made out any title to the property as against those two? Upon what ground? Supposing that before the liquidation they had sold the property and pocketed the money, could the property have been followed into the hands of the vendee? I should hope not. I cannot think therefore that an action at common law would have been maintainable for the recovery of this property against those persons in whom it is, subject to this personal disability. If there is a personal disability on the part of this particular defendant, why is he not to be got at personally; why is not an action brought against him saying, "You have, by your breach of duty, injured somebody; or at all events you have got a benefit which you are personally disabled from getting?" That would be a reasonable thing, and that would be a way of getting at the wrong-doer without injuring those who are not wrong-doers. But this proposition to get these chattels is a proposition to injure people who are perfectly innocent. It appears to me therefore that, acting upon the authority of the cases that have been referred to, the right remedy of the liquidator would be to go against the defendant for money the benefit of which he gets for himself and his firm, though under a personal disability to assert the title as it, and not to go against the property which

belongs, as undoubtedly it does, to himself and two other persons who are perfectly innocent persons, and who may have to lose the whole of it supposing this application should be successful. As I said before, it may well be that one may be under a bias and under an influence to distinguish this case, but I have done my best to get at the truth of it. I am told by counsel for the respondent, and nobody has contradicted it, that the principle of equity is this, that the disability is personal and does not affect those associated with him. I think in the case put by the Master of the Rolls, which I was about to put myself, of an insurance company unincorporated, where there are thousands who would be in the situation these two partners are in, it would be monstrous to say that because of the personal disability of one member of the partnership the whole of the other 999 members are to lose their interest in it. It seems to me there is no such principle of equity, and I feel confident there is none of law, which would involve this consequence, and that in this particular case, assuming as I do the authority of the two cases that have been referred to, if the delinquent director-partner is to be got at all, he must be got at personally, and not in conjunction with his two partners by their property being taken from them. I think, therefore, there is a distinction between this case and those by which we are governed, and that the appeal should be dismissed.

Solicitors: Bower and Cotton, for Dodds and Co., Stockton; Skum, Crossman, and Crossman, for Kidson, Son, and Mackenzie, Sunderland.

# SITTINGS AT WESTMINSTER.

Dec. 11 and 12, 1878; and March 22, 1879.

(Before BRAMWELL, BENTZ, and COTTON, L.J.J.)

BRYANT V. LEFEVRE AND OTHERS. (a)

*Basement—Prescription—Obstructing access of air—Nuisance.*

The owner of a dwelling-house cannot claim, as against an adjoining occupier, a prescriptive right, either at common law or by statute, to have a free access of air to his premises.

Plaintiff was owner of a house which for more than twenty years had had the free access of air to it. Defendant, an adjoining occupier, raised the walls of his house, and piled timber upon the roof, so as to cause plaintiff's chimneys to smoke. Plaintiff claimed damages in respect of the nuisance so caused.

Held (reversing the judgment of Lord Coleridge, C.J.), that plaintiff was not entitled to maintain the action.

APPEAL from a decision of Lord Coleridge, C.J.

The statement of claim alleged that the plaintiff resided at 353, Hackney-road, Middlesex, and that the defendants were timber merchants, occupying premises adjoining the plaintiff's house; that "before the circumstances hereinafter set out the plaintiff had always, and for much more than twenty years, a free access of air to his chimneys, which were on the side of his house next to the house of the defendants. About the month of June 1876, and after the plaintiff was in occupation of his said house, the defendants raised the walls of their house so high, and put stacks of timber on the roof of the said house, so as to

interfere with and prevent the free access of air to the plaintiff's chimneys, and prevented a proper draught in the same, and the plaintiff was totally unable to use his said chimneys, and the enjoyment by the plaintiff of his house was much diminished and injured." The plaintiff claimed damages and an injunction.

The statement of defence denied all the material allegations in the statement of claim, and denied that the plaintiff had any claim at law to a free access of air to his chimneys.

At the trial, before Lord Coleridge, C.J. and a special jury, at the Hilary sittings at Middlesex, 1878, it was proved that the plaintiff and defendants occupied adjoining houses, which were of about the same height up to the year 1876, and that they had remained in the same condition for about thirty years. In 1876 the defendants took down their house and began to rebuild it. They built up a wall by the side of the plaintiff's chimneys much higher than was the wall which had formerly stood there, and they stacked timber on the roof of their own house, and thereby caused the plaintiff's chimneys to smoke, which, it was alleged, they had never previously done.

Lord Coleridge, C.J. allowed the statement of claim to be amended by alleging that, by reason of the facts therein mentioned, the defendants had created a nuisance to the injury and prejudice of the plaintiff in respect of his enjoyment of his house and premises. The jury found that there had been free access of air to the chimneys of the plaintiff's house for more than twenty years, and that the erection of the defendants' wall materially interfered with the comfort of human existence on the plaintiff's premises.

On these findings Lord Coleridge, C.J. directed judgment to be entered for the plaintiff.

The defendants appealed.

Gates, Q.C. and Edward Clarke for the defendants.—No action will lie for the interference with the free access of air to the plaintiff's land. There is no such easement as the one claimed here. The defendants are entitled to raise their roof or to place timber upon it. There can be no such right as the plaintiff claims, either as a natural right of property or by prescription. *Webb v. Bird* (4 L. T. Rep. N. S. 445; 10 C. B. N. S. 268; 30 L. J. 384, C. P.; in Ex. Ch. 13 O. B. N. S. 841; 31 L. J. 335, C. P.) is directly in point, and concludes the question. The cases with respect to support for buildings from the adjoining soil are analogous to the present case, and show that this claim cannot be supported. They are collected in *Angus v. Dalton* (L. Rep. 3 Q. B. Div. 85; on appeal, L. Rep. 4 Q. B. Div. 162). The claim for a nuisance cannot be sustained, because the alleged nuisance is in hindering the escape of smoke, which the plaintiff himself has made.

A. Cock (Staveley Hill, Q.C. with him) for the plaintiff.—An action may be maintained for stopping the access of air to a building whereby the value of it is lessened:

*Aldred's case*, 9 Co. Rep. 58, b.

The finding of the jury, that the comfort of human existence has been materially interfered with by what the defendants have done, entitles the plaintiff to bring his action. He may claim damages and an injunction:

*Walter v. Selfe*, 4 De G. & Sm. 315, at p. 323; 20 L. J. 435, Ch.



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The smoke, which but for the alterations on the defendants' premises would have escaped, has been forced back, causing a nuisance to the plaintiff, for which he can recover damages :

*Dent v. Auction Mart Company*, 14 L. T. Rep. N. S. 827; L. Rep. 2 Eq. 238; 12 Jur. N. S. 447; 35 L. J. 555, Ch.

[COTTON, L.J. mentioned *The City of London Brewery Company v. Tennant* (L. Rep. 9 Ch. 212), where Lord Selborne points out the distinction between claims in respect of the access of light and claims in respect of the access of air, also pointed out by Wood, V.C. in *Dent v. The Auction Mart Company* (*ubi sup.*)] The occupiers of the plaintiff's house have had the access of air to the chimneys as of right for more than twenty years. A grant must therefore be presumed :

Starkie on Evidence, part 3, ch. 1, p. 750, 4th ed.

This is a presumption of law which needs no finding of the jury to support it :

Taylor on Evidence, vol. 1, part 1, ch. 5, p. 148, 7th ed.;

*Deeble v. Linehan*, 12 N. C. L. Rep. 1.

*Gates*, Q.C. replied.

*Cour. adv. vult.*

March 22.—The following judgments were delivered :

BRAMWELL, L.J.—The plaintiff says that he is possessed of a house; that for more than twenty years this house and its occupants have had the wind blow to, over, and from it, and that he has, as so possessed, the right that it should continue to do so; that the defendants have interfered with this right, and prevented the free access and departure of the wind. He adds that they have committed a nuisance to him as so possessed. He has proved that he is possessed of a house more than twenty years old; that the wind had access to it and passage over it for twenty years without the hindrance recently caused by the defendants; that the defendants have caused a hindrance by putting on the roof of their house (which is as old as the plaintiff's) timber to a considerable height, thereby preventing the wind blowing to and over the plaintiff's house when in some directions, and passing away from it when in others; that this causes his chimneys to smoke as they did not before, to the extent of being a nuisance. The question is, if this shows a cause of action. First, what is the right of the occupier of a house in relation to air, independently of length of enjoyment? It is the same as that which land and its owner or occupier have; it is not greater because a house has been built. That puts no greater burthen or disability on adjoining owners. What, then, is the right of land and its owner or occupier? It is to have all natural incidents and advantages as nature would produce them. There is a right to all the light and heat that would come, to all the rain that would fall, to all the wind that would blow—a right that the rain which would pass over the land should not be stopped and made to fall on it, a right that the heat from the sun should not be stopped and reflected on it, a right that the wind should not be checked, but should be able to escape freely; and, if it were possible, that these rights were interfered with by one having no right, no doubt an action would lie. But these natural rights are subject to the rights of adjoining owners, who for the benefit of the community have, and must have, rights in relation to the use and enjoyment of their property that qualify and

interfere with those of their neighbours—rights to use their property in the various ways in which property is commonly and lawfully used. A hedge, a wall, a fruit tree, would each affect the land next to which it was planted or built. They would keep off some light, some air, some heat, some rain, when coming from one direction, and prevent the escape of air, of heat, of wind, of rain, when coming from the other; but nobody could doubt that in such case no action would lie. Nor will it in the case of a house being built and having such consequences. That is an ordinary and lawful use of property, as much so as the building of a wall, or planting of a fence or an orchard. Of course, the same reasoning applies to the putting of timber on the top of a house, which, if not a common, is a perfectly lawful act; and it would be absurd to suppose that the defendants could lawfully put another storey to their house with the consequences to the plaintiff of which he complains, but cannot put an equal height of timber. These are elementary and obvious considerations, but if borne in mind will assist very materially in the decision of this case. The plaintiff then, merely as possessed of land or house, has not the right claimed. But he goes further, and says that the house and its owner and occupier have had the enjoyment of this benefit for twenty years. He therefore relies on that as showing a prescriptive title, or title by lost grant. Whether he has so stated his claim as to raise such a case, it is not necessary to say; for we are of opinion that, even if he has, he has not established it; that no such right as he claims can be established by mere enjoyment without interruption for however long a period. It certainly cannot be claimed under the Prescription Act, nor can it by lost grant, unless of such a character that it could be claimed by the common law prescription. For the expedient of a lost grant is only applicable to cases where something prevents the application of the common law prescription. We do not say there might not be an express grant or covenant not to interfere with the passage of air over neighbouring property, which could be enforced against the grantor or covenantor, and even against his assigns, with notice; whether it could against assigns without notice it is not necessary to say. But the lost-grant doctrine is ancillary to the common law prescription doctrine. Can this right, then, be claimed under that? Now, certainly the land as such has enjoyed this as of right for all time since the sun first shone and the wind first blew, and it is not a case of twenty or any finite number of years. But that enjoyment is the result of the natural right of which we have spoken, and not of an acquired right. Then does the existence of a house on the land for twenty years make any difference? None. The owner of the land enjoyed the free passage of the air over his land when it was a field, subject to the right of his neighbours to build on their own land, or to do on their own land any lawful act. He now enjoys it over his land with a house on it, subject to the same rights. If the house on his land is less commodious by reason of any lawful act of his neighbour done on the adjoining land, then, to use the expression of the judges in *Bury v. Pope* (Cro. Eliz. 118), "it was his folly to build his house so near to the other's land." It may be said that, if this reasoning is correct, it is applicable to lights. So it is to a great extent,

and anyone who reads the cases relating to the acquisition of a right to light will see that there has been great difficulty in establishing it on principle. Willes, J. says it is anomalous (8 C. B. N. S. 285); and per Blackburn, J. (13 C. B. N. S. 844). In the case referred to, of *Bury v. Pope*, it was held that where there are owners of adjoining pieces of land, and one builds a house, and for thirty or forty years has access of light to it, yet the other may build a house adjoining, and shut out the light. This shows the general principle, though the law as to light is now different, as a right is gained to it by enjoyment. But there is this difference between this claim and the claim to light: the right in that case is always limited to the particular window or aperture through which the light and air have had access; it is one therefore against which an adjoining owner can defend himself by blocking it up within the period necessary for the gaining of a right. Lord Wensleydale thought this a very strong theory, as a great burden on the adjoining landowner; *Chasemore v. Richards* (7 H. of L. Cas. 349). But here the claim is of such a character that its enjoyment could only be prevented by surrounding the land with erections as high as it might at any time be wanted to build on the land. The principle of *Chasemore v. Richards* is applicable, viz., that the right claimed is not one the law allows, being too vague and uncertain—one the acquisition of which the adjoining owner could not defend himself against; and that the remedy of the plaintiff in such a case as this is to build higher, as in such a case as that it was to dig deeper. We are of opinion that on principle the plaintiff fails to make out his right as claimed. The authorities are to that effect. *Webb v. Bird* (10 C. B. N. S. 268 and 13 C. B. N. S. 841) is really in point. It is true that in that case the mill appeared to have been built in 1829. I believe the date of the building of the plaintiff's house in this case did not appear; it will hardly be supposed to be one hundred years old. But the reasoning in that case would be equally applicable to a claim by prescription from time whereof the memory of man runneth not to the contrary, if the date of the building of the plaintiff's house could not be shown. It is really hardly necessary to notice the other cases, which are sufficiently dealt with by the judges in *Webb v. Bird*. We may, however, mention *Roberts v. McOow* (1 M. & B. 228), where Patteson, J. was of opinion that a claim like the present could not be supported. All the reasoning and all the considerations that prevailed in *Chasemore v. Richards* are opposed to it. Where it has been said that there is a right to air, there is good ground for supposing that the wholesomeness of the air has been interfered with, or that there was some peculiarity in the land or building which made the air necessary in a definite place. We are of opinion, then, that the action cannot be maintained on this ground. But it is said, and the jury have found, that the defendants have done that which has caused a nuisance to the plaintiff's house. We think there is no evidence of this. No doubt there is a nuisance, but it is not of the defendants' causing. They have done nothing in causing the nuisance; their house and their timber are harmless enough. It is the plaintiff who causes the nuisance, by lighting a coal fire in a place the chimney of which is placed so near the defendants' wall that the

smoke does not escape, but comes into the house. Let the plaintiff cease to light his fire; let him move his chimney; let him carry it higher, and there would be no nuisance. Who, then, causes it? It would be very clear that the plaintiff did, if he had built his house or chimney after the defendants had put the timber on theirs, and it is really the same, though he did so before the timber was there. But (what is in truth the same answer) if the defendants cause the nuisance, they have a right to do so. If the plaintiff has not the right to the passage of air except subject to the defendants' right to build or put timber on their house, then his right is subject to their right, and, though a nuisance follows from the exercise of their right, they are not liable. *Sic utere tuo ut alienum non laedas* is a good maxim; but in our opinion the defendants do not infringe it; the plaintiff would if he succeeded.

CORROX, L.J.—This is an appeal of the defendants from so much of a judgment of Lord Coleridge in favour of the plaintiff as was given in respect of the interruption of air to the plaintiff's chimney, caused by the defendants. The jury have found (1) that there had been for more than twenty years free access of air to the chimneys of the plaintiff's house; (2) that the defendants interfered with it; (3) that the erection of the defendants' wall sensibly and materially interfered with the comfort of human existence in plaintiff's premises; (4) that the plaintiff sustained damage—40*l.* by the building of defendants' wall, 20*l.* by falling of timber and other matters from defendants' stacks on the plaintiff's premises. The first question is whether the plaintiff has, either as a natural right of property or as an easement, a right as against the defendants to have the access of air to his chimney without any interruption by the defendants. In my opinion he has no such right. In my opinion it would be a contradiction in terms to say that a man has a natural right against his neighbours in respect of a house, which is an artificial addition to and not a user of the land. That the owner of a house has as against his neighbours no natural rights in respect of his house is shown by the cases as to subjacent and lateral support. These show that, while every owner of property has independently of user a natural right to support for his land, if he adds buildings to his land, and thereby requires an increased support, he, in the absence of express grant, can only acquire a right to such support by user—that is, by way of easement. The right (if any) of the plaintiff to the uninterrupted flow of air to his chimney must therefore be by way of easement. Cases to prevent, or to claim damages for, interference with ancient lights are frequently spoken of as cases of light and air, and the right relied on as a right to the access of light and air. But this is inaccurate. The cases as a rule relate solely to the interference with the access of light, and in no case has any injunction been granted to restrain interference with the access of air. It is unnecessary to say whether, if the uninterrupted flow of air through a definite aperture or channel over a neighbour's property has been enjoyed as of right for a sufficient period, a right by way of easement could be acquired. No such point is made in this case, and I am of opinion that a right by way of easement to the access of air over the general ascertained surface of a neighbour cannot be acquired by such

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enjoyment. For this *Webb v. Bird* (10 C. B. N. S. and 13 C. B. N. S.) is an authority; and, as the last decision in that case was in the Exchequer Chamber, it would be sufficient to rely upon the authority of that case. But I think it better to say that I entirely agree with that decision and with the reasons given in this case by Bramwell, L.J. In my opinion therefore the plaintiff has no right in respect of the flow of air to or from the chimney. Every man, however, has a natural right to enjoy the air pure and free from any noxious smells or vapours, and anyone who sends on to his neighbour's land that which makes the air impure is guilty of a nuisance. Here it is found that the erection of the defendants' wall has sensibly and materially interfered with the comfort of human existence in the plaintiff's house, and it is said this is a nuisance for which the defendants are liable. Ordinarily this is so; but the defendants have done so, not by sending on to the plaintiff's property any smoke or noxious vapours, but by interrupting the egress of smoke from the plaintiff's house in a way to which, as against the defendant, the plaintiff has no legal right. The plaintiff creates the smoke which interferes with his comfort. Unless he has, as against the defendants, a right to get rid of this in the particular way which has been interfered with by the defendants, he cannot sue the defendants because the smoke made by himself, for which he has not provided any effectual means of escape, causes him annoyance. It is as if a man tried to get rid of liquid filth arising on his own land by a drain into his neighbour's land. Until a right had been acquired by user the neighbour might stop the drain without incurring liability by so doing. No doubt great inconvenience would be caused to the owner of the property in which the liquid filth arises. But the act of his neighbour would be a lawful act, and he would not be liable for the consequences attributed to the fact that the man had accumulated filth without providing any effectual means of getting rid of it. I am of opinion that so much of the judgment as is appealed from must be reversed.

BARR, L.J. concurred in the judgment of Bramwell, L.J.

*Judgment reversed.*

Solicitors for plaintiff, *Sorrell and Son*.

Solicitors for defendants, *Wilkins, Blyth, and Fanebawse*.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

May 3 and 10.

(Before FRY, J.)

BOLTON v. THE SCHOOL BOARD FOR LONDON. (a)

*Right of way—Appendant or appurtenant—Two ways—Way of necessity—Right of election—Convenient way.*

A. contracted to sell the land and houses in a certain street "with the appurtenances." There was a road leading into this street at both ends over freehold property of the vendor, but there were no words in the contract with regard to any right of way. The purchasers claimed a right of way over both the roads.

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

*Held, they were not appendant or appurtenant to the property sold, and, therefore, the purchasers were only entitled to a right of way over one of them as a way of necessity.*

*Held also, that both ways being convenient, the vendor, as grantor, was entitled to elect over which of the two roads he would grant that right of way.*

### ADJOURNED SUMMONS.

This was a summons for the settlement of the draft conveyance of certain land.

On the 19th Dec. 1877, the trustees of the estate of a Mr. Bolton, entered into a contract with the School Board for London, for the sale to the latter of certain land and houses, which they required for the purpose of building a school.

One portion of these premises was known as Buckingham-mews, and the other was certain houses fronting a road called Lonsdale-road, and known as Buckingham-terrace. The backs of these houses faced the backs of the houses on one side of Buckingham mews. The Buckingham-mews portion of the property was the freehold of the trustees, and the Buckingham-terrace portion was the leasehold property of the trustees. Buckingham-mews was approached by two roads, the one from Portobello-road, which is roughly speaking to the west of the property, and which passed over other freehold property of Mr. Bolton.

The other road was one which passed from the eastern end of Buckingham-mews into the Lonsdale-road, and that also was over the freehold of Mr. Bolton. That part of the property in Buckingham-mews was described in the agreement as

All those the several messuages and hereditaments described in the first schedule hereto with their appurtenances, and the inheritance thereof, in fee simple, free from incumbrances, but subject to the several indentures of lease of the same premises respectively, specified in the said first schedule hereto, and all such, if any interest as the vendors possess over the yard in Buckingham-mews, which yard is marked in the plan hereinafter, referred to by the figure 1, and colour blue.

That in Lonsdale-road as

All those several messuages and hereditaments in the 2nd schedule hereto with their appurtenances for the unexpired residue of a term of 99 years from 25th Dec. 1844 therein granted by an indenture of lease dated 2nd Aug. 1853, subject to underleases free from encumbrances except rent.

By the draft conveyance the trustees granted and conveyed to the School Board and their assigns all those two pieces and parcels of land situate, &c., together with certain messuages in Buckingham-mews, Portobello-road, together with all erections, fixtures, ways, lights, rights, privileges, easements, and appurtenances whatsoever for the said pieces or parcels of land and hereditaments respectively or any part thereof, respectively appertaining or reputed as part or member thereof, or as appurtenant thereto; and also assigned a certain piece of land and messuages to the School Board with their rights, easements and appurtenances. The trustees inserted the following words at the end of the general words:

Except any right or way or other easement over, upon, or through the piece of land coloured brown upon the said plan.

The part coloured brown was the entrance to Buckingham-mews from Portobello-road. Instead of these words the School Board wished the following to be inserted:

And also with the benefit of such right of way for all

purposes as the said M. A. Bolton and J. Allen, as such trustees as aforesaid, can grant over all those two pieces of ground, road, or way, coloured respectively brown and green on the said plan and leading to the said piece of land, coloured blue on such plan, from Portobello-road to Buckingham-terrace respectively.

A summons was taken out in chambers in order that the conveyance might be settled there, but was adjourned into court and now came on for hearing.

*J. Pearson, Q.C. and Daniel Jones* for the trustees of Mr. Bolton's estate.—The land now in question was sold to the School Board for a particular purpose, and they cannot use it for anything else. That purpose was to build a school, and the entrance from Lonsdale-road would be quite sufficient for that. If they wanted more they ought to have asked for it. The land being taken by the School Board under their compulsory powers they do not obtain such a wide easement as an ordinary purchaser, but only what is absolutely necessary for the purpose for which the land is taken :

*United Land Company v. Great Eastern Railway Company*, 33 L. T. Rep. N. S. 292; L. Rep. 10 Ch. App. 586;

*Norton v. London and North-Western Railway Company*, 39 L. T. Rep. N. S. 25; L. Rep. 9 Ch. Div. 623.

*Higgins, Q.C. and Simmonds*, for the plaintiff in an action for the administration of Mr. Bolton's estate, supported the contention of the trustees. They referred to

*Wood v. Saunders*, 32 L. T. Rep. N. S. 363; L. Rep. 10 Ch. App. 582.

*North, Q.C. and Kirby* for the School Board.—This contract will pass the right of way without the words "with appurtenances." The land taken was shown on the plan by a particular colour. There is no doubt the School Board have a right to one way, the question being which. As it stands, the agreement does not give the soil of either road. The entrance to Buckingham-mews from Portobello-road is paved and flanked on each side by a kerbed pavement that has all the appearance of a public street, and therefore we have a right of way over it :

*Watts v. Kelson*, 24 L. T. Rep. N. S. 209; L. Rep. 6 Ch. App. 166;

*Langley v. Hammond*, 13 L. T. Rep. N. S. 636; L. Rep. 3 Ex. 161.

Here the mews is sold, and there are no words giving a road out of it, but if a house is sold, it gives a right of way over the road :

*Gale on Easements* (5th ed.), 102.

*Kay v. Ozley*, 33 L. T. Rep. N. S. 164; L. Rep. 10 Q. B. 360.

One way is a way of necessity. [FRY, J.—If there are two ways, one of which is a way of necessity, can you claim both?] As between vendor and purchaser we have a clear right, but it is said that the School Board is in a different position. The land was not taken under their compulsory powers, but the trustees have agreed to sell this land to them; therefore the agreement must be construed in the ordinary manner :

*Clark v. School Board for London*, 29 L. T. Rep. N. S. 903; L. Rep. 9 Ch. 120.

There is no reason because a school is to be built on the ground that there should be any difference in the ordinary rights of vendor and purchaser. Besides the plan on the agreement clearly shows an entrance from Portobello-road, and the trustees are bound by it. When the school is built, the

road from Portobello-road will be required for a side entrance :

*Denny v. Hancock*, 23 L. T. Rep. N. S. 636; L. Rep. 6 Ch. App. 1.

If the School Board had a right of access to the houses in Buckingham mews, they must have the same right now, though the houses are pulled down, and a school built in their place. They also referred to

*Roberts v. Karr*, Taunt. 495;

*Suffield v. Brown*, 9 L. T. Rep. N. S. 627;

*Allan v. Gomme*, 11 A. & E. 759;

*Henning v. Burnet*, 8 Ex. 187, 194;

*Newcomen v. Coulson*, 36 L. T. Rep. N. S. 383; L. Rep. 5 Ch. Div. 133.

[FRY, J. referred to

*Eopley v. Wilkes*, 26 L. T. Rep. N. S. 918; L. Rep. 7 Ex. 298;

*Harding v. Wilson*, 2 B. & C. 96;

*Wimbleton and Putney Common Conservators v. Dixon*, 33 L. T. Rep. N. S. 697; L. Rep. 1 Ch. Div. 362.]

*Pearson, Q.C. in reply*—If the grantee chooses a way he must take the shortest, but if the grantor does so, the grantee must take what the grantor gives him. [FRY, J. referred to

*Rumble v. Heygate*, 18 W. R. 740;

*Viner's Abridgment*, Election, B.; and Co. Litt. 145 (b).]

A right of way of necessity can only arise by grant : *Procter v. Hodgson* (10 Ex. 824.) Under their compulsory powers they have taken more than is necessary and only want this right of way in order to sell that part. [FRY, J.—They took by agreement.] I submit they took under their compulsory powers, as we should not have let them have the land unless they had had those powers. He also referred to

*Pearson v. Spencer*, 8 L. T. Rep. N. S. 166; 3 B. & S. 761;

*Gale on Easements* (5th ed.), 149.

*Our. adv. vult.*

May 10.—FRY, J.—The question which arises for decision on this summons is as to the proper form of conveyance to be executed under a contract between the School Board of London and the trustees of the estate of the late Mr. Bolton. Strictly speaking the question probably is not raised at the right time; in this sense, that if the conveyance had been executed in the strict form, the question which I am now about to decide would be left for decision upon the conveyance, but the question having been mooted before the conveyance has been executed, the parties have desired that the conveyance should be put in such a form as to preclude the raising of this question, and I, therefore, propose to determine it now. [His Lordship then stated the facts of the case.] The contract was for the sale of the property which I have mentioned without any words with regard to the right of way and, in my view, therefore, the effect of that contract was to carry these premises with all that was appurtenant and appendant to them. The trustees of Mr. Bolton are perfectly willing to grant to the purchaser a right of way over the road leading into Lonsdale-road, but they decline to grant a right of way over the road which has hitherto been used into Portobello-road. The School Board say they are entitled to such a right of way. Now the first question which arises is this, were these roads, or was the way into Portobello-road, appurtenant or appendant to Buckingham-mews. In my opinion

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neither of them was appurtenant or appendant, because those words strictly and properly speaking never carry a right of way over another tenement of the grantor, and for this simple reason, that when a man is the owner of two fields and he walks over the one to get to the other, that walking is attributable to his ownership of the land over which he walks, and not necessarily to his ownership of the land to which he is walking; therefore it has been well decided in the two cases of *Harding v. Wilson* (2 B. & C. 96) and *Barlow v. Rhodes* (1 C. & M. 439) that these words, strictly speaking, do not carry a right of way over the grantor's own land. Of course there may be circumstances in the deed which show that the words are used in a secondary sense, and if you find a distinct intention to convey a particular way, and that way is accurately described as appendant and appurtenant, that will not prevent the way passing, but those are not circumstances which arise here. Therefore, in my judgment, the right of way claimed cannot pass under the right to the appurtenants or appendants to the property granted. The next question is whether the grantee can claim it as a right of way of necessity. In the first place, it strikes one that the grantee cannot be entitled to two rights of way of necessity, because there can only be one right of way of necessity. But it is said by the trustees of Mr. Bolton that there is no way of necessity here at all, and that is alleged for two reasons: it is said that the leaseholds being joined to the freehold having a frontage and therefore a right of way, into Lonsdale-road, that right of way must be held to subserve both the freehold and leasehold premises. In my view that is not a sound contention, because, although the leaseholds in this case may be for a long term of years, I must try the question just in the same way as if it was for a short term of years. It appears to me, that to say a freehold estate will not have a right of way as incident to it of necessity, because a portion of your freehold interest will have a right of way over other land of the lessees is not a sound proposition. In the next place it is said that, however that may be in most circumstances, yet, inasmuch as here the School Board purchased for the purpose of erecting school houses or accommodation, and they cannot do that until they obtain the reversion of the Buckingham-terrace property, it must be assumed that they will obtain that, and will then, being in possession of the freehold of the two lots, have a right of way to Buckingham-mews over that of their other freehold. That argument does not appear to me to be sound, for this reason, that it may be that the School Board, acting with perfect propriety, now may acquire the leasehold interest in the Buckingham-terrace property, and yet before they have purchased the reversion they may find that the land is superfluous, and may desire to part with the leasehold interest without ever acquiring a freehold. I think, therefore, one right of way did pass over the freehold of Mr. Bolton as incident to the Buckingham-mews. Then arises the question, in whom is the right of election to determine which of the two rights of way is to be granted to Buckingham-mews. I might, if I had not found authority on the point, have entered on the inquiry upon the general doctrine of election, but I have not done so in this case, because it appears to me that the matter is settled by authority, and the authorities deter-

mine that the right of election is in the person who creates the right of way; in other words, in this case it is in the grantor. The first case which bears upon that is the case of *Clarke v. Esgge* (2 Rol. Abr. 60), which lays down the general rule that where one man grants a close, which is land-locked, and is the owner of the adjoining close, he grants with it a right of way over the adjoining close as incident to the grant; as otherwise, says the reporter, he cannot have any benefit from the grant. Then it is added, "and the feoffor shall assign the way where he can best spare it." The next case which throws light upon it is a converse case; that is to say, it is a case in which the owner of two tenements disposed of the outer tenement, and retained the land-locked, and it was held that he would have a right of way over the outer tenement, and that he would have the right of selecting that way. That is the case of *Packer v. Welsted* (2 Sid. 39). There again the grantor, the person who created the right of way, had the right to select the way. These cases were considered in a much more recent authority of *Pearson v. Spencer* (1 B. & S. 571) where the Court of Queen's Bench in their considered judgment, delivered by the present Lord Blackburn after referring to the authorities I have cited, said this: "In each case it seems to have been thought, the person by whose act the way was created was subsequently to select the way, subject only to this that it should be a convenient way." Now no evidence or argument has been addressed to me to show that the way from the end of Buckingham-mews into Lonsdale-road is not a convenient way. I assume it, therefore, to be such, and hold that the right of election was in Mr. Bolton's trustees, and I therefore think they discharge their duty in assigning that right of way. I propose, therefore, that the conveyance shall contain words to this effect, "including a right of way for all purposes whatsoever, over the strip of land coloured green on the plan from Buckingham-mews to Buckingham-terrace, or the Lonsdale-road, but not including any right of way from the western end of the mews into Portobello-road." Inasmuch as this matter has been brought before me really for the decision of a question which might arise hereafter, and was a very fair question to be considered upon the contract, I think that no costs ought to be awarded on either side.

Solicitors for the School Board for London, Gedge, Kirby, and Mullett.

Solicitors for the other parties, Allen and Edwards; Cronin and Bivolta.

## QUEEN'S BENCH DIVISION.

March 15 and April 5.

(Before COCKBURN, C.J. and MELLOR, J.)

THE PHARMACEUTICAL SOCIETY OF GREAT BRITAIN  
v. THE LONDON AND PROVINCIAL SUPPLY ASSOCIATION (LIMITED). (a)

APPEAL FROM INFERIOR COURT.

*Pharmacy Act 1868* (31 & 32 Vict. c. 121), ss. 1, 15  
—Sale of poisons by corporation—Corporation liable to penalty—"Person" to include corporation.

Any corporation whereof the members are not all duly registered pharmaceutical chemists or

(a) Reported by A. H. FOYER, Esq., Barrister-at-Law.

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chemists or druggists, which shall sell or keep open shop for the retailing, dispensing, or compounding poisons, is liable to the penalties imposed by the Pharmacy Act of 1868, although such business is managed by a duly registered chemist who is a member of the corporation.

The defendants were a company registered under the Companies Acts 1862 and 1867. The object of the company was to purchase or acquire the trade or business of a wholesale and retail grocer and general warehouseman.

W. M., who was not a duly registered chemist within the meaning of the Pharmacy Act, was the managing director. The business of the company included a department for the sale of drugs, and for retailing and compounding poisons within the meaning of the Pharmacy Acts. The business of the drug department was conducted by one H. E. L., a duly registered chemist, with two duly qualified assistants. H. E. L. was a partner in the company, but was paid by salary for superintending the drug department. An action was brought by plaintiffs to recover from defendants a penalty under 31 & 32 Vict. c. 121 for having sold poisons in contravention of the Act.

Held, that the plaintiffs were entitled to recover, as the intention of the Legislature was to exclude all persons other than the registered members of the Pharmaceutical Society from keeping open shop for the compounding or retailing of poisons. That the word "person" in sections 1 and 15 of the Pharmacy Act applies to a corporation as well as to a natural person, and therefore the defendants could be sued, and were liable to pay the penalty imposed by sect. 15 of that Act.

This was an appeal by the plaintiffs from a decision of the judge of the Bloomsbury County Court in favour of the defendants in an action for a penalty under the 31 & 32 Vict. c. 121.

The facts are set out in the judgment of Cockburn, C.J. below.

The Attorney-General (Sir J. Holker, Q.C.) (*Lumley Smith* with him) for the plaintiffs.—Prior to 1868 any person might keep a chemist's shop and sell poisons, but by the Pharmacy Act restrictions are imposed on the sale of poisons. It requires that there should be some responsible person to fall back upon in case anything goes wrong. It is not intended that an unqualified person should conduct a business with a duly qualified assistant. The proprietor himself must be qualified. The word "person" in sects. 1 and 15 of the Act is wide enough to and does include a corporation:

Coke's 2 Inst. 732;

Maxwell on Statutes, 292.

An offence may be committed by a corporation (7 & 8 Geo. 4, c. 28, s. 14), and it may be proceeded against:

*Terry v. The Brighton Aquarium Company*, 32 L. T. Rep. 458; L. Rep. 10 Q. B. 306;

*Reg. v. Birmingham and Gloucester Railway Company*, 3 Q. B. 223;

*Reg. v. Great North of England Railway Company*, 7 L. T. Rep. O. S. 468; 9 Q. B. 315;

*Green v. The General Omnibus Company*, 1 L. T. Rep. 95; 29 L. J. N. S. 13, C. P.

It was the intention of the Legislature that every person should be prevented from keeping an open shop for the sale of poisons unless such person be a duly qualified chemist, but that intention could

not possibly be carried out if a corporation is allowed to escape the penalties imposed by the Act.

A. Wills, Q.C. (*Finlay* with him) for the defendants.—There are many passages in this Act where it cannot possibly be intended that the word "person" is to include a corporation. The word person does not naturally include a corporation at law. This may be a *casus omissus*. If the contention of the Attorney-General is correct, a corporation can never carry on the business of a chemist. That might apply to Apothecaries' Hall, but that surely was not the intention of the Legislature. 7 & 8 Geo. 4, s. 14, applies to certain defined cases. That is rather an argument to show that, except by Legislative provision, a corporation is not included in the word person.

*Lumley Smith* in reply.

*Our. adv. vult.*

April 25.—The following written judgments were delivered:

COCKBURN, C.J.—This is an appeal from the decision of the judge of the Bloomsbury County Court in favour of the defendants in an action for a penalty under the 31 & 32 Vict. c. 121, for having sold poison and kept open shop for the sale of poisons in contravention of that Act. By the first section of the statute it is enacted that it shall be unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons, or to assume or use the title "chemist and druggist, or chemist or druggist, or pharmacist, or dispensing chemist or druggist" in any part of Great Britain, unless such person shall be a pharmaceutical chemist or a chemist and druggist within the meaning of this Act, and be registered under this Act." And by the 15th section "any person who shall sell or keep an open shop for the retailing, dispensing, or compounding poisons, or who shall take, use, or exhibit the name or title of chemist and druggist, or chemist or druggist, not being a duly registered pharmaceutical chemist, or chemist or druggist, or who shall take, use, or exhibit the name or title of pharmaceutical chemist, or pharmacist, not being a pharmaceutical chemist, shall, for every such offence, be liable to pay a penalty or sum of five pounds, and the same may be sued for, recovered, and dealt with in the manner provided by the Pharmacy Act for the recovery of penalties under that Act." By the Pharmacy Act, sect. 12, the penalty recoverable under that Act is to be recovered in England or Wales "by plaint under the provision of any Act in force for the more easy recovery of small debts and demands." The defendants are a company registered under the Companies Acts 1862 and 1867 as a limited company, with a nominal capital of 10,000*l.*, divided into 1000 shares of 10*l.* each. Of these one William Mackness holds 560 shares fully paid up. Six persons (one of whom was Henry Edward Longmore) hold five shares with 2*l.* 10*s.* paid on each share. Three persons hold one share each with 2*l.* 10*s.* paid on each share. The remaining shares are unallotted. The defendants' company was registered on the 29th Jan. 1878, and was formed "To purchase or acquire the trade or business of a wholesale and retail grocer and general warehouseman" then carried on by William Mackness at 113, Tottenham Court-road. Mackness is the managing director of the com-

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pany. He is not a duly registered pharmaceutical chemist or chemist and druggist within the meaning of the Pharmacy Act 1868. Henry Edward Longmore is a pharmaceutical chemist or chemist and druggist within the meaning of the Act, but no other shareholder is so. The business of the company is carried on, as that of Mackness was before the company was formed, at 113, Tottenham-court-road, and includes, amongst other departments for the sale of various goods, a chemist's and druggist's shop or drug department, which is an open shop for the retailing, dispensing, and compounding poisons within the meaning of the Pharmacy Act 1868. Longmore, as has been stated, is and at the time of the sale of the poisons in question was a duly registered chemist and druggist within the Pharmacy Act 1868, and the business of the said drug department was conducted by him with the aid of two qualified assistants. He, with the two assistants, attended regularly to the drug department, and to nothing else. He and his assistants were the servants of the company, and were paid by salary or wages. Upon this state of facts the question presents itself whether the defendant company, as such, is amenable to the penal enactments of the statute. It was fully admitted on the argument, nor could it be contested, that if this had been an ordinary partnership, the individual partners, at all events such of them as were not qualified under the statute, would have incurred the penalties it imposes. The intention of the Legislature appears clearly to have been to prevent any shop or establishment existing for the sale of poisons except under the immediate superintendence and control of a duly qualified proprietor. It is not enough that the proprietor employs a qualified person to manage the business. The master must himself be duly qualified. Two parties could not combine to carry on the joint business of grocer and chemist, though the one attending to the latter department of the business might be a qualified chemist. There would be nothing to insure in such a case that in the absence of the qualified partner the other might not take upon himself to act in his stead, and thus the security against fatal mistakes in the dispensation of medicines which the statute was intended to insure might be seriously compromised. The defendants are therefore within the scope of this legislation, the case comes within the evil against which the statute was intended to provide a remedy. But they are said not to be within the statute as being an incorporated company; the main ground on which this contention rests being that the Act in question, in its prohibitory as well as its penal clauses, uses the term "person," a term which it is contended cannot be properly applied to a corporate body. The objection thus founded on the use of the word "person" in the penal clauses of the Act would seem at first sight to present some difficulty, but, when the scope and purpose of this legislation are taken into account, the difficulty does not appear to be insuperable. Reliance was placed by the Attorney-General in his argument in support of the appeal, on the enactment of the 14th section of the 7 & 8 Geo. 4, c. 28, that whenever any statute relating to any offence, whether punishable by indictment or summary conviction in describing the offender or the

offence, uses words importing the singular number or the masculine gender only, it shall be understood to include several matters as well as one matter, several persons as well as one person, males as well as females, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction. But that Act is expressly confined to proceedings on indictment or summary conviction, and therefore cannot apply here, where the proceeding is by civil action. It shows no doubt the disposition of the Legislature to include corporations under the general designation of person or individual in penal statutes. But the terms of the Act will not admit of its application to the present case. To solve the question we must therefore confine our attention to the statute itself on which this action is brought. That an incorporated company is within the mischief against which this legislation was directed is, I cannot help thinking, quite obvious. If a company, by reason of its being incorporated, is not within the provision of the Act and amenable to its penalties, and effect is to be given to the argument of Mr. Wills, it necessarily follows that such a company might openly carry on the business of chemists and druggists, and sell poison without a single member of the company, even the person employed to conduct this portion of their business, being qualified. The person actually selling the poisons might be amenable, and it was probably with the view to avoid this that in the present instance a qualified person was employed to manage this department of the defendants' business; but the company employing him would enjoy complete immunity. A person desiring to combine the business of a chemist and druggist with that of a grocer would have only to get one or two persons to join him, providing them with a share or two, as appears to have been done in the formation of this company, and so founding an incorporated company to set the statute at defiance. It cannot be supposed that the Legislature can have contemplated a result so entirely at variance with the policy and purpose of the Act, or intended to place incorporated companies on a different footing in this respect from that of ordinary partnerships or individuals. It is no doubt possible that, although joint-stock companies existed at the time this statute was passed, the formation of such companies for the purpose of continuing trades hitherto carried on singly, and among other things for that of superadding the business of the chemist and druggist to that of the grocer or provision merchant, may not have been present to the minds of those who framed and passed the statute. Still, if the case, though unforeseen, is within the mischief which the Legislature had in view, and the enactment is large enough to embrace it, without any forced or strained construction being put on the language of the Act, it is our duty to advance the remedy intended to be afforded. It is true that the term used in the 1st section of the Act is a "person," and that ordinarily speaking this word would not be applicable to a corporation. But when the meaning and effect of the enactment is looked at without too close an adherence to its precise phraseology, it amounts to no less than a general prohibition to every one not qualified according to



the Act from dealing in poisons, or carrying on the business of a chemist and druggist. The fallacy of the argument urged on behalf of the defendants is that it assumes that the prohibition is addressed to individual persons. But the provision being universal must extend to all persons, whether acting in an individual or corporate capacity. The defendants, it is true, ni thus infringing the law, are not acting in their individual capacity, and may not (but on this it is unnecessary to pronounce any opinion) be liable individually. But in their aggregate or corporate capacity they are breaking the law, and being in the latter capacity, as well as individually, within the prohibition, they must, if capable of being sued, be also amenable to the penalty, and must for this purpose be taken to be persons within the meaning of the statute. The fact so strenuously insisted on by Mr. Wills, that in other sections of the Act the word "person" is applicable to individual persons only, and not to a corporate body, only tends to show that the adoption of the business of chemist and druggist by incorporated companies like the present was not contemplated when the Act was passed. It by no means shows that the prohibition being general, and the mischief clearly within the statute, the company, though as such they may be incapable of complying with some of its requirements, as for instance to undergo examination under sect. 6, ought not to be held to be within the penal clauses of the Act, or should be allowed openly to break the law under the belief that they are beyond its reach. In the present case it so happens that a member of the company, who manages the chemical department of its business (Mr. Henry Edward Longmore), is a qualified chemist. But it is not as a member of the company that he so acts, but as the paid servant of the company. It is clear therefore that his being qualified will not exonerate the other members of the company who are not so. Nor would it be otherwise, even if it were as a member of the company that he so acted. So long as any of the company are disqualified the body is disqualified, and the one who, though himself qualified, acts for the body, becomes a party to their offence, and becomes liable conjointly with them. The qualified chemist, who, in partnership with a grocer, carried on the business of grocer and chemist, would be as liable to the statutory penalty as his unqualified partner. The County Court judge was therefore wrong in holding that because the chemical department of the defendants' business was managed by a qualified person the defendants were not liable to the penalty. Being thus of opinion that a company, though incorporated, is none the less within the prohibition of the statute, I come to the remaining question whether such a company is capable of being sued for the penalty provided by the 15th section. Upon this point the authorities referred to by the Attorney-General in his argument appear to me to afford a satisfactory answer, although it is true that a corporation cannot be indicted for treason or felony. It was established by the case of the *Birmingham and Gloucester Railway Company* (*ubi sup.*) that an incorporated company might be indicted for non-feasance in omitting to perform a duty imposed by statute such as that of making arches to connect lands severed by the defendants' railway. It was further held in *Reg. v. The Great Northern*

*of England Railway Company* (9 Q. B. 315), that an incorporated company could be indicted for misfeasance as in cutting through and obstructing a highway, though they could not be indicted for treason or felony, or offences against the person. In the present instance we are dealing not with an indictment on information, but with an action in a civil court. Though the sum to be recovered is no doubt a penalty for the infraction of the statute, the means to be resorted to for its recovery are of a purely civil character. If a corporation can be indicted for misfeasance, I am wholly at a loss to see why it may not be proceeded against in a civil suit for the recovery of a penalty which it has incurred by disobedience to a statutory prohibition. I am therefore of opinion that this appeal must be allowed, the decision of the late judge of the County Court reversed, and judgment entered for the plaintiffs.

MELLOR, J.—I have come with considerable hesitation to the conclusion that our judgment should be for the plaintiffs, and that both questions submitted to us must be answered in their favour. I was for some time inclined to think that the circumstances of the defendants' case were not within the contemplation of Parliament when the Pharmacy Act 1868 was passed, and that, although clearly within the mischief intended to be provided against, words sufficiently comprehensive had not been used in framing the Act to include the acts of the defendants, and that consequently it became a *casus omissus*. A fuller consideration of the provisions of the Act 31 & 32 Vict. c. 121, has however brought me to the same conclusion as that expressed by my Lord Chief Justice in his judgment in this case. I think the great object of the Legislature was to prevent the sale of poisonous or dangerous drugs by persons not qualified by skill or experience to deal in such commodities. It, therefore, proposed to form into one association all persons who for the future should alone be deemed qualified to deal in the same, and who should be registered under the provisions of the Act which we are now considering. It accordingly provided for the interests of all chemists and druggists who had been in business as such previously to the passing of the Act; but with regard to the future it made careful provision for the examination and registration of all persons who should in future form the only qualified body of persons who should be permitted to keep open shop for the retailing or compounding of poisons; and I now think that the sections are really, when carefully considered, only the provisions regulating the steps which in future are to be taken by all persons who desire to obtain the privilege of keeping open shop and retailing, dispensing, or compounding the poisonous drugs in question, and who, upon being registered as pharmaceutical chemists, or chemists and druggists, within the provisions of the Act, will become qualified so to do. To incorporate such a society, and to give to its members in future the sole privilege of keeping open shop as chemists, or chemists and druggists, for the sale or dispensing or compounding poisons, rendered it necessary to prohibit all other persons, not so registered or qualified, from keeping open shop or retailing, dispensing, or compounding such drugs for sale, and from assuming the title of pharmaceutical chemist or chemist and druggist; and therefore, whilst one set of sections are qualifying, and in-

tended to regulate for the future the mode in which persons should become qualified as members of the association, and to provide for the government of the body incorporated, sections 1 and 15 of the Act which contain the prohibitory words, upon the meaning of which we have to decide, have an entirely distinct effect. The object of those sections is absolutely to prevent the danger assumed to be likely to arise to the public by keeping open shop for the retailing, dispensing, or compounding poisons by any persons not being qualified pharmaceutical chemists or chemists and druggists, and the intention and scope of those sections, and the general object of the Act, is absolutely to exclude, from the time of the passing of the Act, all persons other than the registered members of the Pharmaceutical Society from keeping open shop or retailing, dispensing, or compounding poisons. Now, before the passing of the Act 1868 all persons, whether "natural persons" or "artificial persons," constituted by incorporation for trading purposes, might, either as individuals or as a corporation, have kept open shops and retailed, dispensed, or compounded poisons. It was essential, therefore, to the effectuating the objects of the Act, that all persons, whether natural or artificial, should for the future be prevented from dealing as before in the prohibited matters; and the cases cited by the Attorney-General in his argument show that an incorporated company may commit an offence either of non feassance or misfeasance, and may be punished by indictment for the same as if the Act had been done by a natural person. We may well, therefore, interpret the word person with sections 1 and 15 so as to include not only any natural person, but any artificial person created by the law, which would be capable of committing the offence referred to in the 15th section, and we are authorised upon the principle of decided cases to say not only that the "offence" has been committed by the defendants, but that they are liable to be punished for it under the provision of the 15th section.

*Judgment for plaintiffs.*

Solicitors for plaintiffs, *Flux and Co.*

Solicitors for defendants, *Crouch and Spencer.*

*Saturday, March 1.*

(Before FIELD and MANISTY, JJ.)

THE GUARDIANS OF THE POOR OF THE HEREFORD UNION (apps.) v. THE GUARDIANS OF THE POOR OF THE WARWICK UNION (resps.). (a)

*Poor law—Settlement—Child under sixteen—Poor Law Amendment Act 1870 (39 & 40 Vict. c. 61), s. 35.*

*A pauper was born in the H. Union in 1840, but had never acquired a settlement in her own right. Her father was born in the L. Union, but had acquired no settlement except his birth settlement.*

*Held, that, under these circumstances, the pauper was not settled in the H. Union, but must be deemed to have derived her father's birth settlement.*

This was an appeal against an order of two justices for Warwick, adjudicating the settlement of Emma Jones, a lunatic, to be in the Hereford Union.

The appeal was tried at the quarter sessions of Warwickshire holden at Warwick on the 3rd July 1878, when the said order of adjudication was confirmed, subject to the opinion of the Queen's Bench Division upon the following

*CASE.*

It was proved or admitted that the said pauper lunatic, Emma Jones, was born in the parish of St. John, Hereford, in the month of April, in the year 1840, and was the lawful daughter of James and Ann Jones.

James Jones, the father, was born at Leominster in or about the year 1798, and acquired a settlement there by birth, but never acquired any settlement elsewhere.

The said lunatic, Emma Jones, was never married, and had never done anything to acquire a settlement in her own right.

The said Emma Jones was adjudged a lunatic by an order of one of her Majesty's justices of the peace for the county of Warwick, dated May 12, 1878, and was received as a patient in the county lunatic asylum at Hatton.

An order was made by two justices of the peace for the county of Warwick, adjudging the parish of St. John, Hereford, in the Hereford Poor Law Union, to be the place of the last legal settlement of the said Emma Jones, and ordering the guardians of the poor of the said Hereford Union to contribute to her support in the said Hatton asylum.

This order was confirmed by the justices in quarter sessions, they being of opinion that the derivative settlement of Emma Jones from her father ceased on her attaining the age of sixteen years before the passing of 39 & 40 Vict. c. 61, s. 35.

The question for the opinion of the court is, whether such order was rightly confirmed.

By 39 & 40 Vict. c. 61, sect. 35:

No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

An illegitimate child shall retain the settlement of its mother until such child shall acquire another settlement.

If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born.

*Lumley Smith* for the respondents.—The only settlement that it is alleged the father had was a birth settlement. He may have been entitled to a derivative settlement, and that being so, no inquiry can be made into such derivative settlement. The child must therefore take her own birth settlement under the 3rd clause of sect. 35 of 39 & 40 Vict. c. 61:

*Woodstock Union v. St. Pancras*, 39 L. Rep. N. S. 256; L. Rep. 4 Q. B. Div. 1.

*Colmore*, *contra*, cited

*Guardians of Westbury-on-Severn v. Overseers of Barrow-in-Furness*, 38 L. T. Rep. N. S. 315; L. Rep. 3 Ex. Div. 88.

FIELD, J.—I am of opinion that the case comes within the decision of the Exchequer Division in

(a) Reported by A. H. POYSEN, Esq., Barrister-at-Law.

C.P. Div.]

STANANOURT (app.) v. HAZELDINE (resp.).

[C.P. Div.]

*The Guardians of Westbury-on-Severn v. The Overseers of Barrow-in-Furness*, and we are bound to follow that decision. The question we have to determine arises in this way. The pauper in question was born in the Hereford Union in 1840, and never acquired any other settlement, and at the time the Poor Law Amendment Act passed in 1876, she was long past the age of sixteen. There might have been some difficulty in arriving at the settlement of the pauper under these circumstances, had it not been that in the case to which I have before referred, the Exchequer Division has come to the conclusion that sect. 35 of that Act and the proviso therein are retrospective. It follows, therefore, that the pauper in question was a child under sixteen within the meaning of this Act, and up to that age took her father's settlement, which she was to retain until she acquired some other settlement—but she never did acquire another settlement, and therefore she still takes her father's settlement. Mr. Lumley Smith contends that this case comes under the third branch of the 35th section. He says it would be unsafe to assume that the father was actually settled at the place of his birth until the grandfather's settlement has been inquired into, and when once it becomes necessary to inquire into the grandfather's settlement the court should hold its hand, and he relied upon *The Guardians of Woodstock Union v. The Churchwardens of St. Pancras* (*ubi sup.*); but, if that contention is right, you would exclude from the benefit of this section all birth settlements, if it is necessary to go back and inquire into the settlement of all ancestors. This section was clearly intended to exclude birth settlements, so that children under sixteen might be as far as possible settled with their parents. I am of opinion, therefore, that the decision of quarter sessions was wrong and must be quashed.

MANISTY, J.—I am of the same opinion. This case is clearly within the decision of *The Guardians of Westbury-on-Severn v. The Overseers of Barrow-in-Furness*.

*Order of sessions quashed.*

Solicitors for the appellants, *Cooke and Jonas*, for *Llanwarme*, Hereford.

Solicitor for respondents, *H. Tyrrell*, for *Paseman*, Leamington.

## COMMON PLEAS DIVISION.

*Friday, March 14.*

(Before BRAMWELL, L.J. and LOPES, J.)

STANANOURT (app.) v. HAZELDINE (resp.). (a)

APPEAL FROM INFERIOR COURT.

*Municipal election—Ballot Act—Offence under—Criminal information—Bad for duplicity—Officer at polling station—Secrecy of voting—Leaving about the means of information—Not "communicating to any person any information"—35 & 36 Vict. c. 33, s. 4.*

*The 4th section of the Ballot Act 1872 provides that "every officer, clerk, and agent in attendance at a polling station shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate, except for some purpose authorised by law, before the poll is closed, to any person any information as to the name or number on the register of voters of any elector*

*who has or has not applied for a ballot paper or voted at that station," &c.*

*Held, that, in order to prove a breach of this provision, it was not sufficient to show that an officer in attendance at a polling station had given to some persons the opportunity of obtaining information as to the names of electors who had applied for ballot papers by leaving the burgess roll on which he had marked off such names among them, unless it was also shown that they, or some of them, had availed themselves of that opportunity.*

SPECIAL CASE stated by the police magistrate of the borough of Liverpool, under 20 & 21 Vict. c. 43.

On the 6th Nov. 1878 the appellant laid an information before the said magistrate against the respondent, of which the following is a copy:

Borough of Liverpool to wit.

Be it remembered, that on the 6th day of Nov., in the year of our Lord 1878, at Liverpool, in the borough aforesaid, in the county of Lancaster, Joseph Stananourt, at Liverpool aforesaid, cometh before me, the undersigned, one of Her Majesty's justices of the peace in and for the said borough of Liverpool, and informeth me, the said justice, that Francis Hazeldine, on the 1st day of Nov. inst., at the borough of Liverpool aforesaid, being a personating agent duly appointed and in attendance at a certain polling station in connection with the municipal election for a town councillor for St. Anne-street Ward, in the said borough, did not then and there maintain and aid in maintaining the secrecy of the voting in such station, but did then and there communicate, without it being for some purpose authorised by law, before the poll was closed, to a certain person or persons, certain information as to the names and numbers on the register of voters of certain electors who had and had not applied for ballot papers or voted at that station, contrary to the form of the statute in such case made and provided.

On the 19th Nov. 1878 the said information came on to be heard before the said magistrate, when both parties appeared before him.

The complaint arose under the Ballot Act 1872 (35 & 36 Vict. c. 33), the 4th section of which enacts as follows:

Every officer, clerk, and agent in attendance at a polling station shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate, except for some purpose authorised by law, before the poll is closed, to any person any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot paper or voted at that station, or as to the official mark; and no such officer, clerk, or agent, and no person whosever shall interfere with, or attempt to interfere, with a voter when marking his vote, or otherwise attempt to obtain in the polling station information as to the candidate for whom any voter in such station is about to vote or has voted, or communicate at any time to any person any information obtained in a polling station as to the candidate for whom any voter in such station is about to vote or has voted, or as to the number on the back of the ballot paper given to any voter at such station. Every officer, clerk, and agent in attendance at the counting of the votes shall maintain and aid in maintaining the secrecy of the voting, and shall not attempt to ascertain at such counting the number on the back of any ballot paper, or communicate any information obtained at such counting as to the candidate for whom any vote is given in any particular ballot paper. No person shall directly or indirectly induce any voter to display his ballot paper after he shall have marked the same so as to make known to any person the name of the candidate for or against whom he has so marked his vote. Every person who acts in contravention of the provisions of this section shall be liable, on summary conviction before two justices of the peace, to imprisonment for any term not exceeding six months, with or without hard labour.

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

On the hearing of the information it was proved that on the 1st Nov. 1878 there was an election for a councillor for the St. Anne-street Ward, in the said borough, the vacancy being caused by Mr. Ronald M'Dougall's term of office having, pursuant to the Municipal Corporation Act 1835, expired by effluxion of time on that day.

The candidates at such election were the said Ronald M'Dougall and Thomas Hayes Sheen.

Pursuant to the 85th section of the 6 & 7 Vict. c. 18, personating agents were appointed by each candidate, and amongst these the respondent was appointed personating agent for Mr. Thomas Hayes Sheen, and notice of his appointment was duly given to the returning officer.

The respondent made the declaration of secrecy required by rule 54 in the first schedule to the Ballot Act 1872, except that sect. 4 of this Act was not read over to him by the justice who took his declaration, which the note to the form of such declaration in the second schedule to the Act states must be done.

The appellant was duly appointed and declared to act as presiding officer at the polling station in which the respondent acted as personating agent.

The appellant deposed that he acted as presiding officer on the occasion, that he saw the respondent with a part of the Burgess roll in his hand, and that he (the respondent) put a tick opposite the name of every voter when he obtained a ballot paper. Between two and three o'clock in the afternoon he noticed that the respondent had left the booth without his (the appellant's) permission. He also noticed that the respondent's part of the Burgess roll was not upon the table where he had placed it on one or two occasions on which he had left his seat in the polling station. The respondent returned in about a quarter of an hour after the appellant had missed him. On being asked by Mr. Stananought where his part of the Burgess roll was, he replied that he was not going to work for nothing, and as his committee had not supplied him with any refreshment he had given up his part of the Burgess roll to them. The appellant told him he had done very wrong, and had committed an offence under the Ballot Act. The appellant also told him he could not remain in the booth, and he left. The respondent had been in attendance at the polling station from nine o'clock in the morning until the time he left the station as aforesaid, and had not been supplied with any refreshment during that time. The fact that the respondent left the part of the Burgess roll in the committee room of the candidate by whom he was employed was admitted by his solicitor. The matters mentioned in this paragraph took place before the close of the poll.

On the part of the respondent it was contended, first, that the information contained two offences, and was therefore bad under the 10th section of the 11 & 12 Vict. c. 43, which provides that every information shall be for one offence only, and not for two or more offences. This objection the magistrate overruled, on the ground that there was really only one offence charged, namely, that of communicating before the poll was closed to some person information as to the names or numbers on the register of voters of certain electors who had or had not applied for ballot papers. The respondent's solicitor then contended that the appellant had no authority or power to lay

the information, contending that his powers were limited to matters arising within the polling station, and that the information should have been laid by the alderman of the ward. The magistrate overruled this objection, as the Ballot Act does not contain any directions as to the persons by whom the information for the offences under it should be laid.

The respondent's solicitor then contended as follows: "The question is whether any offence has been committed under the 4th section. The object of this section is to prevent other persons becoming acquainted with the proceedings in a polling station. Now, what does this man do? According to the evidence all he does is this: he takes a book (it has not been produced to us) out of a polling station, and leaves it at a committee room. That is not communicating to persons information. To communicate information he must impart it to some person capable of understanding it. If he had whispered into the ear of a deaf man something that had taken place, that would not have been a communication. There must be a communication from one man's mind to another man's mind, so that the man may comprehend what has been done. There was no communication made by the defendant to any other person, as required by the Act of Parliament, to constitute an offence." The respondent's solicitor denied that the book referred to had been looked into, or any information obtained therefrom by any person, but called no witness upon this or any other point.

The respondent's solicitor also contended that, as the magistrate did not read over the 4th section of the Ballot Act to the respondent at the time that he made the declaration of secrecy, the appointment of the respondent was informal, and he could not be convicted. The magistrate was of opinion that, upon the facts proved before him, the respondent had violated the 4th section of the Ballot Act, but he considered this last objection fatal, and he dismissed the information.

The following questions of law are submitted to the court:

1. Whether the information was bad for containing two offences?
2. Whether the information should have been laid by the alderman of the ward instead of by the appellant?
3. Whether it was necessary to prove that the respondent communicated information as to the persons who had or had not applied for ballot papers to some individual person or persons? And
4. Whether it was necessary, in order that a conviction should take place under the Act, that the declaration of secrecy should be read over to the personating agent by the magistrate?

*E. T. Wright* for the appellant.—As to the first point, there is only one offence in the information, viz., that of communicating information contrary to the Ballot Act. The 10th section of the 11 & 12 Vict. c. 43 (Jervis's Act), does not apply where more than one act is charged, but constituting in substance only one offence:

*Reg. v. Scott*, 8 L. T. Rep. N. S. 662;  
*Onley v. Gee*, 4 L. T. Rep. N. S. 338.

As to the second point, this is an offence against public policy, and the information may be laid by anyone:

*Cole v. Coulton*, 2 L. T. Rep. N. S. 216.

As to the third point, the respondent having placed the means of information within the reach of other persons, and having given no evidence to show that they did not avail themselves of it, it was open to the magistrate to find, as he has, that the respondent did communicate information contrary to the Act. If there was any evidence to support that finding, it must stand. As to the fourth point [he was stopped by the Court].

Fullarton, for the respondent, was not called on to argue.

BRANWELL, L.J.—It is unnecessary for us to hear any argument on the fourth question in the case, as we think that our answer to the third question must be in favour of the respondent. As at present advised, I am inclined to think that a double offence is stated in the information, but, as I am not clear on this point, I state it with some reserve. It seems to me that the 4th section of the Ballot Act 1872 refers to the actual voting. If it does, then maintaining the secrecy of the voting is different from not communicating any information as to the names or numbers of those who have applied for ballot papers, or voted, and therefore I am not sure that the information in this case does not allege a double offence. But it is not necessary to determine this, for, granted that it does not do so, there is the third question, viz., whether the respondent had communicated information to anyone contrary to the provisions of the 4th section, and I do not think he had done so. It is not enough, in my opinion, to give the means of knowing, for I do not think there is any communication until it has reached the mind of the person communicated with. It would, I think, have been sufficient for a conviction to have shown that after the book had been taken into the committee room several of the persons there had looked into it, without specifying who in particular had done so. But, in default of the proof to the contrary, it might well be presumed that the members of the committee acted as right-minded men would have done, namely, shut up the book, and refused to look at it. Therefore, there was no evidence to show that the respondent had communicated the information contained in the book to anyone, and, in my opinion, it was not a case on which the magistrate ought to have convicted. Then ought we to send the case back to the magistrate to re-state it? I think not, for I think it was not intended to ask us whether it was necessary to identify any particular individual to whom the communication had been made, but that what the magistrate meant was to raise the question whether it must be shown that the intelligence had reached the mind of the person communicated with; and therefore, if the case were sent back, there would not be any substantial alteration made in it, and consequently it would be useless to send it back. In order to communicate information within the meaning of the Act there must, I think, be a common knowledge in the mind of the person communicating and of the person to whom it is communicated.

LORES, J.—I entirely agree.

*Appeal dismissed.*

Solicitors for the appellant, *F. Venn and Son*, for the Town Clerk, Liverpool.

Solicitors for the respondent, *W. W. Wynne*, for *J. P. Harris*, Liverpool.

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

April 24, 25, and May 20.

(Before Sir R. PHILLIMORE.)

THE CITY OF MANCHESTER. (a)

*Practice—Costs—Cargo suing—Both to blame.*

*Where an action is brought by owners of cargo laden on board one ship against another ship for damages sustained by the cargo through collision between the ship in which it is laden and that other vessel, and both vessels are found to blame for the collision; the plaintiffs will recover their costs as well as half their damages from the ship against which they have brought their action.*

*On the subject of costs, The Milan (Lush. 358) confirmed; and The Hibernia (31 L. T. Rep. N. S. 805) disapproved.*

This was a motion in a cause of damage by collision, brought by the owners of cargo laden on board the *Moselle*, against the owners of the *City of Manchester*. The cause was heard on the 24th and 25th April, when, by the judgment, both vessels were found to blame for the collision.

*Benjamin, Q.C., Phillimore, and Stubbs*, for the plaintiffs, argued that, the action being by owners of cargo only, the Admiralty rule of dividing the damages between the two ships did not apply, and therefore, though admitting that this court would follow the decisions in *The Milan* (Lush. 388) and other cases, yet formally asked for judgment against the *City of Manchester* for the whole amount, so as to give an opportunity for taking the case to the House of Lords.

*Butt, Q.C. and Clarkson* for the defendants.—The court will follow the decision of Dr. Lushington and the Privy Council.

Sir R. PHILLIMORE.—I shall make the decree in accordance with the precedents in this court and the Privy Council both as to damages and costs.

May 20.—Dr. W. G. F. Phillimore moved that the court would condemn the *City of Manchester* in the costs. He argued that, however the appeal as to the amount of the damages was decided, whether *The Milan* (Lush. 388) and other cases following it was overruled or not, the plaintiffs were, at all events, entitled to costs. It does not appear that there is any settled practice where the action is by owners of cargoes and not of ships, and the judgment declares that both ships are to blame. But the owners of cargo ought to get their costs; the cargo is at all events innocent, and they substantially succeed in their action, and are therefore entitled to their costs: (Order LV.) The question has in reality never been argued. [Sir R. PHILLIMORE.—I am informed by the registrar that he has examined the records of the court, and finds that in *The Milan* (Lush. 388) costs were given, but not in the subsequent cases of *The Hibernia* (31 L. T. Rep. N. S. 805) and *The Malta* (not reported).] That is to say, that there is no uniform practice; but for the future one uniform rule as to costs is to apply to all divisions of the High Court: (*The Condor*, 40 L. T. Rep. N. S. 442.) If the defendants had admitted their partial liability, but claimed a contribution as to half the damages from the owners of the *Moselle*, they might claim

(a) Reported by J. P. ASPINALL and F. W. BAIKES, Esqrs., Barristers-at-Law.

to have won in the issue, which would then have had to be tried between them and the owners of the *Moselle*; but we claim for damages occasioned to us by their negligence, and we have got damages, though not all we claimed. The case is different from that of an action by the owners of one ship against the owners of another, when both are found to blame, for then, after the damages of each are assessed in the registry, it may be found that the half of the defendant's damages, which the plaintiff has to pay, exceed in amount the half of the plaintiff's to be paid by the defendant, and that, therefore, in the result the defendant recovers on the balance, and therefore, whilst it is still uncertain which side in the result will have to pay, it is not inequitable that each should pay their own costs. Besides, both are wrong doers, and therefore disentitled to costs. But the case is not so with plaintiffs, who are owners of cargo; they are not to blame, and must, however the damages are assessed, pay nothing to, but recover half their total amount of damages from, the wrong-doing ship, against which they have brought their action.

*B. O. Clarkson*.—*The Condor* (40 L. T. Rep. N. S. 442) is not meant to govern the discretion of the courts below, it only applies to the costs of appeals. *The Milan* (Lush. 388) was never argued as to the question of costs, therefore a decision given *sub silentio* cannot guide the practice of the court. [Sir R. PHILLIMORE.—I decided *The Malta* (not reported) as following *The Hibernia* (31 L. T. Rep. N. S. 805), but it appears from the report, when my attention is directed to it, that the question was not argued in that case either.] It cannot be said that the cargo is in the technical sense not to blame; it is identified with the ship on board which it is carried, at least as much as a passenger on an omnibus with the omnibus. Yet in such a case at common law the passenger was held to be so far identified as to be unable to recover from another omnibus for damage sustained in a collision between them, and for which both drivers were to blame (*Thorogood v. Bryan*, 8 C. B. 115; 18 L. J. 836, C. P.), and therefore he certainly would not get his costs, and there is no reason why, because the peculiar practice of the Admiralty Court gives him half his damages, to which he would not be before the Judicature Act (36 & 37 Vict. c. 66, s. 25, sub-sect. 9) have been entitled in any other court, that practice should still further ameliorate his condition by giving him his costs. The principle of *Thorogood v. Bryan* has been lately approved in *Armstrong v. The Lancashire and Yorkshire Railway Company* (L. Rep. 10 Ex. 47; 33 L. T. Rep. N. S. 228.) [Sir R. PHILLIMORE.—In these cases it is decided that the plaintiff recovers nothing, therefore he gets no costs; here he recovers half from the defendants in this action, and the other half from the owners of the ship in which his cargo was carried.] That would depend on the terms of the contract of carriage in the charter-party and bill of lading. It is not possible to distinguish the case of the cargo from that of the ship in which it is laden, and if the ship were plaintiff in this action she could not recover costs; it is inequitable that she should be enabled to do so by setting up the owners of cargoes to fight the battle for her. The plaintiffs have sought to prove defendants wholly to blame for this collision, and they have failed; that was the issue they set up, and they have only proved half of it, and therefore are not entitled to costs.

Sir R. PHILLIMORE.—There is considerable obscurity in the question, owing to the diverse decisions both in this court and in the Privy Council; but, on consideration, I think the decision in *The Milan* (Lush. 388) the most consistent with justice to the parties, and I shall follow it, and the plaintiff will be entitled to his costs of action.

*Stokes, Saunders and Stokes*, plaintiffs' solicitors; *Gellatly, Son, and Walton*, defendants' solicitors.

## COURT OF BANKRUPTCY.

Monday, May 26.

(Before the CHIEF JUDGE.)

Ex parte BARKER; Re BARKER. (a)

*Bankruptcy*—*Bill of sale*—*Prior agreement*—*Bankruptcy Act 1869, s. 6.*

*An agreement for value by a debtor to execute a further security to his creditor, "if required," is not conditional but absolute.*

*Where a debtor shortly before his bankruptcy executed a bill of sale of all his property, with the exception of book debts, in pursuance of a memorandum of agreement previously executed by him for valuable consideration:*

*Held, that, in the absence of fraud, the bill of sale was valid as against the trustee in the subsequent bankruptcy of the debtor.*

Ex parte Fisher; Re Ash (26 L. T. Rep. N. S. 931; L. Rep. 7 Ch. App. 636), distinguished.

THIS was an appeal from a decision of the judge of the County Court of Yorkshire, holden at Huddersfield, by transfer from the County Court of Lancaster, holden at Wigan, setting aside a bill of sale given by the debtor, John Thomas Barker, to his mother, Alice Barker. The circumstances of the case were these:

The debtor, who was a tailor and draper at Wigan, was entitled to a share and interest under the will of his father, John Barker, of and in the property therein mentioned, but subject to an annuity to his mother. Being in want of money, he applied to his uncle, James Barker, who was co-executor with his mother, under his father's will, to advance him a sum of 359*l.*, which the latter agreed to do upon having security. Accordingly, upon the 14th Nov. 1877 the required sum was advanced by James Barker out of moneys in his hands as executor, and by a memorandum of agreement of that date signed by the debtor and his mother, they respectively undertook to execute a mortgage of their respective interests under the will of John Barker, to secure the sum of 359*l.* and interest, and "if required by James Barker" the debtor agreed to further secure the said sum and interest upon the stock-in-trade, fixtures, and effects in or belonging to his shop and premises.

James Barker died early in Sept. 1877, and Alice Barker thus became the sole personal representative of John Barker deceased.

On the 18th Sept. 1878 the debtor, at the request of Mrs. Barker, and in pursuance of the memorandum of agreement, executed in her favour a mortgage of all his interest under his father's will, and also a bill of sale of all his stock-in-trade and fixtures, but not including book debts, to secure the said sum of 359*l.* and interest.

(a) Reported by A. A. DORIA, Esq., Barrister-at-Law.

[BANK.]

*Ex parte BARKER; Re BARKER.*

[BANK.]

The bill of sale was duly registered. Possession was taken under it, and on the 23rd Sept. the effects were sold, and the proceeds received by Mrs. Barker.

The debtor filed a petition for liquidation on the 10th Oct. 1878, and the creditors having resolved upon a liquidation by arrangement, a trustee was appointed.

By an order of the County Court judge, made on the 18th April 1879, an application on the part of the trustee to have the mortgage and bill of sale declared to be null and void as against him, was dismissed as to the mortgage security, but granted as to the bill of sale, upon the ground that the agreement to execute the bill of sale was neither absolute nor unconditional, but only "if required," and that where a security is executed upon an antecedent promise for value, there must be an absolute agreement to execute such security.

Alice Barker appealed from so much of the decision of the County Court judge as related to the bill of sale, and sought to have it declared that the bill of sale was a good and valid security as against the trustee.

It was in evidence that Mr. France, the solicitor to Mrs. Barker, the bill of sale holder, had on several occasions before it was executed required the debtor to perform the agreement, and give the security in question.

*De Gez*, Q.C. and *E. C. Willis*, for the appellant, contended that the promise contained in the agreement of the 14th Nov. 1877 was an absolute and not a conditional promise. The question was whether the bill of sale was an act of bankruptcy, and although it was for a past debt, yet it was in pursuance of a previous agreement for value. The County Court judge relied upon *Ex parte Fisher, Re Ash* (26 L. T. Rep. N. S. 931; L. Rep. 7 Ch. App. 636); but the recent unreported case of *Ex parte Whitehead, Re Tunstall*, was not before him, or his decision would probably have been different. It was also in evidence that applications had been made to the debtor to execute the mortgage security previously to the 18th Sept. 1878, when it was actually executed. They cited

*Ex parte King, Re King*, 34 L. T. Rep. N. S. 466; L. Rep. 2 Ch. Div. 256;

*Ex parte Hall, Re Jackson*, 35 L. T. Rep. N. S. 947; L. Rep. 4 Ch. Div. 682;

*Ex parte Isard, Re Cook*, 35 L. T. Rep. N. S. 7; L. Rep. 9 Ch. App. 271;

*Jones v. Harber*, 23 L. T. Rep. N. S. 606; L. Rep. 6 Q. B. 77.

*Winslow*, Q.C. and *Finlay Knight*, for the respondents, submitted that the decision of the County Court judge was right. It was not until the very day when a writ in an action for debt had been served upon the debtor that the bill of sale was required and executed. Mrs. Barker in her cross-examination admitted that it was not until her son was in difficulties and she was afraid of losing her money that she bethought herself of procuring the execution of the bill of sale. From that the court would infer that the right to call for the security was not intended to be exercised until the debtor was practically insolvent. It would be against public policy to uphold such transactions. They relied on

*Ex parte Fisher, Re Ash* (*ubi sup.*).

The CHIEF JUDGE.—This is a very plain transaction. The executors of the testator, John Barker, were applied to for an advance by one of the

residuary legatees under his will, and it was agreed that such advance should be made upon the understanding that the mother and son should charge their interest under the will with the repayment of the sum advanced, and that "if required," the son would execute a further security. It is all one single transaction. How can the parties assume that the moneys were advanced upon the faith of one security more than of the other? Mr. Barker's executors had the right at any time to insist upon the execution of a bill of sale, in accordance with the terms of the memorandum of agreement. It is said that the agreement was conditional. I can understand a condition which is for the benefit of both parties or obligatory upon both parties, but an agreement to execute a security, if required, is not conditional; it is to be fulfilled the moment the demand is made. That there was full consideration given at the time of the agreement is undisputed. The learned County Court judge in his judgment said that there was no evidence that the debtor had been required to execute the bill of sale until the 18th Sept. 1878, when it was actually executed, but I find that the bill of sale was mentioned several times, and it was not stated that it was not to be executed until the debtor was in difficulties. There is evidence that Mr. France, the solicitor to Mrs. Barker, applied for the execution of the mortgage security. Is that to be limited to the mortgage of the debtor's interest under his father's will? The bill of sale is just as much a mortgage. The trustee had the right to cross-examine Mr. France, but did not do so, and tried to make out that there was fraud between the debtor and his mother. I am of opinion that the bill of sale is good. The decision in *Ex parte Fisher, Re Ash*, proceeded solely upon the ground of fraud between the debtor and the bill of sale holder. That decision was correct, no doubt, but there is no danger of the principle laid down in that case being extended to cases to which it does not apply. In the present case there is no reason to doubt the validity of the bill of sale; it is properly registered, there is no fraud, and the sale of the effects comprised in it takes place before the petition for liquidation is filed. Even if the debtor's mother knew that he was in involved circumstances, yet, as she was the representative of John Barker out of whose estate the moneys had been advanced, it was her duty as well as her interest to realise the debt. The appeal must be allowed with costs.

Solicitors for the appellant, *Learoyd, Learoyd, and Peace*, Moorgate, E.C., and Huddersfield, agents for *W. S. France*, Wigan.

Solicitors for the respondent, *Layton and Jacques*, agents for *Ainley and Hall*, Huddersfield.

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## House of Lords.

Feb. 18, 20, and April 7.

(Before the LORD CHANCELLOR (Cairns) Lords HATHERLEY, O'HAGAN, and GORDON.)

MULKERN AND ANOTHER v. LORD. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Building society—Mortgage—Action by member to redeem—Reference to arbitration—Friendly Societies Act.**The Friendly Societies Act* (10 Geo. 4, c. 56) provides, by sect. 27, that disputes between the society and any member shall be referred to arbitration.*The Benefit Building Societies Act* (6 & 7 Will. 4, c. 32) provides, by sect. 4, that the provisions of the 10 Geo. 4, c. 56, shall extend to benefit building societies "so far as the same may be applicable."*The respondent was a member of a building society formed under the 6 & 7 Will. 4, c. 32, and not registered under the 37 & 38 Vict. c. 42 (the Building Societies Act 1874). As such member he had mortgaged property to the society to a large amount. In a suit brought by him for a redemption of the property and an account, the defendants asked that the matter might be referred to arbitration, in accordance with the rules of the society, under the 10 Geo. 4, c. 56, s. 27.**Held (affirming the judgment of the court below), that the provisions of this section were not applicable to a dispute where the relation of mortgagor and mortgagee existed.*

This was an appeal from a judgment of the Court of Appeal (James, Baggallay, and Thesiger, L.JJ.) reversing a decision of Jessel, M.R.

The case is reported in 38 L. T. Rep. N. S. 265, and 47 L. J. 228, Ch. The action was brought by the respondent against the trustees of the Birkbeck Permanent Benefit Building Society, of which he was a member, for the redemption of property which he had mortgaged to them to secure a loan of 16,000*l.* and interest. The defendants contended that by the rules of the society the matter should be referred to arbitration, and the Master of the Rolls made an order to that effect. The facts appear more fully in the judgment of the Lord Chancellor, and in the report in the Court below.The *Solicitor-General* (Sir. H. Giffard, Q.C.), Waller, Q.C., and W. S. Owen appeared for the appellants, and contended that the effect of the statutes and of the rules of the society was to oust the jurisdiction of the court, and make arbitration compulsory. The whole intention was to prevent costly litigation between these societies and their members:*Ex parte Payne*, 5 D. & L. 679;*Cutbill v. Kingdom*, 1 Ex. 494; 10 L.T. Rep. O. S. 114.*Morrison v. Glover* (14 L. T. Rep. O. S. 183, 204; 4 Exch. 430) resembles the present case, but there the decision was based on the special rules of the society; so also in *Fleming v. Self* (24 L. T. Rep. O. S. 101; 1 Kay, 518; 3 De G. M. & G. 997). Here the very dispute contemplated by the rules has arisen. This society exists for the purpose of making advances to its members

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

on mortgage in proportion to the amount of their shares. Unless the respondent had been a member of the society he could not have been in the position of a mortgagor at all, therefore the rule applies:

*Wright v. The Monarch Investment Building Society*, 5 Ch. Div. 726;*Reg. v. Trafford*, 4 E. & B. 122; 24 L. J. Mag. Cas. 20.*Willesford v. Watson* (L. Rep. 8 Ch. 473), decided by Lord Selborne, L.C., was a reference to arbitration under the Common Law Procedure Act, which is a totally different thing. [Lord CAIRNS, L.C. referred to *Dimesdale v. Robertson*, 2 J. & Lat. 58.] They also cited*Crisp v. Bunbury*, 8 Bing. 394;*Reeves v. White*, 17 Q. B. 995; 21 L. J. Q. B. 169;*Seagrave v. Pope*, 1 De G. M. & G. 783; 19 L. T. Rep. O. S. 173;*Thompson v. The Planet Benefit Building Society*, L. Rep. 15 Eq. 333; 28 L. T. Rep. N. S. 549.*Davey, Q.C.* and *Bush* appeared for the respondent, and maintained that the case was covered by*Morrison v. Glover* (*ubi sup.*); see also*Doe v. Glover*, 15 Q. B. 102;*Farmer v. Giles*, 5 H. & N. 753.The cases of friendly societies, which have been cited, stand upon a different footing. *Lovejoy v. Mulkern* (37 L. T. Rep. N. S. 77) was an action against the trustees of this society; it went off upon a different point, and this question was never suggested. *Wright v. The Monarch Investment Building Society* (*ubi sup.*), was under the Act of 1874, where the arbitration clause is different. To bring a dispute within this clause it must be one which arises with the party as a member, which this question does not:*Prentices v. London*, L. Rep. 10 C. P. 679; 38 L. T. Rep. N. S. 251;*Crisp v. Bunbury* (*ubi sup.*)*Reeves v. White* (*ubi sup.*)*Wright v. Deley*, 4 H. & C. 209.

It is settled by a long course of authority that the jurisdiction of the court cannot be ousted in a case like this:

*Scott v. Avery*, 5 H. of L. Cas. 848.

Further, the arbitrators in this case were not properly appointed under the rules and Act.

The *Solicitor-General* was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

April 7.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Cairns).—My Lords, the appellants in this case are the trustees of the Birkbeck Building Society, the respondent is a member of the society who has mortgaged property to it to secure a loan of 16,000*l.* He now seeks to redeem that mortgage, and to have an account against the appellants of the moneys received by them on sales of part of the mortgaged estate, and of sums which, but for their default, they might have received while in possession of the estate, they having been mortgagees in possession. A decree for account and redemption would, under the circumstances, be a matter of course, if the respondent is not in some way precluded from asking for it. The appellants contend that he is so precluded, and that his only remedy is arbitration. There is not, I think, any doubt that by the rules of this society, standing

alone, the respondent would not be prevented from maintaining a suit for redemption. Rule 91, it is true, states the terms upon which a member is to be entitled to redeem his property before the expiration of the full term for which it was mortgaged, and the 109th and two following rules provide that if any dispute arises between the society and any member, reference shall be made to arbitration. But it is clear that a mere contract of this kind between the parties, unless made obligatory by some Act of Parliament, would not of itself have the effect of ousting the ordinary jurisdiction of the courts. The appellants, however, insist that arbitration has been made obligatory by Act of Parliament, and the Act to which they refer for this purpose is the 10 Geo. 4, c. 56. That is the statute consolidating the law as to friendly societies, societies established for the mutual relief and maintenance of the members in sickness, old age, and infirmity, but not in any way contemplating transactions by way of mortgage between the society and its members, much less mortgage transactions of the magnitude of the one now in question. Various provisions were made by that statute for the economical and expeditious management of the petty transactions of such societies, and among the rest, sect. 27 enacted that provision should be made in the rules of each society, specifying whether a reference of every matter in dispute between the society and a member should be made to a justice of the peace or to arbitrators. If to arbitrators, the award, assumed to be an award for the payment of money, was to be enforced by warrant of two justices, and if the reference was to be made to two justices in the first instance, they were themselves to enforce their order, which was to be final. It is unnecessary to decide the question but I will assume, in favour of the appellants, that, in the case of societies regulated by this statute, the clause to which I have referred would prevent a member suing the society or its trustees, and would oblige him to submit any dispute which he had as a member with the trustees to such an arbitration as is mentioned in the Act. But how does this statute affect the society of the appellants, which is not a friendly society but a building society, established under the 6 & 7 Will. 4 c. 32? The argument of the appellants is this: They say that the 6 & 7 Will. 4, c. 32, s. 4, enacts that all the provisions of the Friendly Societies Act (10 Geo. 4, c. 56), so far as the same, or any part thereof, may be applicable to the purpose of any benefit building society, shall extend to the Benefit Building Society and the rules thereof, in the same manner as if the provisions had been expressly re-enacted. Now I will assume that the mortgage transaction between the respondent and the appellants was one warranted by the constitution of the appellants' society. It is a mortgage of an ordinary kind, conveying the legal estate, and constituting the relation of mortgagor and mortgagee; that is a relationship the consequences of which are well known to the law. That relationship creates on the part of the mortgagee a right, in certain events to enter into possession of the mortgaged property, subject to a liability to account for receipts, and for wilful default; a further right to exercise a power of sale, if a power of sale is given; and a right to obtain that which a court alone can give, a decree of foreclosure in the event of nonpayment of the mortgage debt. It creates in the mortgagor a

right to obtain from the mortgagee an account, on the footing I have mentioned; and a right to obtain what a court alone can give, a decree for the redemption and reconveyance of the property; a decree which, in default of redemption, dismisses the suit, and thus operates as a decree of foreclosure. This being the relative position, and these the rights of the mortgagor and mortgagee, it appears to me to be impossible that these rights, and especially the rights of foreclosure and redemption, could be enforced or adjusted as is provided by the 10 Geo. 4, c. 56, s. 27; and I therefore arrive at the conclusion that the provisions of that Act are not applicable to those purposes of a benefit building society which involve the adjustment of rights created by mortgage. It is unnecessary, in the view which I take of the case, to refer to many of the authorities which were cited during the argument, but I may say that the view taken by Lord Cranworth in *Flawing v. Self* (3 De G. M. & G. 997) appears to me in substance to coincide with that which I have endeavoured to express. I think the decision of the Court of Appeal in this case is right, and that the appeal should be dismissed with costs.

LORD HATHERLEY.—My Lords, I am of the same opinion, and I shall not detain your Lordships by going through the various authorities that were cited. Some authorities were cited which appeared at the first blush opposed to each other, and to be decided by judges of considerable authority both one way and the other, indeed, I think I am not mistaken in saying that with regard to one authority the same learned judge, according to the view presented by the argument of counsel, took different views at different periods. But the reality was this: the application to building societies at all of the powers of arbitration arose in this way; building societies had many objects in common with friendly societies, and many objects in common with savings banks, and consequently this was another instance in which the application of the rule of arbitration superseding the ordinary courts of justice was introduced. When one came to look into the Friendly Societies Act one saw that not only was there a choice given between arbitration on the one hand and magistrates on the other, but there was a set form of conviction in each case laid down, and two things had to be determined, whether A. should pay to the trustees a certain definite sum of money, that being the matter in dispute which was to be settled by the speedy mode of arbitration; and whether A. continued to be a member of the society, or was not a member, showing again the nature of the dispute, namely, whether a member had or had not so misconducted himself as to be deserving of expulsion for having broken the rules of the society. When you come to look into the authorities which were cited they amount to this, that where the case went beyond the internal arrangements of the society, and introduced something which might be within their functions in the ordinary course of their business, but yet still outside the whole scheme and scope of the society itself, then a person who had a much larger interest than any of those contemplated among the ordinary members could not be deprived of recourse to the ordinary tribunals of the land; and more especially he could not be so deprived in regard to mortgages, where, as in this case, possession was taken, where there was a

question as to an account against the mortgagees for wilful default, and where there was an account also for outlay and expenditure in the mortgaged premises by the mortgagees, and where a number of other questions had arisen, which cannot properly be sifted unless you go to the proper court which has all the means, and the powers of sifting and dealing with them. I think, therefore, when you see what the real nature of the case is, there cannot be a doubt that this tribunal fell short of the requirements of the case, and that the party who sought to have a decree for account and redemption was entitled to it.

LORD O'HAGAN.—My Lords, the substantial question in this case appears to me to have been settled by a series of decisions of very high authority, and, unless your Lordships are prepared to overrule them, I think that the respondent is entitled to succeed. For my part, I see no reason to doubt the correctness of the principles on which they have been founded. On the undisputed facts before us it is plain that the respondent is entitled to maintain his action, unless the appellants can establish that he has been expressly forbidden by law to bring it. The onus is on them. He is a mortgagor, and has received large advances on his mortgage. The appellants are mortgagees. The respondent has failed to make the payments which he ought to have made according to his contract, and the appellants have exercised a power of sale given to them in the usual way, and have sold a portion of the mortgaged premises in discharge of the debt due to their society. A large sum admittedly remains unpaid, and only a part of the premises has been disposed of. In these circumstances the respondent brings his action, and files his claim demanding an account of the money still due by him, an account of the money which the appellants have received, or might have received without wilful default, and an injunction to restrain them from disposing of the premises still remaining unsold. This is a very ordinary claim, and would be considered as a matter of course but for the contention of the appellants that the respondent is a member of their society, and as such is obliged by its rules to submit any disputes between the society and himself to arbitration, pursuant to the 10 Geo. 4, c. 56, s. 27. As I have said, the burden of this contention is on the appellants, and the respondent has a right to sustain his action, unless that right is taken from him by clear and express legislation. The privilege of appeal to a court of justice remains with him, unless its jurisdiction is statutorily superseded. The appellants rely (*inter alia*) on rule 109 of their society, which is in these words: "That in case of any dispute arising between the society and any member thereof, or the legal representatives of any member, reference shall be made to arbitration, pursuant to the 10 Geo. 4, c. 56, s. 27, unless such dispute can be amicably arranged by the board of directors and the member, or the legal representatives of such member, within fourteen days from the time such dispute shall be formally brought before the board." And they contend that this rule, which *per se* would be wholly insufficient to take from the respondent his right of action, is made effective for that purpose by the statute to which it refers. That Act was passed "to consolidate and amend the laws relating to friendly societies." It contained provisions for the cheap and easy settlement of disputes between

their members in reference to matters within the scope of their operations, and if we were dealing with such a dispute, as to such a matter, the rule in question, if properly framed according to the statute, would be of binding force. But the society which the appellants represent is a building society, and the provisions of the Friendly Societies Act are only made to affect it by 6 & 7 Will. 4, c. 32, which was passed "for the regulation of benefit building societies," and by its 4th section enacts that those provisions "so far as the same or any part thereof may be applicable to the purposes of any benefit building society," shall extend and apply to such society, in such and the same manner as if those provisions had therein been expressly re-enacted. The real question is whether the provisions are so applicable? and I am clearly of opinion that they are not, and should not be so applied. It seems to me necessary merely to state the nature of the transactions to which the appellants ask your Lordships to compel the application of the legal machinery of the Friendly Societies Act, and the character and operation of that machinery, to demonstrate the utter inapplicability of the latter to the former. The building society which the appellants represent appears to have large monetary dealings. The advance to the respondent was originally 12,000*l.*, and 4000*l.* was afterwards added to it. The powers given to the mortgagees were used on the default of the mortgagor, and the taking of the accounts which he is entitled to demand may involve long and laborious calculations, the difficult application of legal principles, and the authoritative interference of a tribunal competent to adjust the complicated relations of the parties, and to carry into effect their relative rights. The claim of the respondent may raise nice questions, *e.g.*, as to wilful default, of which only lawyers can be qualified to dispose, and it invokes the exercise of powers by injunction or otherwise, which belong exclusively to a court of justice. This being the nature of the transaction, what is the machinery which the appellants seek to apply to it? That which manifestly was intended to deal with small affairs amongst humble people, and with simple controversies easily brought to a short and final issue. It aimed at securing mutual assistance to the working classes in circumstances of difficulty, and to settle their ordinary disputes, and enforce their limited demands, at the least expense and in the promptest way. It contemplated the daily dealing of the members one with another, and was in no way adapted to the arrangement of considerable claims, and the solution of doubtful questions. And accordingly the matters in dispute with which the statute intends to meddle are to be referred, according to circumstances, to an arbitrator, or a justice of the peace, the arbitrator to be chosen by the society, and the justice to act in cases submitted to him by its rules. But the exercise of the jurisdiction of either can only result in the levy of a sum of money to be raised by distress, and how small, even so, must be the amounts meant to be dealt with is shown by the trifling fee allowed to the arbitrator upon a reference, the few shillings of costs given on a proceeding before the justice, and the absolute finality of the award or the judgment which may be pronounced. There can be no appeal from either, and they are not to be removed into a

court of law, or restrainable by a court of equity. Such provisions can plainly have been designed only to regulate disputes of a trifling and domestic kind; and it seems to me idle to suppose that an account of the sums due upon the respondents' mortgage, or of the sums received by the appellants, or lost by their wilful default, could possibly be taken by an arbitrator clothed with no special powers, or by an ordinary justice of the peace; whilst the redemption which the respondent seeks they must be absolutely without power to secure to him. I should have been of opinion, if we had no guidance from authority, that, for these reasons, the provisions of the Friendly Societies Act cannot be applicable, and ought not to be applied in the circumstances before us. But, as I have said, that view is maintained by many decisions. *Morrison v. Glover* (4 Ex. 430) sustains it, and is undistinguishable from the present case. *Cutbill v. Kingdon* (1 Ex. 494), and *Reg. v. Trafford* (4 E. & B. 122), are to the same effect; and in *Fleming v. Self* (3 De G. M. & G. 997), to which the Lord Chancellor has referred, Lord Cranworth states succinctly the principle adopted in these and other cases: "The total absence of adequate machinery for enabling arbitrators to enforce any award they might make on the mortgage, in a case like the present, affords cogent evidence that the dispute is not within their competency." And surely the evidence is as cogent with reference to a justice of the peace, if any one should claim for such a functionary the power of interference. In the view I take of the matter it is unnecessary to discuss the question raised at the bar as to the validity of the appointment of the arbitrators. As to the Common Law Procedure Act, I agree with the Court of Appeal that, there being no statutable agreement to refer, no jurisdiction is created under that statute. I am satisfied, on principle and on authority, that the appellants have failed in their contention, and that the judgment should be affirmed with costs.

Lord GORDON concurred.

*Decree appealed from affirmed, and appeal dismissed with costs.*

Solicitor for the appellants, J. P. Poncione.

Solicitors for the respondent, Kays and Jones.

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT LINCOLN'S INN.

Wednesday, March 5.

(Before JESSEL, M.R., and JAMES and BRAMWELL, L.JJ.)

NORTON v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY. (a)

*Practice*—Time for appealing—Abandonment of appeal—Second notice of appeal.

*Final judgment was given in an action in July, 1878, and passed and entered on the 4th Dec. On the 5th the defendants served notice of appeal for the 19th, but owing to an oversight of their solicitor, did not set it down till the 19th. Shortly*

(a) Reported by E. S. ROCHS, Esq., Barrister-at-Law.

*afterwards the plaintiff's solicitors informed the defendants' solicitor that the entry of the appeal was irregular, and that they should not waive any objection. A fresh notice of appeal was then sent to the plaintiff's solicitors, accompanied by an offer to pay the costs occasioned by the first notice, and asking them to consent to the first entry being struck out. This request was refused and the second notice was returned. The defendants' solicitor thereupon set down the second notice of appeal, and applied to have the first entry struck out, and to have the second notice treated as regular and valid.*

*Held, that the second notice was regular, and that the appeal must proceed upon it. As the plaintiff ought not to have objected to the course proposed to be taken by the defendants, the costs of the application would be made costs in the appeal, no costs of the motion being given to the plaintiff.*

This was an application on behalf of the London and North-Western Railway Company, that they might be at liberty to withdraw their notice of appeal in an action, dated the 5th Dec. 1878; that the entry in the list of appeals made on the 19th Dec. 1878, might be struck out, and that a second notice of appeal might be treated as regular and valid.

It appeared that Malins, V.C. gave final judgment upon the hearing of the cause on the 15th July 1878, which was passed and entered on the 4th Dec. The following notice of appeal was served on the 5th:

Take notice that the Court of Appeal will be moved before the Lords Justices of Appeal, at Lincoln's Inn, on Thursday, the 19th Dec. 1878, or so soon thereafter as counsel can be heard on behalf of the above-named defendants, the London and North-Western Railway Company, that this action and counter-claim may be heard.

Owing to the oversight of a clerk of the defendants' solicitor the appeal was not set down until the 19th. On that day the clerk applied to have the notice entered, when the clerk at the registrar's objected, saying, "I cannot enter it in the court paper for the 19th, because this is the 19th. You must alter the notice to the 20th." The officer took the fees, and the notice was entered with a note that the appeal was not to come on before the 20th. In Jan. 1879, the plaintiff's solicitors informed the defendants' solicitor that the entry of the appeal was irregular, and that they should object to the entry and take the objection at the hearing. The defendants' solicitor on the 17th Feb. served a fresh notice of appeal for the 3rd March, and sent the following letter to the solicitors of the plaintiff:

In consequence of my clerk not having set down this appeal in the appeal list until after the expiration of the time allowed for that purpose by the general orders, I herewith send you a fresh notice of appeal instead of the one served on you in December last, which you will be good enough to consider as withdrawn, and I shall feel obliged if you would send me in the course of to-morrow your consent to the erroneous entry of the appeal being struck out, to save me the expense of an application to the Court of Appeal on the subject. I am, of course, willing to pay you any costs you may be entitled to by reason of the service of the former notice.

The first appeal was set down on the 18th Feb. and on the 19th the plaintiff's solicitors returned the notice and refused to comply with the request contained in the above letter. The defendants then gave notice of motion that they might be at liberty to withdraw their notice of appeal of the

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5th Dec. 1878, and that the entry of the 19th Dec. might be struck out, and that, notwithstanding the service of that notice and the entry of the appeal, the notice of the 17th Feb. 1879 and the entry thereof might be treated as regular and valid; or that the defendants might be at liberty to serve a fresh notice of appeal as if no previous notice had been given, and that in such case the entry of the 18th Feb. might be struck out. The rule established by *Re National Funds Company* (L. Rep. 4 Ch. Div. 305), is that an appeal must be entered with the proper officer of the Court of Appeal for the day of hearing; or if that day happens to be in the vacation, when the office is closed, then before the next day of the sitting of the court, otherwise the respondent will be entitled to have the appeal motion dismissed as an abandoned motion.

*Glasse, Q.C. and Speed*, in support of the application, submitted that if the setting down of the first notice was irregular, they were at liberty to abandon that notice and give another, upon payment of the costs occasioned by reason of the service of the first notice.

*J. Pearson, Q.C. and Romer*, for the plaintiff, contended that there was no rule that a party might set down as many notices of appeal as he pleased. If it were held that the defendants could abandon one notice of appeal and give another, there was nothing to prevent their giving a fresh notice every week for twelve months. The rule was clearly laid down in *Re National Funds Company*; and unless there was any *mala fides* on the part of the plaintiff which had led to the error, he was entitled to stand upon his rights. The appeal motion must, therefore, be treated as an abandoned motion, as being out of time and discharged. [JESSEL, M.R.—There is nothing in the Act of Parliament to prevent a man giving a second notice within the time allowed for appealing. JAMES, L.J.—I am not aware that there is anything to prevent a man giving notice every day in the year. He can do it technically and legally, but the court will take care to prevent any abuse of its procedure. If a man exercises that power vexatiously we shall know what to do, but if there has been a blunder arising from something that was stated by the clerk at the office, of course, that can be set right.] They submitted that there was no right to withdraw a notice of appeal. [JESSEL, M.R.—If an appeal is not entered the court treats it as an abandoned motion. That implies that the appellant can abandon it, and when a motion is abandoned a fresh notice can be given.] It was not reasonable that an appellant should be at liberty to give fresh notices as often as he pleased.

JESSEL, M.R.—We think that the appeal should proceed upon the second notice, which appears to be regular. I must say, so far as I am concerned, that I think the respondent ought not to have objected. There was an offer to pay the costs occasioned by the mistake, which he could have accepted, and have let the matter go on without our being troubled with it, and as he has not done so we think the right direction will be to give no costs to the respondent upon the present application, and to make the applicants' costs, costs in the appeal.

JAMES and BRAMWELL, L.J.J. concurred.

Solicitors: *Clarke, Woodcock, and Ryland; R. F. Roberts.*

Wednesday, March 19.

(Before JESSEL, M.R., and BAGGALLAY and BRAMWELL, L.J.J.)

ADAIR v. YOUNG. (a)

*Practice—Staying proceedings pending appeal—Infringement of patent—Account of profits—Costs—(Order LVIII., rr. 16, 17.*

*In an action claiming an injunction for an alleged infringement of letters patent for the manufacture of ship's pumps an injunction was granted in the terms asked for by the plaintiff, and an account of profits directed against the defendants, who were pump manufacturers. Notice of appeal having been given, and the appeal set down for hearing, the defendants then applied that all proceedings under the judgment might be stayed till the hearing of the appeal.*

*Held (reversing the decision of Bacon, V.C.), that as by means of the account the plaintiff would be enabled to commence proceedings against the customers of the defendants, and there was danger that the defendants, if ultimately successful might find that in the meantime their business had been ruined, the right course was to advance the appeal and stay all proceedings under the account until the hearing.*

*As the plaintiff obtained a benefit by the advancement of the appeal, the costs of the application would be costs in the appeal, notwithstanding the general rule in Merry v. Nickalls (27 L. T. Rep. N. S. 12; L. Rep. N. S. 8 Ch. App. 205) and Cooper v. Cooper (45 L. J. 667, Ch.).*

THIS was an appeal from an order of Bacon, V.C. refusing an application to stay proceedings under an account directed by a judgment, until the appeal from such judgment was heard. The action was to restrain the infringement of the plaintiff's patent for the manufacture of ship's pumps. The action was originally commenced against James Young, the master of the British ship *Polynesia*, to restrain him from using pumps that were constructed according to the plaintiff's invention, or only colourably differing therefrom; but the makers of the pumps, Messrs. Wallace and Co., were subsequently added as defendants during the course of the action, and the plaintiff, by his amended statement of claim, after alleging that Wallace and Co. had manufactured and sold in considerable numbers pumps made according to the plaintiff's invention, in addition to the relief already claimed against Young, claimed an injunction against Wallace and Co. with accounts and the relief usual in such actions.

On the 5th Feb. 1879 judgment was given by Bacon, V.C. in favour of the plaintiff (reported *ante* 61). The Vice-Chancellor, after granting an injunction against the defendants, directed an account of profits in the following terms: "And it is ordered that an account be taken of all pumps being the same as the pumps used by the defendant J. M. Young as aforesaid, or otherwise made in infringement of the said letters patent, which have been manufactured, or sold, or used by, or by the order or for the benefit of the defendants R. C. Wallace, R. Wallace, and H. C. Wallace, or any of them, and also of the gains and profits made by the same defendants by reason of such manufacture, sale, or use. And it is ordered that the defendants R. C. Wallace, R. Wallace, and

(a) Reported by E. S. ROCHER, Esq., Barrister-at-Law.

H. C. Wallace, do, within one month after the date of the chief clerk's certificate, pay to the plaintiff Wm. Adair what shall be certified to be the amount of such gains or profits." A counter-claim by Messrs. Wallace and Co. was dismissed, and they were ordered to pay the plaintiff the costs of the action, and the costs occasioned by the counter-claim. Wallace and Co. forthwith gave notice of appeal and set it down for hearing. They then gave notice of motion that all proceedings under the judgment might be stayed until the hearing of the appeal. Notice was also given by Young to stay proceedings on the judgment against him, and the Vice-Chancellor granted a stay of proceedings in his case on his undertaking not to use the pumps held to be an infringement of the plaintiff's patent.

On the 13th of March 1879 the motion was heard, when.

BACON, V.C., said:—It seems to me that Mr. Aston, in making this application, has mixed up two things—the order for an account against the defendants Wallace and Co., and the order for an injunction against Young, the captain of the *Polynesia*. I inquired whether the defendant Young would give an undertaking not to use the articles, the use of which has been held to be an infringement of the patent right, and to that he acceded, so that the motion, so far as Young is concerned, is wholly disposed of. But then Mr. Aston has a separate motion. His intention, I have no doubt whatever, is to prosecute the appeal earnestly, and as rapidly as the course of proceeding of the court will allow; and what he asks is that the direction for taking the account should be suspended during the appeal. I will not say that I never heard of such an application, for I have heard many such, but I may certainly say I never heard of such an application succeeding. To grant such an application would be impliedly to say that I entertained some doubt as to the conclusion which has been arrived at. I entertain no such doubt. If the plaintiff should ultimately fail, and any costs should have been incurred by the defendants in consequence of the plaintiff's proceedings he will have to pay those costs. It has been said that the taking of the accounts will be a source of inconvenience to the defendants; but no inconvenience to a defendant can be allowed to stand between a plaintiff and the right which he has established. I can see no reason for granting this application, nor any ground for suspending the operation of the judgment; and the result is that I must refuse this motion with costs.

On the appeal,

McClymont, for the appellants, contended that where, as in this case, there could be no doubt of the intention to prosecute the appeal, r. 16 of Order LVIII., applied. That rule showed it was intended that the court should exercise a discretion in staying execution when the appeal was about to be prosecuted *bond fide*. If an account were taken before the hearing the plaintiff would discover the names of Messrs. Wallace and Co.'s customers, and could threaten an action in every individual case unless they made a payment to him, and therefore, if Messrs. Wallace were ultimately successful, they might in the meantime have sustained an irreparable injury in their business. He cited

*Bridson v. Benacka*, 12 Beav. 1.

*Chadwyck Healey*, for the plaintiff, submitted that the court would not stay proceedings under a decree for an account of profits, merely on the ground of there being an appeal pending.

JESSEL, M.R.—If the plaintiff by means of the account learns the names of all the customers of Messrs. Wallace and Co., there can be little doubt that, as is usual in such cases, he will at once commence proceedings against them, and there is danger that the defendants, if ultimately successful, may find that in the meantime their business has been ruined. At the same time it is not reasonable that the plaintiff, who may ultimately be in the right, should be delayed for a long period in taking the account. I am of opinion that the right course will be to advance the appeal to the first day for hearing appeals after the Easter vacation, and to stay all proceedings under the account until that time. As the plaintiff obtains a benefit by this order, I think it will be reasonable that the costs of this application should be costs in the appeal, notwithstanding the general rule in *Merry v. Nickalls* (27 L. T. Rep. N. S. 12; L. Rep. 8 Ch. App. 205); and *Cooper v. Cooper* (45 L. J. Ch., 687).

BAGGALLAY, L.J.—I am of the same opinion.

BRAMWELL, L.J.—I also concur.

Solicitors, W. W. Wynne; Morten and Cutler.

Wednesday, April 9.

(Before JAMES, BAGGALLAY, and BRAMWELL, L.JJ.)

CRESSWELL v. PARKER. (a)

*Practice*—Service out of the jurisdiction—Rules of court 1875, Order XI., rr. 1, 1a.

An action was brought to carry out the trusts of a marriage settlement which had been executed in Scotland in the Scotch form, the property being in that country, and the trustees being all Scotchmen resided in Scotland. The plaintiff was an infant (by his father as next friend) who was the sole issue of the marriage. The father was an Englishman, the mother (now deceased) was a Scotchwoman. Immediately after the marriage the father and mother went to England and continued to reside there until the mother's death, and when the action was commenced the infant was still residing with his father in England. A writ having been issued, asking that the trusts of the settlement might be carried into execution by and under the decree of the court, *Malins, V.O.* authorised service of the writ out of the jurisdiction.

Held (reversing the order of *Malins, V.O.*), that there having been no breach within the jurisdiction, of the trusts of the settlement, the court had no authority to order service out of the jurisdiction.

THIS was an appeal from an order of *Malins, V.O.* authorising service of a writ out of the jurisdiction. The action was by Richard Henry Cresswell, an infant, by his father and next friend, to administer the trusts of a settlement made on the marriage of Mr. Cresswell with his deceased wife. Mr. Cresswell had always been a domiciled Englishman, but was married in Scotland to a Scotch lady. The settlement was in Scotch form, the trustees were resident in Scotland, and all the settled property was there. The infant was living with his father in England.

(a) Reported by E. S. ROGIE, Esq., Barrister-at-Law.

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It appeared that on the death of Mrs. Cresswell the trustees, who had authority under the settlement to apply the income according to their discretion, applied it by paying the money to the father for the maintenance and education of the infant. The father had married again, and it was alleged that he would not disclose to the trustees, the place where the infant was living, or where he lived himself, or how the money was applied. The trustees, therefore, discontinued paying the income to Mr. Cresswell. The present writ was then issued against the trustees, asking that the infant might be made a ward of this court, and placed under its protection, and the trusts of the settlement might be carried into execution by and under the decree of the court, and that proper directions might be given for the application of the infant's trust fund, and that the trust fund might be administered.

Rules 1 and 1a of Order XI., provide for service out of the jurisdiction.

1. Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or by a judge whenever the whole or any part of the subject matter is land, or stock, or other property situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property, and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be removed, or for which damages are sought to be recovered was or is to be done, or is situate within the jurisdiction.

1a. Whenever any action is brought in respect of any contract, which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief is demanded in such action, when such contract was made or entered into within the jurisdiction, or whenever there has been a breach within the jurisdiction of any contract wherever made, the judge in exercising his discretion as to the granting leave to serve such writ or notice on a defendant out of the jurisdiction shall have regard to the amount or value of the property in dispute or sought to be recovered, and to the existence in the place of residence of the defendant if resident in Scotland or Ireland, of a local court of limited jurisdiction, having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in England or in the place of such defendant's residence, and in all the above mentioned cases no such leave is to be granted without an affidavit.

The Vice-Chancellor having authorised service of the writ out of the jurisdiction, the defendants appealed.

*Glasse, Q.C., and Heath*, for the appellants, submitted that as all the property was in Scotland, and the trustees were resident there, the Scotch courts were the proper tribunals to exercise a discretion in the matter.

*Higgins, Q.C., and Crossley*, for the plaintiffs, contended that although the marriage took place in Scotland, and the settlement was made in that country, the settlement was made in contemplation of an English marriage, and the moneys for the benefit of the infant plaintiff under the settlement became payable in England, where the child was born, and had ever since lived; and that in refusing so to apply the income for the benefit of the infant, the trustees had committed a breach of trust in this country. It was perfectly competent for the court under the old practice to order service of such a writ as this out of the jurisdiction,

and the rules under the Judicature Act made no change in the practice in that respect. The Judicature Act expressly said that the procedure in the different courts, so far as it was not inconsistent with the practice laid down in the rules, should remain in force, and they submitted that under the general jurisdiction, as defined in *Drummond v. Drummond* (15 L. T. Rep. N. S. 337; L. Rep. 2 Ch. App. 32), the Vice-Chancellor had full authority to make the order he did.

JAMES, L.J.—I think this is a very clear case when you come to consider it. I more than doubt whether we have any jurisdiction. I do not see that there was any contract made in England, or any breach in England, or anything alleged to bring the case within the terms of Order XI. r. 1. That rule was certainly intended to express the only circumstances under which it was to be allowed that a man was to be brought from some distant place into this court. If the argument on behalf of the plaintiff is right, and if there were in the State of California rules similar to our rules here, and Mr. Cresswell chose to take his son to San Francisco and live there, the trustees would have to go from Scotland to San Francisco to render their accounts, with possibly the right of appeal to Washington. I do not know whether there is a right of appeal to the Supreme Court at Washington, but there may be in some cases. Here is a Scotch settlement, Scotch property, Scotch trustees, and if it were a matter of judicial discretion at all, the proper place to go to is where the Scotch defendants are, and to get them to render their accounts (or their intermissions, which, I think, is what they call them in Scotland) in the Scotch court, which knows exactly what is the proper mode of dealing with the trust estate; and, in my opinion, it is far better that the infant, or the infant's father, should go there and get that order, than that the trustees should be brought here, out of their own country, to answer to a court which, I dare say, is not very agreeable to their ears. Probably they do not know how much better the Court of Chancery is than the Court of Session. I dare say, they think, in their ignorance, that the Court of Session is better than the Court of Chancery; and, being Scotchmen, they have a right to their opinion on that subject. They prefer having their Scotch deed construed, enforced, and executed by a Scotch court, where they can have their own attorneys and barristers close to them, instead of having to come all the way up to London. I think this order ought to be discharged.

BAGGILLAY, L.J.—I am of the same opinion. The only portion of the first rule of Order XI. under which it can be said that the court has authority to order service of a writ out of the jurisdiction would be the third of the several branches mentioned in that rule, namely, "when-ever there has been a breach within the jurisdiction of any contract wherever made." I am not at all satisfied, and as at present advised, I do not think there has been any breach within the jurisdiction of this contract made upon the occasion of the marriage. But, assuming that there had been a case in which the court has power to direct service of the writ abroad, then the additional rule 1a provides that in exercising that jurisdiction the court is to have regard to a variety of circumstances, amongst others, to the amount



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and value of the property in dispute or sought to be recovered, and to the comparative cost and convenience of the proceeding in England, or in the place where the defendant is resident. I think, having due regard to each of these circumstances, that I can come to no other conclusion than that it is more convenient, and in consequence more desirable, that the administration of this trust should be carried out in Scotland.

BRAMWELL, L.J.—I am also of the same opinion. As to what are called the general merits I have no doubt it would be exceedingly hard for these gentlemen to be brought into an English court to administer the trust. I should think it ought to be administered according to Scotch notions, not according to English, if the parties happen to differ. In addition to that I doubt whether there has been anything which can be called a breach within the jurisdiction. Again, if one is to look at the very words, it is not a breach of the contract they are charged with, but it is a breach of duty as trustees, and that does not seem to have been provided for here, whether intentionally or not I do not know. The third remark I would make upon the case is this, if it is looked at as a breach of contract, for which damages are sought to be recovered, then there is no claim here for damages.

*Order discharged with costs.*

Solicitors: *Phelps, Sidgwick, and Biddle; Carr, Bannister, Davidson, and Morris.*

#### SITTINGS AT WESTMINSTER.

March 1, 3, and 22.

(Before BRETT, COTTON, and THESIGER, L.JJ.)

POSTLETHWAITE v. FREELAND. (a)

*Shipping—Charter-party—Construction of—Demurrage—Charterer's liability—Due diligence.*

A charter-party stipulated that the cargo should be brought to and taken from alongside at merchants' risk and expense, and should be "discharged with all dispatch, according to the custom of the port." In an action by the shipowner against the charterer for demurrage, it was proved that when the ship arrived at the port of discharge, owing to the unusual number of vessels then lying there, all the available lighters in the port were being used for discharging cargoes, so that the ship was compelled to wait her turn for lighters, and there was considerable delay in commencing to unload her. Cargoes were usually discharged in the port by lighters, and no others could be procured within 150 miles, and it was usual for ships entering the port to wait their turn for unloading. The judge asked the jury whether there was a settled custom in the port as to discharging vessels laden like the one in question; and, if there was, whether she was discharged with all dispatch according to the custom. The jury having answered both questions in the affirmative, judgment was entered for defendant.

Held (affirming the decision of the Exchequer Division, Cotton, L.J. dissenting), that, on the construction of the charter-party, the charterer was not bound to begin discharging cargo at once without reference to the means for discharging existing in the port at that time; that the

*practice as to ships being unloaded in turn was part of the custom of the port; and therefore that there was no misdirection.*

APPEAL from a decision of the Exchequer Division (Kelly, C.B. and Hawkins, J.).

The action was to recover damages for breach of an agreement contained in a charter-party to discharge cargo. At the trial the jury found for the defendant, and judgment was entered accordingly.

An order nisi having been obtained for a new trial, the Exchequer Division discharged the order, and the plaintiff appealed.

The material facts of the case will be found to be fully set out in the judgments of the Court of Appeal (*post*).

Cohen, Q.C. and Bigham for plaintiff.—There was a misdirection. The obligation under the charter-party was not that the charterers should use reasonable diligence only in the discharge of the vessel with reference to the means of discharge existing at the port at the time. It is admitted that, if that were the only obligation, there was no misdirection. "According to the custom of the port" means merely "in the manner usually employed in the port." There could be no evidence of custom as to the number of lighters available; it must necessarily vary. The fact that no lighters were immediately available does not relieve the charterers, who are bound under the charter-party to provide means of discharge. Suppose the vessel arrived while a strike of dock labourers was going on, or that all the lighters had been destroyed or injured by a hurricane, the charterers would still be liable under their contract for demurrage. In *Ford v. Cotesworth* (19 L. T. Rep. N. S. 634; L. Rep. 4 Q. B. 127; 38 L. J. 52, Q. B.) the earlier cases are referred to, and the law summed up by Blackburn, J. The learned judge says: "The question depends upon what the contract implied by law is when there is a charter-party silent as to the time to be occupied in the discharge. We agree that, whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances; and if some unforeseen cause, over which he has no control, prevents him from performing what he has undertaken within that time, he is responsible for the damage." Here the charterers or consignees were bound to provide lighters and discharge the cargo. The shipowner had nothing whatever to perform with respect to the discharge. In *Tapscott v. Balfour* (27 L. T. Rep. N. S. 710; L. Rep. 8 C. P. 46; 42 L. J. 16, C. P.), where the vessel got into dock, but could not be loaded at once because of the number of vessels already in dock, it was held that the charterers were liable for the delay from the time of her getting into dock. See also

*Ashcroft v. The Crow Orchard Colliery Company (Limited)* 31 L. T. Rep. N. S. 266; L. Rep. 9 Q. B. 540; 43 L. J. 194, Q. B.

In *Wright v. The New Zealand Shipping Company* (40 L. T. Rep. N. S. 413) this court held, where the time for unloading was not named in the charter-party, that the charterer was bound to provide at the port of discharge sufficient appli-

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.

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ances of the kind ordinarily in use at the port, and that it was no answer to a claim for delay in unloading to show that the delay was caused by the crowded state of the port. Lord Coleridge should have directed the jury that under the charter-party the charterers were bound to provide means for discharging the cargo when it arrived, and also that it must be discharged with due diligence according to the custom of the port with respect to the manner of discharge. The attention of the jury should also have been directed to the fact that four of the lighters were out of repair.

*Watkin Williams, Q.C. and Macleod* for defendant.—Very little assistance can be gained from the authorities on this point; the principle of them is admitted. If the defendant was under the obligation contended for by the other side, it is admitted that the fact that there were a great number of ships at the port, or that this particular one had to wait her turn, would afford no excuse for the delay in unloading. But under the charter-party the defendant is not bound to give an absolute discharge with reference to the ship's capability to discharge. The words "according to the custom of the port" have no meaning if the contention of the other side is right. The evidence shows the very great difficulty there was in discharging cargo. Part of the custom was that ships should wait for their turn to discharge. "According to the custom" therefore means according to what occurs when there are a great number of ships in the harbour.

*Bigham* replied.

*Our. adv. ult.*

March 22.—*THESIGER, L.J.* read the following judgment:—The plaintiff in this action was the owner of a vessel called the *Cumberland Lassie*, and on the 28th April 1875 he chartered her to the defendants to carry a cargo of about 370 tons of steel rails and fastenings from Barrow-in-Furness to East London in South Africa, and there discharge. The charter-party provided that the cargo should be brought to and taken from alongside at merchants' risk. Stipulation: "The cargo is to be discharged with all dispatch according to the custom of the port." The action is brought to recover damages for the alleged breach of such stipulation. The port of East London is situate upon a river having a bar at its mouth, and into which in consequence vessels of the burden of the *Cumberland Lassie* are unable to enter until the greater part of their cargo is discharged. The discharge is performed by lighters, which are worked to and from the ship in a somewhat unusual manner. There is one large warp or cable from the inside to the outside of the bar. From that warp there branch out minor warps, and to those minor warps vessels lading or unloading their cargoes attach their own cables. The lighters have neither sails nor oars, and are worked by being pulled along the warps and cables which I have described. In 1875 the business of lading and unloading was mainly conducted by a company called the East London Loading and Shipping Company, to which the warps belonged, and which owned nine or ten lighters for working in conjunction with the warps. Four only of these lighters were suitable to the discharge of the cargo of the *Cumberland Lassie*. The custom or practice of the port, as regards the discharge

of vessels, was as follows: vessels upon arrival reported themselves at the post office, and in the order in which they reported themselves their turn, as it was called, for unloading came in rotation. As soon as a vessel came in turn, one lighter was sent to her every working day until such time as she was finally discharged, with the exception that when the mail steamers came in a preference was given to them. The *Cumberland Lassie* arrived at East London on the 31st Aug. 1875, and was ready to commence discharging her cargo on the following day. It happened, however, that at the end of 1874, or the beginning of 1875, the supply of iron rails to the Government at East London had commenced, and in consequence the number of vessels arriving at the port in the autumn of 1875 was increased, and when the *Cumberland Lassie* arrived there were already lying in the roadstead seven vessels laden with cargoes similar to her own. The Government obtained from Algoa Bay, situate at least 150 miles south of East London, three or four surf boats, two of which appear to have been brought to East London after the *Cumberland Lassie* arrived there, and all of which, with the exception of one under repair, were employed in discharging the vessels which arrived before the *Cumberland Lassie*. In the result, the turn for the discharge of that vessel did not come until the 6th Oct., when a lighter of the East London Landing and Shipping Company commenced to discharge the cargo. From that time it is not contended on the part of the plaintiff that there was any undue delay; but, inasmuch as twenty-four working days intervened between the date of the ship's being ready to discharge and the 6th Oct., the plaintiff seeks to recover damages in respect of the non-discharge of cargo during those twenty-four days. The evidence establishes that the time occupied in discharging the vessel was not greater than the average time occupied in discharging vessels of like tonnage during the autumn of 1875. At the trial Lord Coleridge left to the jury to say, first, whether there was any settled practice or custom between the months of April and November 1875 as to the unloading of sailing vessels laden as the *Cumberland Lassie* was laden in the port of East London; secondly, if there was, whether the *Cumberland Lassie* was unloaded with all dispatch according to the custom. The jury answered both questions in the affirmative, and the learned judge directed the verdict and judgment to be entered for the defendants. The plaintiff moved the Exchequer Division for a new trial on the ground of misdirection, and that the verdict was against evidence, and the conditional order for a new trial having been discharged, he appealed to this court. The argument before us has really resolved itself into a question as to the construction which the clause in the charter-party "the cargo is to be discharged with all dispatch according to the custom of the port" when read in conjunction with the facts ought to bear. The plaintiff contends in substance that Lord Coleridge ought to have told the jury that as soon as the *Cumberland Lassie* was ready to discharge the defendants ought to have provided her with one lighter for every working day, except perhaps the days on which the lighters were engaged in discharging mail steamers. If the plaintiff is right in his contention I think it clear that the learned judge did misdirect the jury, for

he certainly indicated to them that there was no such obligation upon the defendants to provide lighters; but I am of opinion that the plaintiff is not right in his contention. In order to support it his counsel treat the clause of the charter-party in question as if the words "with all dispatch" were unconnected with the words "according to the custom of the port," and they endeavour by that means to read the clause as running in this way, "the cargo is to be discharged according to the custom of the port, and with all dispatch." Reading the clause in this way, they argue, not without force, that the custom of the port was to regulate the mode of discharge by a single lighter worked by the warps and cable, but was not to regulate the time of commencing the discharge or the rate of despatch, which it was contended was to be as fast as one lighter, commencing as soon as the vessel was ready to discharge, could on working days discharge the cargo. In my opinion, however, the words "according to the custom of the port," placed as they are in immediate juxtaposition with the words "with all dispatch," were intended to be read, and must be read, so as to qualify these latter words; and, if that be so, it appears to me to follow that the practice or custom as to vessels coming on turn was one which regulated the despatch of the *Cumberland Lassie* just as much as the practice or custom of unloading vessels by lighters worked along the warps or cables. Indeed, lighters, warps, and cables may in this case be looked on as forming one apparatus for unloading, and the plaintiff had no right to complain of the defendants, because this apparatus was, until the 6th Oct., occupied by vessels which arrived before the *Cumberland Lassie*, and over which the defendants had no control. The decision in this court of *Wright v. The New Zealand Shipping Company* (*ubi sup.*), to which we have been referred, is in no way inconsistent with this view. There the charter-party did not contain any express provision in reference to the discharge of the cargo, and the obligation of the charterer was therefore that implied by law—that is, to discharge within a reasonable time. The ordinary time for discharge of vessels of similar burthen with and loaded as the chartered vessel in that case was loaded, was proved to be thirty-five days; but, owing to a concourse of vessels annually at the particular time of the year at which the plaintiff's vessel happened to arrive, and due in great measure to arrivals of the defendants' own vessels, the lighters were inadequate in point of number, and the plaintiff's vessel was delayed for a much longer period than thirty-five days. Upon that state of facts it was held that the shipowner ought not to be the sufferer from a delay, against which the defendants might themselves have provided, in respect to which the charter party contained no express stipulation, and the cause of which, although recurring at fixed intervals of time, was exceptional when compared with the general state of the port of discharge. The cases of *Tapscott v. Balfour* (27 L. T. Rep. N. S. 710); L. Rep. 8 C. P. 46) and *Ashcroft v. The Crow Orchard Colliery Company* (31 L. T. Rep. N. S. 266; L. Rep. 9 Q. B. 540) are also distinguishable from the present. In the former the loading of a cargo of coals was to be in the usual and customary manner, nothing being

said as to time, and it was held that the words applied to the mode of loading only, and that the charterer was responsible for delay, which arose from his vessels' inability to get under the tips, that inability again being due to the number of vessels waiting in turn to go under the tips before her, of which number, moreover, several were loaded by the agent employed by the charterer. It is also to be observed that in that case it was proved that, although loading from the tips was the most usual method of loading in the particular dock, yet it could be, and not unfrequently was, done from lighters, and Denman, J. in his judgment relies upon the fact as giving additional support to the view that the charterer, who might have obtained lighters, was responsible for the delay. In *Ashcroft v. The Crow Orchard Colliery* (*ubi sup.*) a cargo of coal was to be loaded with the usual despatch of the port, or if longer detained the ship was to be paid forty shillings demurrage. It was there held that the charterers were liable for a detention outside the docks for an unusual time, that detention being due to the fact that the charterers themselves had, when the charter party was entered into, three ships loading in the docks, and ten other charters in their books having priority over the plaintiffs. None of the decisions to which I have referred in any way impugned the authority of cases of the class of *Leideman v. Schultz* (23 L. J. 17 C. P.; 14 C. B. 39) and *Lawson v. Burness* (1 H. & C. 396) which were decided in favour of the charterer upon words in the charter party importing that he has only to be bound to take cargo in regular turns of loading. They are merely illustrations of the principle enunciated in *Ford v. Cotesworth* (19 L. T. Rep. N. S. 634; L. Rep. 4 Q. B. 127), to which my judgment in this case is in no way opposed. That principle is that, under a charter-party which provides for the delivery of the cargo in the usual and customary manner, but which is silent as to the time to be occupied in the discharge, the law implies a contract that each party will use reasonable diligence in performing that part of the delivery which by the custom of the port falls upon him. Here the use of the warp and lighters in regular turn was part of the custom of the port by which the discharge with all dispatch was to be qualified and limited, and by that custom the control of the lighters as well as of the warp was no more in the hands of the charterers than it was in the hands of the shipowner. For these reasons I am of opinion that the ruling of the learned judge at the trial was correct, that the findings were warranted by the evidence, and that this appeal should fail.

COTTON, L.J. read the following judgment:—This was an action by the owner of a sailing vessel called the *Cumberland Lassie* against the charterers for the detention of his ship. The action was tried before Lord Coleridge, and resulted in a verdict and judgment for the defendants, and this was an application by way of appeal from the Exchequer Division for a new trial, on the ground of misdirection. By the charter-party, which was dated the 28th April 1875, it was agreed that the *Cumberland Lassie* should take a cargo of rails from Barrow-in-Furness to East London in South Africa, and it was stipulated that the cargo should be brought to and taken from alongside at merchants' risk and expense; and further (which is

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the provision on which the question turns), that the cargo was to be discharged with all dispatch according to the custom of the port. It was for delay in accepting delivery of the cargo at the port of discharge that the action was brought. The ship arrived at East London on the 31st Aug. 1875. The harbour there is a bar harbour, and vessels of the size of the *Cumberland Lassie* are obliged to unload a considerable portion of their cargo before they can cross the bar. The discharge of cargoes outside the bar is effected by means of lighters or other small vessels. The usual way by which in Sept. 1875 lighters were brought alongside the vessel to be unloaded was by means of a warp, consisting of a rope carried across the bar and fastened to buoys, and on the outside connected with the ropes branching from it; from the end of these branch warps the lighters were warped to the vessel to be unloaded by a rope provided by that vessel. The complaint of the plaintiff is, that for twenty-four working days after the *Cumberland Lassie* arrived at the port no lighter or other vessel was provided by the defendants, the charterers, to accept delivery of the cargo. The defendants admit the fact, but they say that, having regard to the terms of the charter-party and the facts proved, they are not liable for the delay. It was proved at the trial that, at the time when the *Cumberland Lassie* arrived at East London and was in course of unloading, the only lighters for unloading vessels outside the bar, with the exception of three boats belonging to the Government, belonged to a company which had purchased these lighters and the warp from the Government; that there was a practice or custom at the port that every sailing vessel should be taken in turn for unloading, according to the time of her arrival in port, and that when the turn of a vessel arrived it should have the services of one lighter only, and once only in the day; that the company had four lighters only capable of carrying iron rails; that mail steamers were, as against sailing vessels, entitled to preference in the use of the lighters, and that in regular turn the *Cumberland Lassie* was not entitled to the use of a lighter for discharge of her cargo before the twenty-four working days had expired. There was evidence that, having regard to the number of vessels in the port at the time when the *Cumberland Lassie* arrived and to the number of lighters then at the port available for unloading rails, the turn of the plaintiff's vessel to have a lighter for unloading the cargo did not arrive before the twenty-four days had expired. The defendants contend that the reference to the custom of the port contained in the provisions of the contract to which I have referred absolves the defendants from liability, and so Lord Coleridge directed the jury; for he in his summing up in effect directed that, if they found that at the date of the charter-party and from that time till the time of the unloading there was a practice at the port as to the unloading, and if so, that the defendants used the existing appliances with due dispatch in accordance with the practice, that then they should find for the defendants. If the delay of which the plaintiff complains was not attributable to what can be called the custom or practice of the port, this was a misdirection; for, in the absence of any reference to the custom of the port, and if there was no express stipulation in the contract to regulate

in this respect the rights and liabilities of the plaintiff and defendants, it would be the duty of the charterers to provide at or shortly after the vessel was ready to discharge its cargo appliances of the kind ordinarily in use in the port for the purpose of taking delivery—that is, in the present case, lighters or other small vessels capable of crossing the bar. Did then the reference to the custom of the port vary the defendants' liability in this respect? It was argued that it does so, because the custom or practice of the port was that vessels should be entitled to lighters in turn according to the times of their respective arrivals, and by treating the warp and lighters as one entire instrument for unloading vessels outside the bar. But there was no evidence that a larger number of lighters than were in use at the time in question in the port could not have crossed the bar daily by means of the warp; and, on the contrary, there was evidence that shortly afterwards a larger number of lighters were employed in unloading vessels, and crossed the bar by means of the warp. The delay therefore was attributable to the number of lighters at the port being insufficient for the number of vessels. The number of lighters cannot, in my opinion, be considered as a matter regulated by or dependent on the custom or practice of the port. It would not, I should think, be contended that, however the business of the port might increase, it could be said to be the custom or practice of the port that the only lighters for hire there should be such as the company were for the time being possessed of. In my opinion the defendants are not, by the qualifying reference in the charter-party to the custom of the port, protected from liability for delay caused by the number of lighters at the port being insufficient for the vessels for the time being in the port. It is said that this will make the words "according to the custom of the port" inoperative and strike them out of the contract. But, in my opinion, this is not the case. These words will qualify the words "with all dispatch" by excusing any delay caused, for example, by the preference given by the practice of the port to mail steamers, or by no work being done on those days which it is the practice of the port to observe as holidays. It was much pressed in the course of the argument that it was impossible for the charterers to provide more lighters. If, however, the construction which I have put upon the contract is correct, the defendants cannot protect themselves from liability to pay damages to the plaintiffs for the delay by alleging that this is attributable to their inability to discharge an obligation which the defendants, as between themselves and the plaintiffs, had undertaken. It was said that the number of the lighters was insufficient, in consequence of there being at the time an unusually large number of vessels which were waiting to discharge their cargo. In my opinion, if such was the case, it cannot excuse the defendants from liability; for, if such was the case, the delay would be caused by an accident, of which, as between themselves and the plaintiff, the defendants must bear the loss.

BRETT, L.J.—The question in this case is whether there ought to be a new trial on the ground of misdirection. The action is for demurrage, and the answer is that under the charter-party discharge of the cargo was to be according to the custom of the port, and that it was properly

discharged in accordance with the charter-party. Lord Coleridge asked the jury whether there was an established custom of the port, and whether, if so, the cargo was discharged in accordance with that custom; and the jury answered both questions in the affirmative. So far there is no symptom of a misdirection. But it is said that the judge misdirected the jury as to what might and what might not be a part of the custom of the port. The objection in reality is that the learned judge admitted evidence to show that certain things were part of the custom of the port which in their nature could not be so. It was shown by evidence that part of the custom was that vessels should be unloaded by certain lighters, that is to say, by those belonging to a certain company and those belonging to the Government, and that such lighters were only supplied to the ships in turn, and in a particular way. It was shown that this was the practice of the port, not only at the time when the ship arrived, but had been so for so long a time that it had become a recognised custom. But it was urged on behalf of the plaintiffs that this evidence was immaterial, and that the learned judge was wrong to admit it—that this evidence was, in fact, shut out by the terms of the charter-party. Now, the charter-party provides that “the cargo is to be brought to and taken from alongside at merchants’ risk and expense, that twelve running days (Sundays and holidays excepted) are to be allowed, and that the cargo is to be discharged with all dispatch according to the custom of the port.” In other words, the cargo is to be discharged with all dispatch consistent with its being discharged in the way in which every ship is invariably discharged at that port. What, then, is the manner in which the vessel is to be discharged? The ship cannot cross the bar, and must lie outside. The discharge must therefore take place by lighters, which are warped along a fixed cable across the bar, and, when they have crossed the bar, they are warped along smaller ropes to the ship’s side, and in the same manner are warped in again. The port is 160 miles at least from any place whence any additional lighters can be procured; and to say that anyone could get more lighters for the purpose of unloading a particular ship is to say that which, from a business point of view, is impossible. Therefore, *a priori*, one would suppose that the unloading must be done by lighters belonging to that port only. Evidence was given which accords with that which one would naturally expect—that the unloading had to be done by lighters only, and not by such lighters as the owners of the cargo could procure at their own will and pleasure, but by the lighters belonging to the company and the Government. Now, the company and Government would only supply those lighters in one particular way, viz., at the rate of one lighter per day to the ships in turn, according as each arrived and was reported. Therefore, the process by which a ship had to be discharged was by placing itself on the turn and waiting till it received from the Government permission to have one lighter per day to discharge the cargo. So far from thinking that this cannot be a custom, I am of opinion that it is the only substantial custom of the port. If there was no custom whatever, and the charterer could have supplied himself with a hundred lighters at once, he must still use them by going along the fixed warp. That is a matter

of necessity, and therefore the use of the fixed warp cannot be called an essential part of the custom; but an essential part of the custom was to wait till the vessel could get a lighter in her turn. Therefore, unless we hold that the defendants were bound to go to any distance to fetch lighters, they used all diligence and every dispatch. I hold that it was an essential part of the custom that the charterers were not bound to get lighters from any other place, in any other way, or at any other time, but only from the company and Government, at such times as they would allow; I am of opinion that that was a valid custom, that the learned judge was right to admit the evidence, that the verdict was right, that upon that finding no other judgment could be entered, and that consequently this judgment ought to be affirmed.

*Judgment affirmed.*

Solicitors: *Chester and Urquhart*, for *Bradshaw*, Barrow-in-Furness, for plaintiff; *Allen and Greenor*, for defendant.

May 20, 21, 22, and 23, and Dec. 21, 1878.

(Before BRETT, COTTON, and THESIGER, L.JJ.)

ANGUS AND CO. v. DALTON AND THE COMMISSIONERS OF HER MAJESTY’S WORKS AND PUBLIC BUILDINGS. (a)

APPEAL FROM THE QUEEN’S BENCH DIVISION.

*Easement—Right to lateral support of buildings by adjoining soil—Uninterrupted enjoyment for twenty years—Presumption of grant—Prescription Act (2 & 3 Will. 4, c. 71).*

*The right to lateral support of buildings by the adjoining soil is not a right of property, but is an easement, and can be acquired by express or implied grant.*

*Such right is not within the Prescription Act (2 & 3 Will. 4, c. 71), but after twenty years’ uninterrupted enjoyment the presumption of a lost grant applies.*

*Plaintiffs owned a dwelling-house adjoining a house built upon the extremity of defendants’ land. Twenty-seven years before the cause of action, plaintiffs altered the character of their house by converting it into a coach factory, substituting for some of the old internal walls a chimney-stack of brickwork, which they carried to the extremity of their land, and by which the upper stories were mainly upheld. Defendants excavated their land, and in consequence plaintiffs’ building fell. Plaintiffs sued to recover damage for the loss occasioned thereby.*

*A verdict was directed for the plaintiffs, but the Queen’s Bench Division held that the defendants were entitled to judgment.*

*Held, by Cotton and Thesiger, L.JJ., that the fact that there was no grant did not prevent the acquisition by the plaintiffs of the right to support, and therefore defendants were not entitled to judgment.*

*Held, also, by Cotton and Thesiger, L.JJ., that, as no question as to whether the defendants had notice of the amount of support required by the plaintiffs’ building had been left to the jury, defendants were entitled to a new trial.*

*Judgment of the Queen’s Bench Division reversed.*

*Held (Brett, L.J. dissenting), that, as there had*

(a) Reported by F. B. HUTCHINS, Esq., Barrister-at-Law.

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*been in fact no grant, plaintiffs had acquired no right to support, and defendants were entitled to judgment.*

THE action was brought to recover damages for loss occasioned by the fall of a building belonging to the plaintiffs, caused by excavations made by the defendants in the adjoining land.

The trial took place before Lush, J. at the New-castle Summer Assizes 1876, when a verdict was directed for the plaintiffs for the amount claimed subject to a reference to ascertain the amount of damages.

On motion for judgment the majority of the Divisional Court (Cockburn, C.J. and Mellor, J., Lush, J. dissenting) gave judgment for the defendants, and the plaintiffs appealed.

The case in the Divisional Court is reported 38 L. T. Rep. N.S. 510.

The facts are fully stated in the judgments of Brett and Thesiger, L.JJ.

May 20, 21, 22, 23.—*Littler, Q.C., Gainsford Bruce, and E. Ridley* for the plaintiffs.

The *Attorney-General* (Sir John Holker, Q.C.), Sir *James Stephen, Q.C.*, and *A. E. Gathhorne Hardy* for the Commissioners of Works and Public Buildings.

*Herschell, Q.C. and Wheeler* for the defendant Dalton.

The arguments which were used are sufficiently referred to in the judgments.

In addition to the authorities referred to in the judgments, and those which were cited in the court below, the following cases were referred to in argument :

*Slingsby v. Barnard*, 1 Roll Rep. 430;  
*Holcroft v. Heel*, 1 B. & P. 400;  
*Rolle v. Whyte*, L. Rep. 3 Q. B. 286;  
*Jenkins v. Harvey*, 1 C. M. & R. 877;  
*Tapling v. Jones*, 12 L. T. Rep. N. S. 555; 11 H. L. Cas. 290;  
*Aynsley v. Glover*, 32 L. T. Rep. N. S. 345; L. Rep. 10 Ch. 287;  
*Harbidge v. Warwick*, 3 Ex. 552;  
*Suffield v. Brown*, 33 L. J. Ch. 249;  
*Stroyan v. Knowles*, 6 H. & N. 454; 30 L. J. 102, Ex.;  
*Smith v. Thackeray*, L. Rep. 1 C. P. 564;  
*Sutton v. Clarke*, 6 Taunt. 29;  
*Badcliffe's Executors v. Mayor of Brooklyn*, 4 New York Rep., Comstock 195;  
*Chadwick v. Trower*, 6 Bing. N. C. 1;  
*Hervey v. Smith*, 22 Beav. 299;  
*Gray v. Pullen*, 5 B. & S. 970; 34 L. J. 265, Q. B.;  
*Butler v. Hunter*, 7 H. & N. 826; 31 L. J. 214, Ex.;  
*Hole v. Sittingbourne Railway Company*, 6 H. & N. 488; 30 L. J. 81, Ex.;  
*Ellis v. Sheffield Gas Company*, 2 E. & B. 767; 23 L. J. 42, Q. B.;  
*Pickard v. Smith*, 10 C. B. N. S. 470;  
*Rapson v. Cubitt*, 9 M. & W. 710;  
*Allen v. Hayward*, 7 Q. B. 960;  
*Reedie v. London and North-Western Railway Company*, 4 Ex. 244; 20 L. J. 65, Ex.;  
*Overton v. Freeman*, 11 C. B. 867; 21 L. J. 52, C. P.;  
*Peachey v. Rowland*, 13 C. B. 182; 23 L. J. 81, C. P.  
*Cur. adv. vult.*

Dec. 21.—The following judgments were delivered:

THESIGER, L.J.—The material facts of this case may be shortly stated. Down to the year 1849 two dwelling-houses of considerable age stood side by side, each having had in fact for a period long exceeding twenty years lateral support from the soil upon which the other house rested. In 1849 the plaintiffs' predecessor converted one of the dwelling-houses into a coach factory. In the

course of the conversion the internal walls, which had previously existed, were removed, and girders supporting the upper floors of the factory were on one side let into a large chimney-stack, which extended along a portion of the dividing wall, and on the opposite side took their bearings from the plaintiffs' wall. The effect of this mode of construction was to throw a considerable part, estimated at one-fourth, of the whole weight of the factory upon the chimney-stack, the foundations of which, being in contact with the soil under the adjoining house, the lateral pressure upon that soil was materially increased. No express assent to the alteration was given by the owner of the adjoining house, but it must be taken that he was aware of the conversion of the dwelling-house into a factory, although there is no evidence of his having been aware of the precise nature of the internal alterations made for that purpose, or of the exact effect which they would produce as regards lateral pressure. The adjoining house continued in its condition of a dwelling-house until shortly before the commencement of the present action, when the Commissioners of Her Majesty's Works and Public Buildings became possessed of it, and by a contract with the defendant Dalton, a builder, engaged him to pull it down, to excavate to such a depth as would enable cellars, which had not previously existed, to be made, and to erect upon the site of the old house a building to be used as a probate office. Under the specification, which was incorporated with the contract, Dalton was bound to shore up adjoining buildings, and to make good all damage caused thereto during the erection of the building, and to provide three rods of brickwork in Portland cement, to be used, if necessary, in underpinning the adjoining property. Dalton employed Messrs. Newby and Thorpe, as sub-contractors, to do the whole of the excavators', drainers', bricklayers', and masons' work on the building under conditions, which may be assumed to have included those to which I have referred. They therefore excavated to the depth of several feet below the level of the foundation of the plaintiffs' chimney-stack, and notwithstanding that they left a thick pillar of the original clay around the stack for the purpose of supporting it during the erection of the new dividing wall, the clay gave way after exposure to the air and the stack sank and fell, carrying with it a considerable portion of the factory, and causing damage to the plaintiffs, in respect of which the present action was brought. The case came on for trial before Lush, J. and a special jury, when, in addition to proof of the above-mentioned facts, the plaintiffs' witnesses gave detailed evidence as to the construction of the factory and the weight thrown upon the chimney-stack, the fair inferences from which evidence appear to me to be that the construction of the plaintiffs' factory, although somewhat unusual, was such as to make it reasonably stable, and that looking to the character of the building, and the purposes for which it was erected, the weight imposed upon the chimney-stack, although greater than if there had been internal walls, was not unduly great. The cross-examination of the plaintiffs' witnesses was obviously directed to displacing the plaintiffs' case upon these points, and at the close of the plaintiffs' case it was submitted on the part of the defendants that no right to support for the chimney-stack with the weight

upon it had been obtained, or that at least it was a question for the jury whether the weight, which was thereby put upon the adjoining soil, was of such a character as the neighbouring owner could reasonably be expected to be aware of and to provide for. It was contended also on the part of the commissioners that Dalton, the builder, being a contractor and not a servant or agent to them, was alone liable, while Dalton took the same point as regards his sub-contractors. Upon this point the learned judge held that he was bound by the authority of *Bower v. Peate* (35 L. T. Rep. N. S. 321; L. Rep. 1 Q. B. Div. 321) to hold both the commissioners and Dalton responsible for the acts of the sub-contractors; and upon the main question he ruled, as I gather from the shorthand writer's notes of the trial, that where a building has stood twenty years it has acquired an absolute right to the support of the adjacent land, without any reference to the question whether the adjoining owner has had notice of the alterations of structure and of the additional weight thereby imposed, and that such right is not dependent upon the implication of a grant. In accordance with his ruling he directed a verdict for the plaintiffs, leaving them to move for judgment. Upon motion for judgment the case was argued in the Divisional Court of Queen's Bench, before the Lord Chief Justice and Mellor and Lush, JJ., and while Lush, J. adhered in substance to the view of the case which he had taken at the trial, the other members of the court held that the facts proved showed no right of support, and directed the judgment to be entered for the defendants. Against this judgment the present appeal was brought. The principal question raised by it is of unusual difficulty as well as of great importance, and looking to the difference of opinion, which unfortunately exists upon it in this court as well as in the court below, I cannot but feel diffident as to the correctness of the conclusion at which I have arrived. If, indeed, that question had been wholly untouched by authority, I should have felt the greatest hesitation in forming an opinion upon it, for in every aspect in which it presents itself it discloses difficulties which render a satisfactory solution almost impossible. Although, however, the exact point for decision in this case may not have been covered by direct authority, the dicta of judges upon it are to be found in a large number of cases in which analogous points have formed the subject of distinct decision, and it is, I think, possible to obtain from these dicta and decisions valuable assistance in determining what is the nature of a right of support such as is claimed in the present case, and under what circumstances it may be acquired. The right to lateral support of buildings from adjoining soil holds an intermediate place between the right to lateral support of soil from soil, and the right to lateral support of buildings from buildings; and some light may be thrown upon this case by consideration of these kindred rights. The right to support of soil from soil is a right of property, which requires neither prescription nor grant for its acquisition, and which naturally exists wherever the lands of adjoining owners are in contact: *Humphries v. Brogden* (16 L. T. Rep. O. S. 457; 12 Q. B. 739); *Rowbotham v. Wilson* (2 L. T. Rep. N. S. 642; 8 H. L. Cas. 348; 8 E. & B. 123). The right to support of buildings from buildings, on the other hand, is an ease-

ment of a highly artificial character, and one which must necessarily be of infrequent occurrence. Properly constructed houses do not, as a rule, depend for their stability upon the existence of adjoining houses. No man can, therefore, from the mere existence in fact of this dependence, be presumed to have notice of it, and as a consequence be presumed, in the event of his not interrupting it, to acquiesce in his neighbour's enjoyment of it. Such enjoyment offends against one of the cardinal rules governing the acquisition of an easement, namely, that the user must not be secret. But although the general rule be as I have stated, still, so far as there is authority upon this point at all, it would appear to have been the opinion of the courts that the easement in question might, under special circumstances, be acquired. The decision in *Peyton v. Mayor of London* (9 B. & C. 725) turned in great measure upon the form of the declaration which, as Lord Tenterden said, neither alleged as a fact that the plaintiffs were entitled to have their house supported by the defendants' house, nor contained any allegation from which a title to such support could be inferred as a matter of law; but the concluding passage of the judgment in that case, in which the court adverted to the want of evidence from which a grant to the plaintiffs of a right to the support of the adjoining house might be inferred, as well as to the form of the declaration, leads fairly to the conclusion that upon stronger evidence directed to a more properly drawn declaration a grant of the right of support claimed might have been presumed. In *Solomon v. Vintners' Company* (4 H. & N. 585; 28 L. J. 370, Ex.), which was a case in which a right of support for a house from another house not immediately adjoining was claimed, Pollock, C.B., in giving the judgment of himself and two other judges, although apparently not favourably disposed towards such a right under any circumstances, yet admitted that, if the house removed had been next adjoining the plaintiffs, he would have been much embarrassed by cases and dicta in arriving at a decision against the right claimed. Bramwell, B. was careful to rest his judgment against the particular claim made on the ground that, upon the facts proved, the enjoyment was not open. *Richards v. Ross* (22 L. T. Rep. O. S. 104; 9 Ex. 218) was the case of houses originally built together and belonging to the same owner, and there the court presumed that upon the severance of the ownership there was a grant and a reservation of the reciprocal right of support. These cases, then, at least indicate that even in the case of a claim to the purely artificial support of building by building, the reason against presuming a right upon evidence of mere user is rather the particular one derived from the nature of the easement claimed, and the consequent improbability of knowledge and acquiescence on the part of the owner of the servient tenement than a general one founded upon the impossibility of such an easement being acquired by user at all. I come now to the consideration of the easement which is claimed in the present case. It holds, as I have said, an intermediate place between the artificial right, to which I have just referred, and the natural right of property, by which a man is entitled to have his soil supported laterally by his neighbour's soil. It has an affinity to this natural right, if the means of support be looked at; it is more akin to



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the artificial right, if the object of the support be considered. I have applied the term "easement" to the right claimed in this action, because it is clear that the support of a building cannot be claimed as a natural right of property. Natural rights of property must be rights which attach to property in its primitive state, and cannot, without a contradiction in terms, be applied to an artificial subject-matter like a house; but I need not stop to reason this out, for the judgment of the Exchequer Chamber, delivered by Willes, J., in *Bonomi v. Backhouse* (E. B. & E. 646; 28 L. J. 378, Q. B.), following what had previously been laid down in *Wyatt v. Harrison* (3 B. & Ad. 87f), *Partridge v. Scott* (3 M. & W. 221), and other cases, distinctly affirms the proposition that the right to support of buildings must be founded upon prescription, or grant, express or implied. It is true that when *Bonomi v. Backhouse* (8 L. T. Rep. N. S. 754) came upon appeal to the House of Lords (9 H. of L. Cas. 503; 34 L. J. 181, Q. B.), two members of that House, viz., Lords Cranworth and Wensleydale, used expressions to the effect that the right claimed in that case was not an easement, but a right of the plaintiffs to the enjoyment of their own property, and the language of Wightman, J. in the Court of Queen's Bench (27 L. J. Q. B. 378) was to the same effect. In no part, however, of the opinions and judgment referred to was it suggested that the decisions in previous cases upon this point were erroneous, and the language used may be reasonably attributed to the fact that while damage to the plaintiff's buildings constituted the damage in respect of which the action was brought, it was caused by mining operations, which had affected the soil upon which the plaintiff's buildings stood quite apart from the additional weight which they imposed upon it; in other words, that the natural right of property had been invaded. The Lord Chancellor and Lord Brougham accepted the reasons, as well as concurred with the judgment of the Exchequer Chamber. If then the right claimed be not a right of property, is it an easement which can be acquired? and if it can, how and under what circumstances may it be acquired? That it is a right or easement, which may under some circumstances be acquired, is treated as clear law by a long series of authorities, and is admitted by all the judgments in the court below: that it is an easement not coming within the Prescription Act appears also to be generally admitted, and is assumed by me; that it is a right or easement which must be founded upon "prescription or grant express or implied" is a proposition stated in terms already quoted in the judgment of the Court of Exchequer Chamber in *Bonomi v. Backhouse* (E. B. & E. 646, at p. 654), and borne out by the general current of authority upon the subject of the acquisition of easements. I cannot therefore accede to the view suggested by Lush, J. in the court below, that an absolute right to an easement uninterruptedly enjoyed for twenty years may be obtained by analogy to the period of limitation fixed as regards entry on lands by 21 Jac. 1, c. 16. It may be that the commencement of the reign of Richard I was originally fixed as the period of prescription for incorporeal rights by analogy to the statute 3 Edw. 1, c. 29, which fixed the same period for alluring assisin in a real action, and there are dicta to be found in the

books supporting the view that as a matter of theoretical law the same analogy carried with it an alteration as regards incorporeal rights, when the period of sixty years was fixed for a writ of right, and fifty years for a possessory action by 32 Hen. 8. But, as a matter of practical law, this analogy does not appear to have been extended by the courts to these last-mentioned statutes. The reign of Richard I. still remained the time, to which legal memory in regard to easements was supposed to relate, and although the later statute of 21 Jac. 1, c. 16 did undoubtedly suggest to the minds of the judges the propriety of giving to twenty years' uninterrupted enjoyment of incorporeal rights an effect to some extent at least commensurate with that produced by a similar enjoyment of land, they seem to have been unwilling, probably for good reasons, to go the whole length of applying the statute by analogy, notwithstanding that if they had done so they would have followed the example set them by their predecessors in respect of the statute of Edward I. They effected the object which they had in view by the creation of the fiction of a grant made and lost in modern times. Such a fiction, like other fictions, may be open to the strictures passed upon it, although, I must add, that it has had in my opinion in many respects a beneficial operation, and is, after all, but an extension of the fiction, which had previously formed the basis of prescriptive titles, for every prescription imports a grant which in most cases no one believes in. But whatever may be the merits or demerits of the fiction, it is too late to question the validity of its introduction. The doctrine of lost grant forms part of the law of the land, and any dislike which may be felt for this and like fictions cannot be allowed to interfere with the carrying out of the doctrines involved in them to the full extent, which has been sanctioned by established authority. It becomes necessary therefore, in the first place, to consider the character and extent of the presumption of a lost grant as applicable to easements generally, and then, in the second place, to see in what respects, if any, a difference exists in regard to the particular easement claimed in this action. And, first, as regards easements generally, the authorities cited in the court below establish that this presumption is not a *presumptio juris et de jure*, or, to use other language, is not an absolute and conclusive bar. On the other hand, these same authorities lay down that the uninterrupted enjoyment of an easement for twenty years raises, to use the words of Lord Mansfield in *Darwin v. Upton* (2 Wms. Saund. 506), "such decisive presumption of a right by grant or otherwise, that unless contradicted or explained the jury ought to believe it:" and the corollary upon this proposition is stated by Bayley, J., in *Cross v. Lewis* (2 B. & C. 636), where he says: "I do not say that twenty years' possession confers a legal right; but uninterrupted possession for twenty years raises a presumption of right; and ever since the decision in *Darwin v. Upton* (2 Wms. Saund. 506) it has been held that in the absence of any evidence to rebut the presumption, a jury should be told to act upon it." What then is the nature of the evidence which would be held to "contradict," "explain," or "rebut" this decisive presumption? Proof of the mere origin of the easement within the period of

legal memory is not sufficient for this purpose: it was to meet the hardship, which arose from such proof preventing the acquisition of a prescriptive title, that the legal fiction of a grant made and lost in modern times was invented; neither is it sufficient to prove such circumstances as negative an actual assent on the part of the servient owner to the enjoyment of the easement claimed, or even evidence of dissent short of actual interruption or obstruction to the enjoyment: see *Cross v. Lewis* (2 B. & C. at p. 689), where Bayley, J., speaking of the case of opening windows says: "If his neighbour objects to them, he may put up an obstruction, but that is his only remedy; and if he allows them to remain unobstructed for twenty years, that is a sufficient foundation for the presumption of an agreement not to obstruct them." Again, proof that the dominant and servient tenement were originally in one ownership, and were separated under such circumstances as to negative the presumption of any reservation or grant of the easement claimed having actually been made at the time of the separation, would not be sufficient to prevent the presumption arising in a case where the enjoyment has been uninterrupted for twenty years: see *Livett v. Wilson* (3 Bing. 115), where, although it was proved that the two tenements were separated by a deed containing no grant or reservation of the easement claimed, the court did not rely upon this fact as supporting the verdict of the jury negating the presumption of a lost deed, but took as their ground the contested character of the user. In harmony, as it appears to me, with the last proposition, is the further proposition, that the presumption cannot be rebutted by mere proof by the owner of the servient tenement that no grant was in fact made either at the commencement, or during the continuance of the enjoyment. I am not aware that this proposition has been in terms directly decided, but it is almost impossible to suppose that among the numerous cases in which easements have been held by the courts to have been acquired by uninterrupted user for twenty years only, there must not have been many in which the owner of the servient tenement at the time when the period commenced was alive when the action was tried, to contradict, if such evidence had been admissible, the fact of a grant; and if such evidence were admissible, it is almost inconceivable that in the numerous cases, in which questions of easements have been discussed, no trace of an opinion to that effect should be found in the observations of the judges. The correct view upon this point I take to be, that the presumption of acquiescence, and the fiction of an agreement or grant deduced therefrom, in a case where enjoyment of an easement has been for a sufficient period uninterrupted, is in the nature of an estoppel by conduct, which, while it is not conclusive so far as to prevent denial or explanation of the conduct, presents a bar to any simple denial of the fact which is merely the legal inference drawn from the conduct. If, instead of its being a mere legal inference, the courts had considered that it was an inference of fact, to be drawn by juries like other inferences of fact, and in respect of which the servient owner might be called as a witness to negative the fact by denial of a grant ever having been made, it is difficult to understand how judges could have systematically, as the Lord Chief Justice admits they did, directed juries to find grants "in cases in which

no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction" (38 L. T. Rep. N. S. 516; L. Rep. 3 Q. B. Div. 105). The case of *Campbell v. Wilson* (3 East, 294) lends support to my view upon this point, and illustrates to some extent my meaning when I speak of explanation of the conduct, which is relied upon as leading to the presumption of a grant. There, under an award made twenty-seven years before action, all rights of way in a particular locality, except those set out in the award, of which the way in dispute in the action was not one, had been extinguished. The facts of the case pointed so strongly to the use of the way in question having originated in a mistaken acting under the award, that the judge in his summing up almost assumed the fact; but having ruled also that notwithstanding it, the proof of subsequent user as of right was sufficient to raise the presumption of a grant, and the jury having found in favour of the defendant, who claimed the way, the Court supported both the ruling and the finding; and Le Blanc, J., said: "Unless the jury could, in the words of the report, refer the enjoyment for so long a time to leave, favour, or otherwise than under a claim or assertion of right, and indeed unless it could be referred to something else than adverse possession, I think such length of enjoyment is so strong evidence of a right, that the jury should not be directed to consider small circumstances as founding a presumption that it arises otherwise than by grant." The direction of the Lord Chief Justice himself to the jury in the case of *Rogers v. Taylor* (30 L. T. Rep. O. S. 277, 321; 2 H. & N. 828), to which I shall have to refer again, still further supports my view. But while the cases which I have cited throw light upon the point as to what circumstances will not negative the presumption of a grant arising from uninterrupted enjoyment for twenty years, still further light is thrown upon the subject by a consideration of cases cited in the Court below, in which the presumption was held to have been properly rebutted. The case of *Barker v. Richardson* (4 B. & A. 579) was one in which the owner of the servient tenement, a rector, tenant for life, was incompetent to make a grant, and it was held, therefore, that a grant by him could not be presumed. In *Webb v. Bird* (4 L. T. Rep. N. S. 445; 13 C. B. N. S. 841), which was the case of a claim, as stated in the declaration, to the enjoyment as of right of the "benefit and advantage of the streams and currents of air and wind which had used to pass, run, and flow from the west unto a windmill," and which enjoyment was alleged to have been interrupted by the building of a schoolhouse twenty-five yards to the west of the windmill, Wightman, J., in delivering the judgment of the Court of Exchequer Chamber, said as follows: "In the present case it would be practically so difficult even if not absolutely impossible, to interfere with or prevent the exercise of the right claimed, subject, as it must be, to so much variation and uncertainty, as pointed out in the judgment below that we think it clear that no presumption of a grant, or easement in the nature of a grant, can be raised from the non-interruption of the exercise of what is called a right by the person against whom it is claimed, as a non-interruption by one who might prevent or interrupt it." Again in *Chasmore v.*

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*Richards* (33 L. T. Rep. O. S. 350; 7 H. L. C. 349), a claim was made to underground water, which merely percolated through the strata in no known channels, and it was held by the House of Lords that the claim could not be supported as a right of property, and that looking to the casual and uncertain, as well as secret character of the enjoyment of such water, no grant of an easement could be presumed. The cases, therefore, as direct authorities, go no further than to show that a legal incompetence as regards the owner of the servient tenement to grant an easement, or a physical incapacity of being obstructed as regards the easement itself, or an uncertainty and secrecy of enjoyment putting it out of the category of all ordinary known easements, will prevent the presumption of an easement by lost grant; and on the other hand indirectly, they tend to support the view, that as a general rule where no such legal incompetence, physical incapacity, or peculiarity of enjoyment, as was shown in those cases, exists, uninterrupted and unexplained user will raise the presumption of a grant upon the principle expressed by the maxim, *Qui non prohibet quod prohibere potest assentire videtur*. This maxim brings me, secondly, to the consideration, whether the easement of lateral support for buildings from adjoining soil differs, and if so, in what respects, from easements generally, and whether different principles or presumptions of law are to be applied to it. It is said by the Lord Chief Justice that this particular easement is one the enjoyment of which it is practically impossible to resist. If that be so, then the maxim I have just quoted does not apply, and the proper inference would be that the easement comes within the authority of the cases of *Webb v. Bird* (4 L. T. Rep. N. S. 445; 13 C. B. N. S. 841) and *Chasemore v. Richards* (33 L. T. Rep. O. S. 350; 7 H. L. C. 349), and cannot by any period of user, however long, be acquired; but the Lord Chief Justice does not go so far as this: his language upon the point is as follows: (38 L. T. Rep. N. S. 520; L. Rep. 3 Q. B. D. 116), "I am very far from saying that when houses or buildings have stood for many years, especially when they appear to be of equal age, the presumption of a reciprocal easement of lateral support ought not to be made. It may reasonably be inferred that they were built under any of the circumstances, from which, at the present time, a grant would properly be implied. Thus they may have been built by one owner, or under a common building lease, or if built by different owners, where some arrangement for mutual support was come to. Thus, had the plaintiff's premises remained in their original condition, I should have been prepared to make the necessary presumption to uphold the right. Where land has been sold by the owner for the express purpose of being built upon, or, when, from other circumstances, a grant can reasonably be implied, I agree that every presumption should be made and every inference should be drawn in favour of such an easement, short of presuming a grant when it is undoubted that none has ever existed." The Lord Chief Justice appears therefore to place the easement of lateral support for buildings in some special class of its own, and while admitting that the doctrine of a lost grant may be, under certain circumstances, applicable to it, to make its application subject to conditions and limitations other than those which

apply to easements generally. Is then the nature of the easement so anomalous as to justify this treatment of it? and even if in its nature it does present anomalous features, are they such as have at any time been considered by the courts to warrant distinctive treatment? Upon the first of these two questions it may not unreasonably be urged that the physical impossibility of resistance to the enjoyment of the easement, if it exists at all, exists only in cases where, while the servient tenement has to bear the burden of the easement, it at the same time as a dominant tenement enjoys a corresponding benefit; that the tenement, from which support is claimed, must at the commencement of the period of enjoyment be land either in its natural state or built upon; if the former, that there is little, if any more difficulty in physically resisting the enjoyment of the easement than there would be in obstructing the access of light to windows; if, on the other hand, the servient tenement be land built upon, that then the easement which the dominant tenement will obtain will be no other in kind than that which the servient tenement must either have already acquired or be in the course of acquiring. Notwithstanding this reasoning, I am not inclined to dispute that the easement of support for buildings from adjoining soil does possess physical features, which distinguish it materially from most other easements, except perhaps that of the access of light to ancient windows, to which it has a strong analogy; and if the principles of law relating to easements were now to be settled for the first time, I might be disposed to limit this particular easement of support, and I may add that of light also, by conditions other than those which are applicable to affirmative easements. But the principles of law relating to easements are in the main settled, and the easements most analogous to the one in question here, namely, that of light, is found to be at common law placed as high as, and by the Prescription Act placed even higher than, affirmative easements, although one, the obstruction of which in many cases must be of the greatest practical difficulty. Can it properly be said then, that the difficulty or practical impossibility of obstruction in the case of the easement of support for a building by soil is such as to place it at common law in an entirely different category from other easements, and to render it subject to any real legal distinctions? I think not. This very ground of difficulty and practical impossibility of obstruction was present to the minds of the judges, who took part in the judgment in the Court of Exchequer Chamber in *Webb v. Bird* (4 L. T. Rep. N. S. 445; 13 C. B. N. S. 841), and whilst they decided against the easement claimed in that case on that ground, Blackburn, J., was careful to guard against the supposition that the reasoning of the judgment extended to the easement of lateral support for buildings. His words were as follows (13 C. B. N. S., at page 844): "I perfectly concur in the judgment, but wish, for myself, to guard against its being supposed that anything in the judgment affects the common law right that may be acquired to the access of light and air through a window or to the right to support by an ancient building from those adjacent. I agree with my brother Willes, in the Court below, that the case of the right to light, before the statute, stood on a peculiar ground." But the question can only be fully answered by

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tracing down in a little more detail the authorities upon the subject. In *Palmer v. Fleshees* (Sid. 167), which was a case of lights, the resolution of the judges put the right of support for an ancient house upon the same footing as the right to ancient lights. The fact alleged by the Lord Chief Justice (38 L. T. Rep. N. S. 519; L. Rep. 3 Q. B. Div. 114) that the case does not say what length of time will constitute a house or lights "ancient," and does not touch the subject of presumption, does not affect the value of the case upon the point for which I cite it. Again, in *Stansell v. Jollard* (1 Selw. N. P. 457, 11th edit.) Lord Ellenborough in terms affirmed in respect of a building, which had stood for twenty years, the right to support, "or as it were of leaning to the adjacent soil," by analogy to the case of lights. It is true that this ruling of Lord Ellenborough was questioned by the Lord Chief Baron Pollock in the case of *Solomon v. Vintners' Company* (4 H. & N. 585). But the two cases were very dissimilar, in their circumstances, and they may well stand together. In *Hide v. Thornborough* (2 C. & K. 250), Parke, B. (afterwards Lord Wensleydale), held as *Nisi Prius* that where the house of the plaintiff had been supported for twenty years to the knowledge of the defendants it had acquired a right to the support, and the observations of the same judge in *Gayford v. Nicholls* (9 Ex 702) are to the same effect. In *Brown v. Windsor* (1 O. & J. 20), there was evidence of express assent on the part of the owner of the servient tenement to the plaintiff's house being rested upon his wall; but at the same time the judges who decided the case, appear to have been clearly of opinion that apart from the express assent the acquiescence for twenty-seven years in the enjoyment of the support afforded presumptive proof of the right to the easement claimed. This case, however, was so special in its circumstances as not to afford much assistance upon the point under consideration. The case of *Partridge v. Scott* (3 M. & W. 220) is a more important authority. There a house built more than twenty years before action stood upon land which had been excavated, according to the assumption of the court, within twenty years; and, if it had not been for the excavation of the land, the mining operation of the defendant on the adjacent soil would not have affected the house. The Court, in a considered judgment delivered by Alderson, B., decided that the right to lateral support for the house, standing as it did upon excavated soil, had not been acquired. But the judgment at the same time in substance affirmed these propositions, namely, first, that the house as an ancient house would, but for the excavation of the soil upon which it stood, have acquired an easement of support by virtue of an implied grant; secondly, that, apart from the Prescription Act, such a grant might have been inferred from an enjoyment of the house, although standing upon the excavated soil for twenty years after the defendants might have been or were fully aware of the facts. The judgment, therefore, seems to assume that in the case of a house standing upon soil in its ordinary condition, the servient owner has sufficient notice of the fact of support being enjoyed to raise the presumption of acquiescence, and the consequent implication of a grant by him, when the enjoyment has continued for twenty years. *Beggs v. Taylor*, 30 L. T. Rep. O. S. 277, 521; 2 H. & N. 828, was a case of subjacent

support, in which there had been twenty years' enjoyment of the support, which, however, upon the trial was alleged on the part of the defendants to have been only a contentious enjoyment subject to acts negating any right of support. The Lord Chief Justice himself, as I have already mentioned, tried the case, and he told the jury that he thought at the end of twenty years after the house had been built the plaintiff would have acquired a right to support, unless in the meantime something had been done to deprive him of it; that the jury must presume that the additional burden was put upon the land by the assent of the owner of the minerals, and must presume a grant by such owner of a right to support. He thereupon left it to the jury to say whether the plaintiff had enjoyed the support for the foundations of his house for twenty years, and the verdict found for the plaintiff upon the direction was upheld by the Court. *Humphries v. Brogden* (16 L. Rep. O. S. 457) (12 Q. B. 739) was a case of subjacent support of soil by soil, but the considered judgment of the Court of Queen's Bench, delivered by Lord Campbell, C.J., while affirming the existence of the right as a natural right of property unaffected by a reservation of minerals, went at great length into the analogies to be derived from the principles of law relating to rights of lateral support, and treated as unquestionable law the proposition, that a right to lateral support of a house by the adjacent soil may be acquired like other easements by twenty years' uninterrupted enjoyment of such support. The language of the judgment upon this point is as follows (12 Q. B. at p. 749): "Where a house has been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house: *Stansell v. Jollard* (1 Selw. N. P. 457 11th ed.), and *Hide v. Thornborough*. (2 C. & K. 250.) Although there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favours the preservation of enjoyments acquired by the labour of one man and acquiesced in by another who has the power to interrupt them; and as, on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle." The words "with his knowledge," used in the passage I have quoted, as well as in the ruling of Parke, B., in *Hide v. Thornborough* (2 C. & K. 250), must, I think, be referable to cases like *Partridge v. Scott* (3 M. & W. 220.), which is cited in the judgment, and to any other cases, in which the circumstances of a house are of such a special character as to throw without the knowledge of the servient owner a greater than ordinary burden upon his tenement, and cannot be construed to mean that any special knowledge is required in the case of an ordinary house, which must as a matter of course, and to the knowledge of every person, increase by its downward pressure the lateral thrust of the soil upon which it stands. The question of knowledge, however, as affecting the present case

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is a material one, and will be considered by me more particularly before the close of this judgment. Lastly, comes the case of *Bonomi v. Backhouse* (E. B. & E. 646; 9 H. L. C. 503), the judgments and opinions in which certainly assume the right of lateral support to a building from adjacent land to stand as high as other easements, if indeed they do not treat it as one more nearly approaching a right of property, and as such more easily to be acquired than an ordinary easement. The result of the authorities which I have cited is to show that in the opinion of a large number of judges ranging over a period of 100 years, from 1761 to 1861, the grant of a right of support for buildings by adjacent soil is one subject to like conditions as, and which may be acquired in like manner with, easements generally by proof of uninterrupted enjoyment for twenty years. Against the consensus of dicta in support of this view no direct authority or even distinct dictum is produced. And under such circumstances I do not feel myself justified, even if I were disposed, which I am not, in running counter to judicial views so long and so consistently entertained. But the question still remains whether the right of support acquired by user is an absolute one attaching itself to any house, which has stood the requisite time, or whether any and what limitation is to be put upon the right in this respect. I have already incidentally touched upon this question, and its answer, as it appears to me, is to be found in a reference again to the rule that a user which is secret raises no presumption of acquiescence on the part of the servient owner, and, as a consequence, no presumption of right in the dominant. If, therefore, a particular house were by reason of some intrinsic or extrinsic weakness of a serious character, or owing to some unreasonable method of construction, to require an amount of support greater than houses of its kind usually require, I think that the mere enjoyment in fact of that extra support would not raise the presumption of acquiescence on the part of the servient owner, or create after twenty years' user, a right to that extra support. If, on the other hand, a house is of ordinary stability and of reasonable construction, I think it equally clear that the owner of the adjacent soil must be assumed to know the amount of lateral support which such a house must need, and is bound to afford it as a matter of right after the house has in fact enjoyed it for twenty years. This question was discussed but not decided in *Dodd v. Holmes* (1 Ad. & E. 493). In *Partridge v. Scott* (3 M. & W. 220) the house was ancient, but the excavation which necessitated the additional support was assumed to be modern, and the judgment therefore in that case is not a direct authority upon the question; but the dictum contained in the judgment that a grant of the additional support ought not be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts is a distinct intimation of the opinion of the court upon the question. If the knowledge on the part of the servient owner is required to make effective the enjoyment of additional support for a house where it is rendered necessary by the soil under it having been excavated, it must equally be required where, by reason of some internal alteration of the house itself, some special support beyond what the general construction and character

of the house would indicate becomes necessary. This, as I have already said, I infer to have been the meaning of Parke, B. in *Hide v. Thornborough* (2 C. & K. 250), and of the Court of Queen's Bench in *Humphries v. Brogden* (16 L. T. Rep. O. S. 457; 12 Q. B. 739), when they speak of knowledge as a necessary condition of the easement of support. It may be that in the case of the conveyance of one or both of two houses belonging to one owner, each of which is in fact enjoying, by virtue of some peculiarity of construction, a more than ordinary amount of support from the soil of the other, reciprocal grants of the right of support may be presumed without proof of notice or knowledge; but such a case involves different considerations to those which belong to ordinary cases of easements claimed by user, and it appears to me that to hold that a house, whatever be its construction and whatever the amount of support it may need, acquires, merely by twenty years' enjoyment of such support, an absolute right to it, would be to run counter to well-established laws of easements as well as to offend against the principles of reason and justice, on which those laws are founded. Applying, then, these observations to the present case, I cannot concur in the ruling of Lush, J. at the trial, that where a building of any kind has stood for twenty years it has acquired an absolute right of support without reference to the question of notice to the adjacent owner; and inasmuch as the effect of that ruling was practically to preclude the counsel for the defendants both from addressing the jury and, if they were so minded, from calling witnesses upon the question of notice, I feel a difficulty in seeing how, under such circumstances, a new trial can be refused to the defendants. But apart from what I hold to be the erroneous ruling of the learned judge, and assuming that his ruling had been founded upon the doctrine of an implied grant, I should still be forced to the conclusion that the defendants are entitled to a new trial. At the close of the plaintiffs' evidence the position of the case stood thus: the plaintiffs' witnesses had proved that the factory was of a construction reasonably stable, but had admitted at the same time that its construction was somewhat unusual. It was clear also that the result of the insertion into the chimney-stack of the girders supporting the upper floors was to concentrate a greater weight at one part of the building than would have been the case if the girders had, on the side adjoining the defendants' soil, taken their bearings, as they did upon the opposite side, from a dividing wall; and the cross-examination upon this point had raised the issue of the reasonableness of such a method of construction; and lastly, although it was alleged on the part of the plaintiffs that the stack of brickwork would have fallen in consequence of the excavation upon the adjoining soil, without the extra weight of the upper floors of the factory upon it, the counsel for the commissioners distinctly intimated that he was prepared to negative by witnesses that allegation. This being the position in which the case stood, I cannot hold that the jury could be properly directed as a matter of law to presume a grant of the easement claimed upon the footing of its having been enjoyed with the knowledge of the defendants, and, as a consequence, with their acquiescence; and I think that the defendants' counsel were warranted in asking that the jury should determine whether

the weight which had been put upon the adjoining soil was such as the owner of the soil could, under the peculiar circumstances of the case, be reasonably expected to be aware of and to provide for. One more point remains for consideration, namely, whether assuming the plaintiffs to be entitled to recover for the damages caused by the acts of the sub-contractors, the defendants are responsible in law for those acts. Upon that question I entertain no doubt. It is properly admitted by the defendants' counsel that the case of *Bower v. Peate* (35 L. T. Rep. N. S. 321; L. Rep. 1 Q. B. Div. 321) is undistinguishable from the present, and I am of opinion that the law there laid down by the Lord Chief Justice in delivering the considered judgment of the court is correctly stated and placed upon proper principles, and that the defendants in the present case, who have ordered work to be executed, from which in the natural course of things injurious consequences to the plaintiffs' factory might be expected to arise, unless means to prevent them were adopted, are, if the plaintiffs are entitled to recover at all, responsible for the damage, which has in fact arisen owing to the means adopted having proved to be insufficient. For the reasons given I am of opinion that the judgment of the court below should be reversed, and if the defendants desire it, that the case should go down for a new trial; otherwise that the judgment should be entered for the plaintiffs.

CORROX, L.J.—The plaintiffs have no right to recover in the action, unless they are entitled to have from the land, which was excavated, the lateral support required by their house. The majority of the judges in the Queen's Bench Division were of opinion that the plaintiffs under the circumstances had no such right, and the first question is, were they so entitled? The plaintiffs in the first place contend that every owner of property is entitled independently of user and grant, and as a natural right of property, to have from the soil belonging to adjoining owners such support as any buildings on his own land require: in my opinion this cannot be maintained. In all cases, in which the right of lateral support for buildings has been considered, the judges have with one exception after-mentioned treated the right to lateral support for buildings as one to be acquired by enjoyment or grant, that is, an easement. This is, I think, the correct view. Every owner of land must from the first have had as a necessary incident a right to the support from his neighbour which the land in its natural state requires. This is a right, subject to which all property must be taken; but, independently of grant or right acquired by enjoyment, no one can have a right to throw a greater burden on his neighbour by requiring him to support artificial erections. The one exception to which I have referred, was *Bonomi v. Backhouse* (9 H. L. Cas. 503), where Lord Cranworth in the House of Lords speaks of the right of the plaintiffs in that case as a right of property. But I think the correct explanation is, that in that case the operations of the defendant would have let down the land of the plaintiffs, even if there had not been any buildings thereon. The right of the plaintiffs to support for their buildings must then be considered as an easement, and the question is whether they have under the circumstances acquired any such right. It is not an easement

within the statute 2 & 3 Will. 4, c. 71. In this I agree with the judges of the Queen's Bench Division. The plaintiffs must therefore make out their right in such way as is available for that purpose independently of the statute. It was argued for the defendants that the easement was of such a nature that it could not be acquired except by express grant. Although there is not much decision as to the right of support for buildings, the view thus contended for by the defendants is opposed to the opinions expressed by many judges of the highest authority, who all treat the right of lateral support for buildings as capable of being acquired by use or enjoyment. I may refer to the decision of Lord Ellenborough in *Stansell v. Jollard* (1 Selw. N. P. at p. 457, 11th ed.), to what is said by Willes, J. in *Bonomi v. Backhouse* (E. B. & E. 646), by Alderson, B. in *Partridge v. Scott* (3 M. & W. 220), by Parke, B. in *Gayford v. Nicholls* (9 Ex. 702), by Bramwell, B. in *Rowbotham v. Wilson* (8 E. & B. at p. 140), and by Lord Campbell, C.J. in *Humphries v. Brogden* (16 L. T. Rep. O. S. 457; 12 Q. B. 739). Though in none of these cases is there any express decision of the point, all the judges whom I have named assume that a right to lateral support for buildings is an easement capable of being acquired by any means by which, independently of the Act of 2 & 3 Will. 4, c. 71, an easement may be acquired. These means are either an enjoyment beyond living memory, from which in the absence of evidence to the contrary enjoyment before the time of legal memory would be presumed, or by enjoyment for such a time as would be sufficient in the absence of evidence to the contrary to justify a presumption of a modern grant which has been lost. In the present case the building had been for twenty-seven years in the state in which it was, when the act of defendants, which is the foundation of the action, was done. The question of enjoyment beyond the time of living memory does not arise, but there had been upwards of twenty years' enjoyment, and this is sufficient to raise a presumption that the enjoyment has been under a modern lost grant. This is, no doubt, liable to be rebutted, and in my opinion the real question on this part of the case is, what evidence is sufficient to rebut the presumption. On this point there is very little authority, but as stated by Cockburn, C.J. in this case (38 L. T. Rep. N. S. 516; L. Rep. 3 Q. B. Div. 105), it is not necessary that the jury should come to the conclusion that in fact there was such a grant. The easement is analogous to that of a right to light before the statute 2 & 3 Will. 4, c. 71, and in *Cross v. Lewis* (2 B. & C. 686) Bayley, J. lays it down, and, in my opinion, correctly, that in such case mere dissent by the owner of the alleged servient tenement will not be sufficient to rebut the presumption. If, therefore, the parties at the trial, as stated by the Lord Chief Justice, admitted that there was not in fact any grant, this, in my opinion, was not sufficient to rebut the presumption arising from twenty years' enjoyment, or to justify a judgment for the defendants. But it may be urged this is contrary to what is said in many cases, namely, that twenty years' enjoyment raises a presumption only, and that the opinion which I have expressed will make such enjoyment confer an absolute right; but this is not so. The presumption may be rebutted by showing that the owner



of the servient tenement was not capable of making a grant, as, for instance, that he was tenant for life, or of unsound mind; and the principal cases, except *Webb v. Bird* (4 L. T. Rep. N. S. 445; 13 C. B. N. S. 841) and *Chasemore v. Richards* (33 L. T. Rep. O. S. 350; 7 H. of L. Cas. 349) referred to by Cockburn, C.J., where the presumption arising from twenty years' enjoyment was rebutted, is *Barker v. Richardson* (4 B. & A. 579), where the owner of the alleged servient tenement was incapable of making a grant. The cases of *Chasemore v. Richards* (33 L. T. Rep. O. S. 350; 7 H. of L. Cas. 349) and *Webb v. Bird* (4 L. T. Rep. N. S. 445; 13 C. B. N. S. 841) turned on the peculiar character of the rights claimed, and in the latter case Blackburn, J. expressly distinguished the right then in question from that on which the plaintiffs rely. An admission, therefore, or evidence, that in fact there was no grant, would not, in my opinion, rebut the presumption; and, notwithstanding such evidence or admission, unless there was any other evidence to rebut the presumption (as, for instance, evidence that the adjoining owner was incapable of making a grant), the jury ought to have been directed to find that there had been a grant which has been lost. This, however, does not decide the case in favour of the plaintiffs. Enjoyment does not confer a right, unless the enjoyment has been open. Twenty years' enjoyment of lateral support only gives a right to such support as the actual construction of the house, if known to the adjoining owner, requires, or to such support as is reasonably required by a house of the dimensions and construction known or apparent to the adjoining owner. In my opinion, therefore, though on the evidence in this case the jury ought to have been directed to find that the plaintiffs by enjoyment had acquired a right to some support, the question of the degree of support to which they had acquired a right still remained. There was no evidence that the owner of the adjoining house knew of the particular construction of the plaintiffs' house; and, in my opinion, the question ought to have been left to the jury to find whether the support required for the plaintiffs' house was more than reasonably required by a house of the apparent dimensions and character of the house of the plaintiffs, if used for the purpose for which the house was used. If this question had been answered in the affirmative, the verdict would have been for the defendants; but if answered in the negative, for the plaintiffs. Lush, J. entirely withdrew the case from the jury, and, in my opinion, there must be a new trial if the defendants desire it. I think it unnecessary to enter at length into the question whether, assuming the contractor, Dalton, to be liable to the plaintiffs, the defendants, the commissioners, are answerable for the injury caused by the acts of their contractors. On this point I agree with the decision in *Bower v. Peate* (35 L. T. Rep. N. S. 321; L. Rep. 1 Q. B. Div. 321), that where a defendant has employed a contractor to do work, which in its nature is dangerous to a neighbouring property, and damage is the result of the work done, the employer is liable, though he has employed a competent contractor, and given him directions to take precautions in executing the work.

BRETT, L.J.—In this case it seems to me very desirable, in order to express exactly my view of

the law, to commence by stating what I understand and assume to have been those facts which were material to the decision which were in evidence at the trial. I collect them from the judgments: it was not in any way, as I apprehend, argued before us, that they had been misunderstood by the judges of the Queen's Bench Division. As collected from the judgments of Lush, J. and the Lord Chief Justice, they were, that there had been before 1849 two dwelling-houses adjoining each other, each built to the extremity of the soil belonging to its owner, but each independently built, so that they were without any party wall. In 1849 the plaintiffs altered the dwelling-house belonging to them into a coach factory, and so altered the structure as to make it, as a building, different from what it had been before, but the same as it was when it fell. It was, as I apprehend, at the trial and on the argument in the Queen's Bench Division taken as a fact, proved or admitted, that they made the alteration without any grant from the owner of the adjoining premises of any right of lateral support, unless his assent is necessarily to be inferred from his taking no steps to resist the acquisition and enjoyment of such support. This is what I gather from the express statement of the Lord Chief Justice (38 L. T. Rep. N. S. 515; L. Rep. 3 Q. B. Div. 101) and Lush, J. says (38 L. T. Rep. N. S. 513; L. Rep. 3 Q. B. Div. 94): "Nothing is shown except that the adjoining owner was not asked for and did not give his assent to the alteration of the house into a factory." The adjoining owner was never in fact asked for and never in fact gave his assent to the alteration of the house into a factory; the adjoining owner, however, must have known that the building was in and from 1849 used as a coach factory instead of a house, but there was no evidence that he knew the nature or extent of the structural alterations made in the building. The work complained of was done by one Dalton, a builder, under contract with the commissioners: it was done according to the plans he was instructed to carry out without negligence on his part; the plans did not disclose any danger to the plaintiffs' building; work done according to them might have been reasonably deemed to be sufficient to prevent any damage to it. But by exposure to the air the thick pillar of clay, left by Dalton according to the plans, between his workings and the plaintiffs' building cracked and gave way, and so the plaintiffs' factory was brought down. The pillar of clay left might have supported the plaintiffs' land in its natural state, but did not support the land with the factory on it. Upon this evidence Lush, J. directed the jury, as matter of law, to find a verdict for the plaintiffs, leaving them to move for judgment. Upon a motion to that effect Lush, J. gave judgment that the direction was right, and that the plaintiffs were entitled to judgment; the Lord Chief Justice and Mellor, J. gave judgment that the verdict ought to have been directed to be entered for the defendants, and that they were entitled to judgment. It was contended before us, on appeal, that the judgment ought to be for the plaintiffs, or that there ought to be a new trial. The learned judges of the Queen's Bench Division seem to have been agreed on many propositions; as that the right to lateral support from the adjacent soil of an adjacent owner, necessary for buildings in addition to the support



necessary for the soil on which they stand, is not a right of property; that such a right may exist, but if it does it is a right which exists as the result of an easement; that such an easement can, in consideration of law, only have its origin in grant; that such an easement is not within the Prescription Act (2 & 3 Will. 4, c. 71); that upon proof of twenty years' enjoyment after knowledge by the adjoining owner of the support given by his soil, and absence of any other evidence, a jury ought to be directed to find for the claimant a right, as if there had been a grant in the nature of an easement. The points of difference were, that Lush, J. held, that where there has been in fact an enjoyment of lateral support to a building for twenty years without physical obstruction, the jury are to be directed, as matter of law, to find for the right, and no evidence is admissible to show that there never was a grant, or that the defendant had no knowledge of the nature or extent of the support given by his soil or premises, or that he objected otherwise than by physical obstruction. And he deduced this doctrine as a necessary consequence, not of the Prescription Act (2 & 3 Will. 4, c. 71), but of the Limitation Act (3 & 4 Will. 4, c. 27). The other learned judges held that enjoyment for twenty years, with other circumstances, may be *prima facie* evidence of an original reservation or grant, but that such *prima facie* evidence may be met by evidence arising either in the plaintiff's or defendant's case, showing that no such reservation or grant was ever in fact made; that if the evidence on the latter points be questionable, the whole evidence must be left to the jury; but if such evidence be not questioned or questionable, the jury should be directed to find that there never was any reservation or grant, and therefore that there never was any right. They further held, that as in this case the fact of there never having been any real grant or reservation was not questioned or questionable, the jury ought to have been directed to find for the defendants. As to the question raised by reason of the employment of Dalton as an independent contractor, all the judges were agreed that the case of *Bower v. Peate* (35 L. T. Rep. N. S. 321; L. Rep. 1 Q. D. Div. 321) was applicable and binding, so that if the plaintiffs were entitled to the support they claimed, they were entitled to judgment both as against the commissioners and Dalton, whether there was or was not negligence on the part of Dalton, or, if there was negligence by Dalton, whether they had or had not the right to support. On the argument before us it was contended, on behalf of the plaintiffs, that the right to lateral support from the adjacent soil of an adjacent owner necessary for buildings in addition to the support necessary for the support of the soil on which they stand, is a right of property; that such a right, if only an easement, is within the Prescription Act; that if not, and though the right be only an easement, yet a user for twenty years without physical obstruction gives a legal right on which a judge is bound to direct in favour of the plaintiff, and in derogation of which no evidence is admissible; that at all events a user for twenty years without any evidence to explain the origin of it entitles the person in possession to a direction to the jury to find a right as if by grant, and that in this case there was no evidence to explain the origin, and that the plaintiffs were therefore entitled to the

direction which was given at the trial; and that there was evidence, which at least ought to have been left to the jury for them to say whether they would find that there had been a grant; and that there was evidence of negligence, which ought to have been left to the jury. The first question, then, to be determined is, whether the right claimed is a right of property, for if it is, it is unnecessary to inquire further in this case, the plaintiffs being clearly entitled to succeed. If such a right is admitted, it existed *ex necessitate* from the moment the factory was constructed. It must be, if it exists, a right wholly independent of the consent or knowledge of the defendants, created solely by the will and acts of the plaintiffs. The questions of twenty years' user, of knowledge by the defendants, of negligence, are all immaterial. It is contended that this right is a right of property, first, as the result of reasoning from principle, and, secondly, as being settled by authority. As to the first, it is said that the right claimed is in strict analogy with rights which have been admitted to be rights of property, as the right of support of land not built upon, the right to the use of the light and air where adjacent soils are both unincumbered. The validity of this argument depends on whether the alleged analogy exists. It exists, if the reasons for which the right has been recognised in those cases are applicable to the claim now under discussion, but not otherwise: *Cessante ratione, cessat lex*. The reason given in those cases has been, that such rights must be admitted if the owner of land is to enjoy it, if he so pleases, as it must have been always in nature from the beginning. They are attributes of nature given for the common benefit of mankind. "They are," says Parke, B., in *Embrey v. Owen* (6 Ex. at p. 372), "bestowed by Providence for the common benefit of man." And he relies upon the elaborate judgment of Story, J. in *Tyler v. Wilkinson* (4 Mason, 397), in which the right is founded on this reason. The support to land in its natural state by adjacent land in its natural state must necessarily have existed from the beginning, so must the run of water, so must the passage of light and air over lands unincumbered by buildings. Unless each owner is entitled, as of natural right, to enjoy unmolested his land with all those attributes given to it by nature, he has not a free and absolute use of it. Such a right "stands on natural justice, and is essential to the protection and enjoyment of property:" (*Humphries v. Brogden*, 12 Q. B. 744.) The reason, then, why the right is admitted in all those cases is, that without such a right the owner cannot enjoy his land, if he so pleases, in the condition in which it was given for the enjoyment of man by nature. It is obvious that the reason is not applicable to a claim of support necessary for such a building, as any one may according to his fancy erect, requiring more or less support according to the size or form which he has given to the particular structure, but requiring by the hypothesis more support than is necessary for the support of the soil on which it stands. Not only is the reason given for allowing the right to be a right of property in those cases inapplicable to the case now under discussion, but to allow the present claim would be inconsistent with that reason, because the exercise of the claim by the one owner would prevent the enjoyment by the other of his land as

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nature gave it. As the result of logical reasoning or deduction from admitted principles, therefore, the present claim cannot be maintained. Then follows the question, whether authorities by which we are bound have decided otherwise. The first on this subject is the passage in Rolle's Abridgment, citing a case of *Wilde v. Minsterley* (2 Roll. Abr. Trespass I. pl. 1, and see the note to *Wyatt v. Harrison*, 3 B. & Ad. at p. 873). It is an authority which has been so frequently cited and acted upon, that it is certainly binding. But it consists of two parts, and it seems difficult to say with propriety that it is to be treated as a binding authority as to one, and as wrong as to the other; more especially, as the part which has been distinctly adopted, namely, that with regard to land unbuilt upon, is that which is introduced by the term "semble," whilst that, which it is now said should be rejected, is the cited decision of the court. That decision is clearly that the claim to support for a house is not a right of property. The distinction taken is between the right of support to land in its natural state, and the right to support of buildings upon the land, and the right of the latter in the case of a new house is distinctly denied. But if the right be a right of property it must exist in the case of a new house just as much as in the case of an old house: as the right of the land itself to support is just as absolute the day after the two ownerships are called into existence, as twenty years or any number of years afterwards. The judgment of Lord Tenterden in *Wyatt v. Harrison* (3 B. & Ad. at p. 875) is distinct: "Whatever the law might be, if the damage complained of were in respect of an ancient messuage possessed by the plaintiff at the extremity of his own land, which circumstance of antiquity might imply the consent of the adjoining proprietor at a former time to the erection of a building in that situation, it is enough to say in this case that the building is not alleged to be ancient, but may, as far as appears from the declaration, have been recently erected; and if so, then, according to the authorities, the plaintiff is not entitled to recover. It may be true that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbour digs in his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it. And this is consistent with 2 Rolle's Abridgment." The whole of this passage is necessarily wrongly conceived, and the decision of the case is wrong, if the right now claimed is a right of property; because it must be always remembered that, if the right is a right of property, the length of time since the house in respect of which the claim is made was built, is immaterial. The judgment of Alderson, B., in *Partridge v. Scott* (3 M. & W. 220) is also against the claim as a right of property. "Rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds his house at the extremity of his land, he does not thereby acquire any right or easement for support, or otherwise, over the land of his neighbour. He has no right to load his own soil so as to make it require the support of that of his neighbour unless he has

some grant to that effect. *Wyatt v. Harrison* (3 B. & Ad. 871) is precisely in point as to this part of the case, and we entirely agree with the opinion there pronounced." This discussion is without meaning, if the claim could be supported as of a right of property. The statement of the law as to lateral support in the judgment in *Humphries v. Brogden* (16 L. T. Rep. O. S. 457; 12 Q. B. 739) is the same. The principle is deduced by Lord Campbell from the passage in Rolle, and stated to be settled by *Wyatt v. Harrison* (3 B. & Ad. 871). After stating that the right of land in its natural state to support from adjacent land is a right of property, he goes on to say: "This right to lateral support from adjoining soil is not, like the support of one building upon another, supposed to be gained by grant, but is a right of property passing with the soil." It must in fairness be observed that the contrast he draws is in terms between the support given to a building by a building; but the reasoning is surely equally applicable to the support given to a building by land. *Gayford v. Nicholls* (9 Ex. 702) seems directly against the claim. There it was decided that the plaintiff had no right to support for his building from the defendants' adjacent soil. "This is not a case," says Parke, B., "in which the plaintiff has the right of the support of the defendants' soil, either by virtue of a twenty years' occupation, or by reason of a presumed grant or by a presumed reservation, where both houses were originally in the possession of the same owner; for unless a right of support by some such means can be established, the owner of the soil has no right of action against his neighbour, who causes the damage by the proper exercise of his own right." Here again in one branch of the sentence he no doubt speaks of a right by virtue of a twenty years' occupation; but if he had intended that such an occupation of itself gave an indefeasible right, he would not have introduced the next phrase as to a right by a presumed grant, which would be wholly unnecessary; for in order to found that presumption there must be a twenty years' occupation. By the former phrase, therefore, he must have alluded, although only in general terms, to the user for twenty years, from which unexplained a prescriptive user may be inferred. He speaks also of two houses, but that is in the phrase relative to a right by reservation. It was suggested, however, that the case of *Bonomi v. Backhouse* (E. B. & E. 646; 9 H. L. C. 503) is to the contrary, and is binding. But the first observation to be made is, that there is no reference in the facts stated by the arbitrator to any distinction between the support necessary for the land, if it had been unbuilt on, and that necessary for the buildings. It is consistent with the statements and findings, that the workings complained of would have let down the plaintiffs' land, if there had been no buildings on it. This is easily accounted for, if the workings would in fact have let down the land itself of the plaintiff, because the arguments appear to have been confined to the question of what is the cause of action in such cases, and what is the time at which a cause of action accrues. The want of reference, either in the statement of facts by the arbitrator or in the arguments, to the distinction between the support to buildings and that to mere land is natural and right, if the workings would have let down the land, though there had been no buildings on it,

but is inexplicable otherwise. The judgments then are to be applied to excavations which would let down the plaintiffs' land, though not built upon. In that view it was right to say that "in such cases as the present the right claimed by the plaintiff was not a right founded upon the presumption of a grant or easement, but the common right of the owner of land not to be injured in his property, &c." If the excavations in that case would not have let down the land as mere land of the plaintiff, the judgment of Willes, J., in the Exchequer Chamber, the reasoning of which is adopted as correct in the House of Lords, could not have been given without inquiring as to the origin of the admitted right in that case of the plaintiff to support. "The right to support of land and the right to support of buildings stands," he says, "upon different footings as to the mode of acquiring them, the former being *primâ facie* a right of property analogous to the flow of a natural river or of air, &c., whilst the latter must be founded upon prescription, or grant express or implied. . . . But the character," he says, "of the rights, when acquired, is in each case the same. The question in this case depends upon what is the character of the right." The question, therefore, was not, what is the origin of the right, that is to say, the mode of acquiring it, but what is the character of the right when acquired. There was no question as to how the right in that case had been acquired; it was admitted to exist; but the statement in the judgments of the law as to the origin of such a right is directly contrary to the argument urged on behalf of the plaintiffs in the present case. The right to support of buildings must, it is said, be founded on prescription, or grant express or implied; if so, it cannot be, and it is stated not to be, a right of property. I am therefore of opinion that, both on reason and authority, the right to support from the adjacent soil of an adjacent owner, necessary for buildings in addition to the support necessary for the soil on which they stand, is not a right of property. The next question is, whether there can be such a right given by means of an express grant; and if yes, what is the character of such a grant? In order to answer this question, the character of the right, if it can exist, should be considered. It has been pointed out in the case of the right to the advent of light to windows or other openings in a building, that no grant is required of leave to a man to build a house with windows or other openings at the extremity of his own land; he has the right without a grant. Such a grant would be futile and inoperative; but the erection of the building gives its owner no right to prevent his neighbour from building on his land so as to obstruct the light which would otherwise come across his land to the windows or openings of the first builder. The owner of the adjacent land may, however, by grant covenant that no building on his land shall interrupt the free use of light from across his land to the building erected or to be erected by the grantee on his land. This is the judgment of Littledale, J., in *Moore v. Rawson* (3 B. & C. 332), and such a grant imposes a servitude on the adjacent land of the grantor: see per Cresswell, J. in *Smith v. Kenrick* (7 C. B. 565, 566), which servitude, as pointed out in a note to p. 320 of Gale on Easements, must be a servitude like that of the Roman *ne facias*, affecting the grantor's land by burdening it with a negative

easement, *ne facias*. So, in the present case, that is to say, in the claim of right to support now under discussion, a grant to the claimant of permission to build his house at the extremity of his own land, and so as to require support from the defendants' soil, would be futile. The claimant of such a right has an absolute inherent right to build any house requiring any support at the extremity of his own soil; but there seems to be no valid reason why the adjacent owner should not by grant impose upon his own adjacent soil the servitude, that it shall not be so dealt with as to leave the grantee's building without support from it, or an equivalent support provided by the owner of such servient soil. The analogy is perfect between this grant and that admitted to be legal and binding in the case of light. Suppose such a grant made for a valuable consideration: there is no principle of law which can forbid its being binding any more in the case of a similar grant with regard to light. Such an easement, therefore, can be created by express grant. If there could be an express grant, imposing by its legal effect such a servitude on the grantor's land, can such a servitude be prescribed for at common law? Subject to the well recognised conditions of the evidence upon which such a prescription may be founded, there seems to be no legal reason why it should not. If evidence were given of the existence, as long as living memory could reach, of a building situated at the extremity of the owner's soil, of such a size or form of construction that it requires support from the soil of the adjacent owner, and if no evidence could be or were given by reason of the style or materials of the building or otherwise, that the building was or must have been erected within the time of legal memory, there seems to be, and in my opinion there is, no legal reason why the owner should not, on controversy, be entitled to prescribe for a right to the necessary lateral support; but in point of fact there can hardly arise any such case; the origin of the building at a time later than the time of legal memory could, by scientific or other evidence, invariably be proved. The difficulty of maintaining the right, as by prescription at common law, is a difficulty of fact and not of law. Is the case within the Prescription Act? I agree with the unanimous decision of the judges of the Queen's Bench Division that it is not. One reason alone is decisive. Such a negative easement as this is clearly not within the statute. The next question is, can such an easement be supported by the application of what has been called the doctrine of a lost grant? Such a right might be created by an express grant; it is a right of easement; it is an easement strictly analogous to those in which it is admitted that, upon certain evidence, a jury should be directed to find a right in the plaintiff as arising upon a lost grant, or in which, upon other evidence, it should be left to a jury to say whether they would infer such a lost grant. Unless, therefore, it is justifiable in the courts of the present day to say that they will no longer apply this doctrine even to cases to which it has before been applied, or that they will not apply this principle to a case strictly analogous to the cases to which it has hitherto been applied, it must be applied to such a case as this. But I am of opinion that no court has the power legally to set aside a principle of law which has been established as law by the highest tribunal

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or tribunals, to whose decision this court must bow, or to refuse to apply it to any case brought within the proposition enunciated in and by the principle. Moreover, it has been repeatedly recognised by many judges that this principle is applicable to this very right. The statement in Selwyn's Nisi Prius of the direction of Lord Ellenborough in *Stansell v. Jollard* (1 Selw. N. P. 457, 11th edit.), although it may not go further, does at least go the length of affirming that upon proof of a twenty years' user, and no evidence which proves the contrary, a grant may be inferred, and the right thereupon found and established by the jury. The ruling of Parke, B., in *Hide v. Thornborough* (2 C. & K. 250) also affirms this proposition: "If there were twenty years' enjoyment by the plaintiff of the support of the house from the defendant's land, and it was known that the defendant's land supported the plaintiff's house, that is sufficient to give him a right of support." That is, at least, to say, that upon such evidence a jury may find that he has such a right. But the origin of such a right must be a grant express or implied. This is, therefore, an authority that the jury may upon such evidence infer a grant. The passage before quoted from the judgment of Parke, B., in *Gayford v. Nichols* (9 Ex. at p. 708), does of necessity also import, at least, this same proposition. The phrase "either by virtue of a twenty years' possession," imports, at least, that evidence of twenty years' possession is material evidence; but, if material, it must at least be evidence from which a grant may be inferred; and in the next phrase he says in plain terms, "or by reason of a presumed grant." So Bramwell, B., in *Rovbootham v. Wilson* (8 E. & B. 140): "But after a house has stood in such a position twenty years, it acquires a right to support from the adjoining land." This must at least mean that it is evidence from which, if uncontradicted or unexplained, a grant may be inferred. In the judgment of Lord Campbell, in *Humphries v. Brogden* (12 Q. B. at p. 749) he says: "Where a house has been supported more than twenty years by land belonging to another proprietor or with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house." He cites as authorities *Stansell v. Jollard* (1 Selw. N. P. 457, 11th edit.) and *Hide v. Thornborough* (2 C. & K. 250). There is also the judgment of Willes, J., in *Bonomi v. Backhouse* (E. B. & E. at p. 655), where, speaking of the right of support to buildings as distinguished from the right of support to land, he says it "must be founded upon prescription or grant, express or implied." It is impossible that these passages could have been written unless those who wrote them were of opinion that a right to support of a building from the adjacent soil of an adjacent owner might be inferred from evidence of twenty years' user. I am thus brought to acquiesce in all the propositions in which the learned judges of the Queen's Bench Division were agreed, and have only further to give my opinion upon the proposition on which they differed. Unless we are controlled by authority, we ought not, as it seems to me, to take what I will respectfully venture to call the bold step taken by Lush, J. He deprecates that which, he affirms, was an assumption of legislative power by the judges, who introduced the fiction of a lost grant; but, with deference, I think he exercises the power of

legislation, and does not confine himself to the duty of declaration when he holds that a twenty years' user without physical obstruction shall of itself, as matter of law, confer a right, not because such facts bring the case within the Prescription Act or the Limitation Act, but by judicial authority, because the Statute of Limitations has fixed twenty years as the limit, after which under certain conditions an action cannot be maintained for the recovery of real property. I incline to agree that the judges of former times did encroach upon the legislative function in what they held with regard to the doctrine of a lost grant, and to the effect they gave, in support of that doctrine and of the doctrine of prescription, to a user of twenty years. Yet so far as their ruling has been affirmed by courts, to whose decisions we owe obedience, we are, in my opinion, bound to accept and apply their ruling. But I do not think that any judges now should, in order to overcome a different apparent hardship or difficulty, follow their example. This, then, being the doctrine which is to be applied, a question has been raised whether, in applying it, it is necessary to find formally that there has been a grant which is lost, or whether it is sufficient without going on to find the inference that there has been a grant and that it is lost, to find the fact of an uninterrupted user for twenty years after knowledge of the burden imposed on the adjacent land. That must depend on whether the inference is to be treated as a necessary legal consequence or as an inference of a fact. If it is an inference merely of law, I can see no distinction, not even the slightest, between the doctrine or application of the doctrine of a lost grant and the doctrine of prescription under the Prescription Act. If we were to hold that it is a mere inference of law, it seems to me that we should be doing in an analogous form precisely what was done by the judgment of Lush, J., which I think cannot be supported. Such a decision is legislation and not declaration. The forms of expression used by Lord Ellenborough, by Parke, B., and Bramwell, B., in the passages I have cited, are relied upon as showing, it is said, that in their opinion a twenty years' user, uninterrupted in fact, gives an absolute right, and therefore a right which cannot be contradicted, and therefore a right on the part of the plaintiff who has proved such user to a judgment thereupon that he has established his right. But those expressions are consistent with the view that those learned judges were speaking of the effect of evidence of user for twenty years without any other evidence, and as laying down that in such case in a trial before a judge and jury, the judge would be bound to direct the jury to find the existence of a lost grant. They seem to me, when read with their context, to be only consistent with that interpretation of them. I do not believe that any one of those learned judges meant to say that in the case of a trial by judge and jury the plaintiff could succeed without a finding by the jury under direction, or upon consideration, of the existence of a lost grant: none of them meant to say that a special verdict would have been good which did not in terms find the existence of a grant. No case, I am sure, can be found in which on a trial with a jury the judge has not either directed the jury to find, or left them to find, the fact as a fact whether there has been a grant. No judge could have called this doctrine

a revolting doctrine, unless he had been of opinion that the jury must be asked to find the fact as an existing fact. If it were only an inference of law, there is nothing which can be called revolting in it. In order therefore to support such a claim, the existence of a lost grant must be found as a fact. If the case is tried before a judge without a jury, he must find such fact, though he may not do so in terms; if it is tried before a judge and jury, inasmuch as the judge cannot in such case determine any fact, it is the jury which must find the fact. This raises another question, namely, whether the judge may under certain circumstances direct the jury as matter of law to find the fact; and if he may, what are the circumstances under which he may or must do so. It is admitted by every one, I think, that he is bound to do so, where there is evidence of twenty years uninterrupted user after knowledge of the facts and no other evidence. Now arises another question, which is, what other evidence is admissible or may be acted on? Is it only evidence of acts of interruption? or, although no act of interruption has been done, may evidence be given tending to show that no grant was in fact ever made? If the parties are alive, may they be called to prove conclusively that there never was a grant? If the question, whether there ever was a grant, is one of fact to be found by the jury, I know of no principle of law which can exclude evidence tending to show that there never in fact was such a grant. The Legislature might forbid such evidence to be given, but there the Legislature would in reality enact with regard to a right to lateral support a Prescription Act, similar to that which they have enacted with regard to lights and rights of way. To introduce into the common law proposition as to a lost grant the limitation of interruption only by Acts is to introduce a limitation which it required an Act of Parliament to introduce in the case of lights and ways. The limitation as to them has been held to be an inference from the statute. The Legislature has not done so. The doctrine of inferring a lost grant was brought forward and applied, because there is no prescription. The distinction between the two doctrines and the legal mode of applying the latter seem to me to be clearly laid down by Lord Mansfield in the *Mayor of Hull v. Horner* (Cowp. 102). In that case the question was left to the jury, "whether they would not consider the usage from the year 1441 to the time of action brought" (i.e., in 1774) "sufficient ground to presume a grant of the duties between the 5th Richard II. (anno 1382) and the year 1441." There had therefore obviously been an uninterrupted user for more than 300 years, and yet the question was left to the jury. "Now with regard to admitting evidence to satisfy a jury that a charter did exist within time of memory which is not produced by record, my opinion is this, that all evidence is according to the subject-matter to which it is applied. There is a great difference between length of time which operates as a bar to a claim, and that which is only used by way of evidence. A jury is concluded by length of time, that operates as a bar; as where the Statute of Limitations is pleaded in bar to a debt; though the jury is satisfied that the debt is due and unpaid, it is still a bar. So in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a

legal commencement of the right. But any written evidence showing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription. But length of time used merely by way of evidence may be left to the consideration of the jury to be credited or not, and to draw their inference one way or the other according to circumstances." And afterwards: "In questions of this kind possession goes a great way, but there is no positive rule which says that 150 years' possession, or any length of time within memory is a sufficient ground to presume a charter." He must by the context, mean "to presume as a presumption of law." Again: "Under circumstances it may be left to the consideration of a jury or of a court of equity, if the case comes properly before them, whether there is not a sufficient ground to presume a charter. The cases of *Campbell v. Wilson* (3 East, 294), *Darwin v. Upton* (2 Wms. Saund. 506), and *Cross v. Lewis* (2 B. & C. 686), are precisely, as I understand them, to the same effect, namely, that although the user is for twenty years without interruption, the inference must be left to the jury. I am therefore of opinion, in conclusion, that the right to lateral support from the adjacent soil of an adjacent owner, necessary for buildings in addition to the support necessary for the soil on which they stand, is not a right of property; but that such a right may be established; that where it exists, it consists of a negative easement, by which the land of the adjacent owner is burdened with the servitude that it cannot be so used as to deprive the building of the adjacent owner of the support acquired by virtue of the easement, unless an equivalent support is supplied; that such an easement might be given at once by express grant of the owner of the servient property, and the servitude so imposed would pass with the land; that such a servitude might, as matter of law, be proved as by prescription at common law; but could hardly be so proved, as matter of fact, in accordance with the legal conditions of evidence as to such a prescription; that such an easement is not within the Prescription Act (2 & 3 Will. 4, c. 71); that such an easement, if it exist in a particular case, must, in contemplation of law, have originated in a grant; that the claim to it may be supported by evidence complying with the legal doctrine of an alleged lost grant; that if in any particular case evidence be given of the existence for twenty years, without interruption, of a building which for that period has required and had support from the soil of the adjacent owner, and the building is of such a nature or in such a position that it must have been apparent to any observant person that it required such support, or if the adjacent owner in fact had noticed that it required such support, and if no evidence be given tending to show that there could not have originally been or that there was not and never had been a grant, the plaintiff would be entitled to a direction, as matter of law, to the jury to find for the plaintiff a right to support, as if he had a grant which is lost. If the existence of the building for twenty years be proved, but there is contradictory or doubtful evidence as to the question whether it must have been apparent that it required support, or whether the adjacent owner had notice that it required support, or of circumstances tending to show that there could not have been and was not and never had been any grant, or the like, then the evidence

must be left to the jury for them to say, whether they will or will not find for the plaintiff a right to support in respect of a grant which is lost. If there be no evidence of the existence of the building for twenty years, or if there be undisputed or necessarily conclusive evidence, or if it be admitted that there was no grant and never had been any grant, then the defendant is entitled to a direction, as matter of law, in his favour. Upon the present occasion it seems to me that the case was at the trial treated by all the parties upon the footing that there was conclusive evidence, or an admission, that there never had been a grant. I am of opinion that there was no evidence of negligence in excavating. I am, therefore, of opinion that all the defendants were entitled to a decision in their favour, that the plaintiffs had no right to the support they claimed, and that they had given no evidence of negligence, and that therefore the plaintiffs had made no case against any of them. The point raised with regard to *Bower v. Peate* (35 L. T. Rep. N. S. 321; L. Rep. 1 Q. B. Div. 321) does not therefore become material. I, therefore, give no opinion upon it. The judgment should, in my opinion, be affirmed.

*Judgment reversed, and order made, directing that the defendants should elect, within fourteen days, whether they would take a new trial, and if they did not so elect, that judgment should be entered for the plaintiffs for the amount of damages assessed by the special referee.*

Solicitors for plaintiffs, *Shum, Crossman, and Crossman*, for *Stanton and Atkinson*, Newcastle-upon-Tyne.

Solicitors for the Commissioners of Works and Buildings, *The Solicitor for the Treasury; Hare and Fell*, agents.

Solicitors for defendant *Dalton, Prior, Bigg, Church, and Adams*, for *T. Dalton*, Leeds.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

*Saturday, Feb. 8.*

(Before JESSEL, M.R.)

MOOR v. ANGLO-ITALIAN BANK. (a)

*Company—Winding-up—Secured creditor—Rules in bankruptcy—Judicature Act 1875, s. 10—Immovable property in foreign country—Injunction.*

*Sect. 10 of the Judicature Act 1875 does not make all the rules of bankruptcy apply to a secured debt.*

*There is no mode in a winding-up of applying the bankruptcy rule that a petitioning creditor with a secured debt must either give up or value his security (in the latter case proving for the difference), as there are no means of knowing in the winding-up whether the company is insolvent or not.*

*A secured creditor may present a petition for a winding-up.*

*When a foreign tribunal has seisin of a matter respecting immovable property within its jurisdiction, and all the parties are before it, an English court will not interfere.*

THE Florence Land and Public Works Company was incorporated in Jan. 1866, and registered

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

under the Companies Act 1862 for the purpose of purchasing a concession of freehold lands and buildings in the city of Florence, and for the execution of works authorised by the said concession.

In 1868, in pursuance of powers contained in the articles of association of the company, mortgage debentures were issued to the amount of 40,000*l*. They were executed as deeds under the common seal of the company, and were in the following form :

The Florence Land and Public Works Company Limited.  
Capital 500,000*l*.

Obligation,

Total issue 250,000*l*.

The Florence Land and Public Works Company Limited, in consideration of the sum of one hundred pounds advanced and lent to them by . . . of . . . do hereby in pursuance, and under the power of their articles of association, bind themselves, their successors, assigns, and all their estate property and effects, to pay to the said . . . or bearer on presentation of this bond at the registered office for the time being of the said company in England, the said principal sum of one hundred pounds on the 24th day of June 1878, and also interest on the said principal sum of 100*l*. until paid at the rate of 6 per cent. per annum at the times and places mentioned in the coupons attached hereto.

Provided also, and it is hereby declared that this bond is issued subject to and in accordance with the conditions and scale endorsed hereon.

The indorsement referred to the powers and methods of redemption of the said debentures.

No other debentures were issued, and none of those issued had been redeemed, or the interest thereon paid since Dec. 1875.

The plaintiffs, Maria Moor, David Smith, and George David Richardson, were the executors and trustees of Henry Moor, who was a holder of fifty-four of the said debentures, which became payable on 24th June, 1878, and in respect of which 5400*l*., and interest at 6 per cent. from Dec. 24, 1875, were owing to the plaintiffs.

The defendants, the Anglo-Italian Bank, are an English joint-stock company, registered under the Act of 1862, having a registered office, and carrying on their business in England.

The defendant bank alleged that the company was indebted to them in the sum of 83,271*l* 3*s*. and interest, which debt was secured by mortgage of certain lands and buildings belonging to the company at Florence. The plaintiffs alleged that at the date of such advances the bank had full notice of the issue of the said debentures.

On the 21st July 1877 the bank presented a petition for the winding-up of the Florence Land Company, but in their petition did not, as the plaintiffs alleged, estimate the value of their security, or offer, or in any way express their willingness to give up the same to be realised by the company or its liquidator, but claimed to prove for the whole sum due with interest, without making any deduction in respect of the security.

It was alleged by the bank that on the 29th Aug. 1877 executive power was given to their mortgage in Italy, and authority given to the proper officer to enforce the same.

On the 3rd Nov. 1877 an order was made for the winding-up of the company.

On the 24th May 1878 the plaintiffs took out a summons in the liquidation for a declaration that the said mortgage debentures were a charge upon all the estate, property, and effects of the company, and for inspection of the documents in the posses-



sion of the company relating to its estate, property, and effects, and the issue of the said mortgage debentures.

By an order upon the hearing of the summons by Hall, V.C., the judge being of opinion that the said debentures did not operate as such a charge made no order except that the applicants were to be at liberty to institute an action against the company in respect of the debentures.

By an order of the Court of Appeal, dated the 18th Dec. 1878, upon appeal from the order of Hall, V.C., the court declared that upon the true construction of the said mortgage debentures a charge was created upon the estate, property, and effects of the company; but the declaration was without prejudice to any question as to whether land in any foreign country or what estate, property, and effects were comprised in the mortgage debentures, and other mortgages (if any) of the company. The appeal is reported L. Rep. 10 Ch. Div. 530.

The defendants had in the meantime taken legal proceedings in the Italian courts to realise their security by means of a judicial sale of the property in Florence, which, as the plaintiffs alleged, was the only property available for the payment of the creditors.

The plaintiffs therefore brought their present action against the bank and the company, claiming, on behalf of themselves and all the other debenture holders, a declaration that the bank was not entitled to a first or any charge on the property of the company, and that they might be restrained by injunction from selling or disposing of the property of the company, or receiving any of the moneys arising from such sale, and that it might be declared that the plaintiffs and all other holders of mortgage debentures were entitled *pari passu* to a first charge upon all the real and personal estate (wherever situate) of the Florence Land Company for the moneys claimed by the same debentures.

The plaintiffs moved that the defendant bank, their servants and agents, might be restrained by injunction until the hearing of the action or further order from selling or disposing of the whole or any part of the property of the company under the securities alleged to be held by them, or from receiving any money arising from the sale of any of the property of the company sold under or by order of any foreign court or otherwise.

The evidence of an Italian advocate was adduced to the effect, that when the sale took place under the order of the Italian court at Florence, the purchase-money would be under the custody of the court, and would not be disposed of without notice to the other claimants.

*Roaburgh, Q.C.* and *Whitehorse* for the motion. —The debenture holders have the prior charge, and the bank took their mortgage with notice of that charge. The bank, by the proceedings which have been taken, must be taken to have elected to go on the general estate, and to have given up their security. If they sell, therefore, they hold the proceeds upon trust for the creditors as a body. By the combined operation of sect. 10 of the Judicature Act 1875, which provides that in the winding-up of insolvent companies the same rules shall prevail as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable as are in force

under the law of bankruptcy, and of sect. 6 of the Bankruptcy Act 1869, by which it is provided that the petitioning creditor's debt must not be a secured debt, unless the creditor state his readiness to give up his security on the debtor's adjudication as a bankrupt, or to give an estimate of the value of the security, and prove for the rest, the bank cannot get relief both as secured and unsecured creditors. Here the bank has elected to prove as for an unsecured debt, because they have not fulfilled the conditions mentioned in the sections referred to by the Bankruptcy and Judicature Acts. See

*Ex parte Ashworth*, 30 L. T. Rep. N. S. 906; L. Rep. 18 Eq., 705.

In the case of *Re Printing and Numerical Registering Company* (38 L. T. Rep. N. S. 676; L. Rep. 8 Ch. Div. 535), your Lordship said with respect to the 10th section of the Judicature Act 1875: "As I read the section the respective rights of the secured and unsecured creditors of a company in liquidation are the same as under the law of bankruptcy." See also

*Re Balbirnie*, 35 L. T. Rep. N. S. 533; L. Rep. Ch. Div. 488;

*Campbell's case*, L. Rep. 4 Ch. Div. 470;

*Re Stockton Iron Furnace Company*, 40 L. T. Rep. N. S. 19; L. Rep. 10 Ch. Div. 335;

*Ex parte Tait*, L. Rep. 13 Eq. 311.

*Davey, Q.C.* and *Stirling* for the Anglo-Italian Bank.

*Ince, Q.C.* and *Crossley* for the liquidators of the company.

JESSEL, M.R.—I do not want to hear you, Mr. Davey. This is an experiment, as stated really by the counsel making the motion, but it appears to me the more it is looked into the less ground there is for sanctioning such an experiment. The plaintiffs are some of the debenture holders of a company which is being wound-up, the Florence Land and Public Works Company (Limited). The first defendant is the Anglo-Italian Bank, which has a first mortgage on some immovable property at Florence, in Italy, consisting chiefly of houses which belong to the company, and the second defendant is the company appearing by its liquidator. The object of the motion is to restrain the sale, at the instance of the Anglo-Italian Bank by the Italian tribunal at Florence, of the property which is subjected to this first mortgage on the ground that the Anglo-Italian Bank is locally subject to the jurisdiction of this court, and that the plaintiffs have an equity to restrain such sale. It appears also that the sale will not take place very rapidly; it will be at least two or three months before it takes place, and that when it does take place the money will be brought into the foreign court, and will not be disbursed without notice to all the claimants, and it is not suggested on the part of the applicant that any other mode of sale is possible when there is a mortgage or mortgages, except a sale through the Italian tribunal; in other words, the mortgagees cannot, in Italy, whatever he can do in this country, sell the property except through the tribunal. That is almost matter of common knowledge as regards continental law; but we have in this case the evidence of an advocate to that effect. That being so, the first question one naturally asks is, why should I interfere at all? If the plaintiffs have any rights, those rights will be finally adjudicated upon at the trial of the



action, long before the money can be distributed. Besides that, the plaintiffs would appear before the Florence tribunal and claim their share of the proceeds. It is not suggested that the Florentine tribunal does not know how to sell property subject to its jurisdiction. But, inasmuch as the case has been argued on the merits, and the merits, or so called merits, raise some points of law upon which I have formed a very decided opinion, I see no reason for resting my decision merely on the ground that it is not a proper subject for an interlocutory application, because the cause will be heard, if it is ever heard at all, before the sale takes place, or rather, before the proceeds are distributed. Now the plaintiffs say this: they say as debenture holders of the company they have a charge on all the property of the company, and that their charge is prior in equity to the charge of the Anglo-Italian Bank. They say, secondly, that even supposing it is not prior in equity to the charge of the Anglo-Italian Bank, yet the Anglo-Italian Bank in Italy have by virtue of certain proceedings taken in liquidation of the company, and by certain provisions of the Judicature Act, forfeited or lost their security, and that forfeiture or loss of the security, as I understand it, enures in some mysterious way which I do not understand for the benefit of the plaintiffs. Now I will examine each of these points. First of all as regards the charge of the plaintiffs, that has been established by the decision of the Appeal Court, in which I myself took part on the 20th Nov. last. But that established something more than that the plaintiffs had a charge; it also established that the charge was subject to any mortgage made by the company carrying on their business before the debenture holders interfered to stop them, and therefore in equity, notice or no notice, the charge of the defendants, the Anglo-Italian Bank, would be prior to that of the plaintiffs. What I said in the Appeal Court—which, of course, is binding upon me here—is this: I said "Some security. Now what kind of security." Then I say, "You may arrive fairly at the conclusion that it means this kind of security; that the bond or debenture shall be a security on the property of the company as a going concern, subject to the powers of the directors to dispose of the property of the company, while carrying on its business in the ordinary way. It is to be observed, as I said before, that the whole of the sub-sections in clause 88 are subordinate to the introductory words that it is to be in the management of the affairs and business of the company. It is therefore inconsistent to suppose that the moment you executed a bond or debenture you paralysed the company and prevented it carrying on its business, for if you read the words to mean a charge, as I do, under the articles on the property of the company, then of course they could not make any practical use of the money borrowed, because that would become the property of the company, and anybody with notice would be liable on that view to repay it to the mortgagee or debenture holder. That would be an extravagant result. Another would be this,—that if the company is formed to build, and to let, and mortgage its property, you can neither lease nor mortgage without the consent of every individual bondholder or debenture holder; which, again, to my mind would be extravagant. But if you read it as making a charge only to this

extent, subject to the powers of the directors whilst they are carrying on the business, then if they make default in payment of the principal or interest, a creditor can apply to a court of justice for a receiver and stop them going on; but subject to that they carry on their business as usual, leaving the creditor to his remedy in case of default or in case of a winding-up." James, L.J. took the same view. After saying it is a charge on the undertaking he goes on to say, "I am of opinion that the law does not allow such a company to charge its undertaking, meaning thereby to charge the assets for the time being." And then he goes on: "Of course it would leave them (that is the company) masters to deal with the property as long as the company remained a going concern, just as Lord Justice Giffard said in one of the cases cited in argument that the company being a company capable of buying property, selling it, disposing of it, and making specific mortgages upon it, they were to go on doing that according to the constitution of the company, which the persons lending the money must have known." Reading it as I do as a charge on the assets of the company for the time being, that would not in the slightest degree interfere with the company carrying on the business for which it was incorporated, so that the effect of the notice did not at all prevent the mortgage of the Anglo-Italian Bank being prior in point of security to the security of the plaintiff. That disposes of that part of the case. Now then, that being so, I will examine the next part of the case. It was said that the effect of the 10th section of the Judicature Act 1875 was to make all the rules of bankruptcy apply to a secured debt. Well, that is not quite so. When you come to look at the section, all it says is this, that "in the winding-up of any company whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt," the same law shall prevail. That only applies where the assets prove insufficient; that is, it does not apply to a winding-up generally, but to a winding-up in cases of insolvency. Now the same rules are to apply as to the respective rights of secured and unsecured creditors. What are the rules as regards secured and unsecured creditors which it is alleged apply here? It appears to me the whole of the argument which has been addressed to me is founded on a mistaken reading of that section of the Judicature Act, which the plaintiffs say is this. They say that a petitioning creditor in bankruptcy in order to obtain adjudication must be an unsecured creditor. That is quite correct in this sense that he must be a creditor who either never had security, or if he has one, has given it up or valued it, asserting it to be less in value than the debt, and presents his petition as being well founded on the balance of the debt after setting off the value of the security, and that balance must amount to a certain sum. That is quite true in bankruptcy to obtain adjudication, but it has nothing whatever to do with

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winding-up. There are no such rules in winding-up; a secured creditor may present a petition for a winding-up, in fact you might not know at the time of the winding-up whether it is what is called a shareholder's liquidation or a creditor's liquidation—in fact whether the company is solvent or insolvent. No such rules apply at all, but the winding-up is equally good, whether it is obtained by a secured creditor or an unsecured creditor. The analogy fails because in applying the rule of bankruptcy you must see that you can apply it to the winding-up; and there is no mode of applying this rule in bankruptcy to a winding-up. That would altogether dispose of the supposed analogy: but there is a little more in it than that when you come to examine it. In the next place, I am not aware of any rule in bankruptcy that forfeits the petitioning creditor's debt. The rule in bankruptcy requires you before the person is adjudged a bankrupt to see (when I say "you," I mean the judicial authority in bankruptcy, the registrar or judge as the case may be) before he adjudicates a man a bankrupt to see there is a proper unsecured debt in the manner I have explained. But if the adjudication is made without this being looked into the only result is the adjudication is bad, and you may set it aside in due time. It does not deprive the petitioning creditor of anything that I am aware of; and you must carefully distinguish between the notion of forfeiture and the decisions on the doctrine of election in bankruptcy, which relate to a totally different subject. In bankruptcy, if a secured creditor wants to prove, he must do one of three things: he may give up his security altogether, and prove for the full amount; or he may get his security valued, and prove for the difference; or he may sell and realise his security, and then prove for the difference. If without doing either of the latter two things, he proves for the full amount, as he cannot prove for the full amount and receive a dividend except on the theory of giving up the security, he shows by that an intention to give up his security, and if he so proves and receives a dividend or votes, he shows pretty conclusively that he has finally elected to give up his security and take his dividend; in other words, having two funds to resort to, the bankrupt's general estate so as to get a dividend on the whole amount of his debt, or his security, he elects to take the bankrupt's estate, and in that way gives up his security. It is not forfeiture, it is election; but the petitioning creditor gets nothing unless he proves. There is no obligation on the petitioning creditor to prove; he may make the man a bankrupt, and then he might be satisfied as far as he is concerned and leave other creditors to prove; he does not elect simply by making a man a bankrupt, as I pointed out to Mr. Whitehorn in the course of the argument. It is a new doctrine of forfeiture to be brought into bankrupt law, if the petitioning creditor is to lose his security without getting anything out of the bankrupt's estate; it is no longer election—it is forfeiture, and forfeiture must be discovered in some Act of Parliament, or section of an Act of Parliament, and there is no such section to be found. It appears to me, therefore, as far I know that there is no such rule in bankruptcy, and therefore even if the Judicature Act were to be read differently to what I read it, the same result would follow under bankruptcy law. There is only one other point I wish to

remark upon, and it is this, the nature of the injunction asked. Now the real injunction asked is to restrain the defendants, the mortgage creditors, suing in the court of the country where the immovable property is situate to obtain a decision in the court of that country on the law relating to the disposition of that immovable property. *Prima facie* this court cannot interfere to restrain that proceeding. The court of the country must be assumed to know more about the law of its own country, than the court of a foreign country, and the risk of miscarriage in this court if it undertook to administer Italian law would be much greater than in the court of Italy, who are, of course, more familiar with their own law, and as all parties can appear in that court and have their rights finally settled, it appears to me it would be in the highest degree inconvenient for this court to interfere at all, more especially when to use an English phrase, the Italian courts first had seisin of the matter, and have had seisin of it for some two or three years now past. On this ground also I should feel myself quite unable to accede to the present motion, which must be refused with costs.

Solicitors: *Lewis, Munns, and Longden; G. M. Clements; Carr, Bannister, and Co.*

May 1, 2, and 7.

(Before BACON, V.C.)

KELLY v. BYLES. (a)

*Copyright—Right to use title of a book—Trade mark—Exclusive use of name "Post Office" Directory—Copyright Act 1842 (5 & 6 Vict. c. 45).*

The plaintiff had been in the habit, since 1852, of publishing numerous county and trade directories, which he had called always "post office" directories, and was the registered proprietor, under the Copyright Act, of, amongst others, "The Post Office Directory of the West Riding of Yorkshire." The defendants had, with the assistance of the postmaster at Bradford, compiled a directory for that town, which they proposed to call the "Post Office Bradford Directory." In an action by the plaintiff to restrain the intended publication by the defendants of their directory with the words "post office" forming part of the title, and from in any way representing their directory as a "post office" directory, or from doing anything which might induce the public to believe that their directory was in any way connected with the plaintiff,

Held, that the taking a part of the title of a registered copyright work without fraud and without any circumstances from which an *animus furandi* could be inferred, was not an infringement; and that, as to the plaintiff's property in the name "post office" as a quasi-trade mark, a right of that kind could only attach where the wares offered for sale were so nearly identical that the use of the particular trade mark or name might mislead unwary purchasers.

Judgment for the defendants.

ACTION.

This was an action by Edward Robert Kelly, registered proprietor under the Copyright Act 1842 of a book entitled "Post Office Directory of West Riding of Yorkshire," which included the

(a) Reported by W. COWELL DAVIES, Esq., Barrister-at-Law.

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town of Bradford, to restrain the intended publication by the defendants, Messrs. Byles and Son, of Bradford, of a directory of Bradford, as advertised by them under the title of "The Post Office Bradford Directory." The plaintiff claimed the right to the exclusive use of the words "post office," as forming the distinguishing part of all directories published by him; and, as the defendants declined to recognise this right, the plaintiff in Nov. 1878 commenced the present action, and by his statement of claim asked that the defendants might be restrained from canvassing for, compiling, editing, printing, publishing, selling, delivering, or otherwise disposing of the directory advertised by them with the words "post office" forming part of the title, and from in any way representing their directory as a "post office" directory, and from doing any act or thing to induce, or which would induce, the belief that the directory advertised by the defendants was a directory compiled or published by the plaintiff or in any way connected with him or his business.

It was not suggested that any part of the contents of the plaintiff's volume had been copied or taken, or imitated by the defendants.

The history of the use of these words, "post office," as applied to directories, and the facts proved in the course of the trial, were stated by the Vice-Chancellor in his written judgment to be as follows:—"More than seventy years ago a Mr. Crichtett, a clerk or officer in the London Post Office, conceived the design of publishing a list of the names and addresses of persons in and about London. His connection with the post office may be assumed to have afforded him peculiar facilities for executing his design, which he accomplished successfully; and, having called his publication 'The Post Office Directory,' it has been annually continued to this day, it being the useful and well-known work called 'Kelly's Post Office Directory.' In 1837 Mr. Frederick Kelly, a brother of the plaintiff, became, and has ever since been and is the publisher and proprietor of the work I have mentioned, which has, however, no connection with the present action. It appears that in or about 1846 a complaint was made in Parliament that it was inexpedient that the letter carriers and other persons engaged in the post office department should be engaged in assisting a private person in the compilation of the work, and in consequence, the post office authorities prohibited any such employment, and Mr. F. Kelly was left to his own resources for collecting the information and other materials for his directory, which he has ever since done by employing a staff of agents to that end, but whose services were not actively engaged in that task during a large portion of each year. The plaintiff has said that in or about the year 1852 he conceived the design of compiling and publishing country directories, similar to that which had been so successful and had become so well known in London, but confined and dedicated to particular districts in the country, and other directories relating to exclusive trades or branches of commerce which were not so confined; that his principal inducement to enter on these enterprises was to make the services of the *employés* I have mentioned available for purposes not included in his brother's business, and during periods when they would otherwise have been unemployed, although they must still have been in receipt of their several

stipends, because from the nature of their duties they could not be dismissed. However this may have been, from the time I have mentioned the plaintiff has produced a great number of directories on his own account; he has expended large sums in salaries to travellers and other persons employed by him, and in collecting and compiling the information necessary for the purpose; and among others he has produced and published the volume which is the subject of the present action, and he has in every instance called his publication 'Post Office Directory.' The volume before me comprehends the whole of the West Riding of Yorkshire, an area of upwards of a million and seven hundred thousand acres, with a population of more than a million and eight hundred thousand persons. The large manufacturing and commercial town of Bradford comprises very nearly thirty-three thousand acres, and its population was in 1871 little less than one hundred and forty-six thousand persons, it having increased to that amount since 1801, when it was not much over thirteen thousand persons. I take these numbers from the preface to the plaintiff's volume. There have been at various times directories relating to the district in which Bradford is situate, but none relating exclusively to that town. The defendants, being of opinion that the social and commercial interests of their town required and would be promoted by the publication of a separate directory, undertook its publication. They procured the assistance of the resident postmaster, and with his sanction they employed the letter carriers of the postal district to deliver at the houses of the inhabitants circular forms, to be filled up by the residents, containing the names and addresses requisite for the purpose, and from these materials, with such others as they thought fit to procure, they have compiled the work (the publication of which the plaintiff seeks to restrain) so far as it is yet completed. So much of it as has yet been printed consists of 376 pages, which is said to be more than two-thirds of the intended contents. The defendants, having announced by advertisements in local newspapers and by public placards their intention of publishing 'The Post Office Bradford Directory' for 1879 and 1880, and having stated that their publication would issue with the sanction and assistance of the post office authorities, some application would seem to have been made to the head office in London, in consequence of which the Postmaster-General forbade the postmaster at Bradford to permit the letter carriers and other persons employed in the public service to collect or furnish materials for the defendants' publication, but he afterwards permitted the use of such materials as had been collected, interdicting for the future any such practices."

It was also proved that in Scotland and Ireland post office directories had been established for many years, and that there had been a "post office" directory at Bath for the last twenty-one years, and another at Bolton, and that the plaintiff was aware of these publications.

Kay, Q.C., Hemming, Q.C., and Leeson, for the plaintiffs.—The plaintiff has registered this directory of his under the Copyright Act 1842, and is entitled to prevent the user and appropriation of any of the words protected by this registration. The law is settled: in the case of a book, which is different in that respect from a newspaper, you have copyright and therefore title, and

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an injunction will be granted where the title is threatened. *Mack v. Petter* (L. Rep. 14 Eq. 431), *Metzler v. Wood* (38 L. T. Rep. N. S. 541; L. Rep. 8 Ch. Div. 606), and even in a case where the title was innocently appropriated as in *Weldon v. Dicks* (39 L. T. Rep. N. S. 467; L. Rep. 10 Ch. Div. 247). There is copyright in the name and title page, as well as in the letter press. *Kelly v. Hutton* (19 L. T. Rep. N. S. 228; L. Rep. 3 Ch. 703) shows the difference between the copyright in the name of a newspaper and in a book. In *Maxwell v. Hogg* (16 L. T. Rep. N. S. 130; L. Rep. 2 Ch. 307) the injunction was only refused because the book *Belgravia* was not then published, otherwise it is to be inferred from the judgment of Lord Cairns that the injunction would have been granted. They also referred to *Bradbury v. Boston* (21 L. T. Rep. N. S. 323; 39 L. J. 57, Ch.). But apart from any question of copyright, the plaintiff is now entitled to the exclusive use of the name he has adopted as his quasi trade mark, and where a person has acquired property in a name either in a book or as a trade mark of the goods he sells, the important words or peculiar collocation of words cannot be made use of by any other person in such a way as to induce purchasers to believe that the spurious article they offer for sale is the article manufactured or sold by the plaintiff; and in the case of a book it does not matter whether the name has been registered or not:

*Braham v. Bustard*, 9 L. T. Rep. N. S. 199; 1 H. & M. 447;

*Woltherspoon v. Currie*, 27 L. T. Rep. N. S. 393; L. Rep. 5 E. & J. App. 508;

*Singer Manufacturing Company v. Wilson*, 38 L. T. Rep. N. S. 303; L. Rep. 3 App. Cas. 376.

Sir H. M. Jackson, Q.C. and Rigby for the defendants.—As to copyright, it is a mere creature of statute, and exists not as common law at all. There cannot be copyright in two such words as “post office.” Copyright is in the matter, not in the name. Though the term copyright seems to be applied by Lord Romilly in *Mack v. Petter* (L. Rep. 14 Eq. 631) to the title of a publication, the other authorities clearly show that there is no copyright in a title:

*The Correspondent Newspaper Company v. Saunders*, 11 L. T. Rep. N. S. 541; 11 Jur. N. S. 540;

*Kelly v. Hutton*, *supra*.

And registration under the Copyright Act gives no further right to protection than existed independently of such registration:

*Maxwell v. Hogg*, *supra*;

*Sebastian on Trade Marks*, p. 171.

In *Mack v. Petter* (*supra*) and *Metzler v. Wood* (*supra*) there was piracy and colourable imitation, and the book complained of was generally like the plaintiffs' book in appearance. That is not the case here. *Weldon v. Dicks* (*supra*) is in direct conflict with the other authorities, but there defendant had taken the whole title, not only a part, of the plaintiffs' publication. But even if the plaintiff has a copyright in the title, which we do not admit, we have not infringed it. What he has registered is “Post Office Directory of the West Riding of Yorkshire,” for which our title is no equivalent. The plaintiff has used more than the mere words “Post Office” in his registration. As to the quasi trade mark part of the case, in order to establish his right to an injunction, the plaintiff must establish four things: First, that he was the original inventor of the

name he claims; that is disposed of by the evidence of his brother and himself. Secondly, the name must be an arbitrary word or fancy word, and not words fairly descriptive of a well-known commodity:

*Young v. Macrea*, 9 Jurist N. S. 322.

And post office is not a fancy name; it is the name given generally to this class of directories. Thirdly, the plaintiff's user must be exclusive; that is not the case here, as we had a London Post Office Directory long before the plaintiffs'; another at Bath, and another at Bolton, and several in Scotland and Ireland. Fourthly, the plaintiff must show that we have colourably imitated his name or trade mark; it is not attempted now to prove that there has been colourable imitation. On these grounds, therefore, we say that this action cannot be maintained.

Kay, Q.C. in reply.—According to the Copyright Act 1842 the title-page of a book is entitled to protection, but we do not rest our case on copyright. In *Metzler v. Wood* (*supra*) there was no copyright, but a proprietary right in the name Hemy. No authorities were cited for the proposition that the plaintiff must be the first inventor of the name, and that is not correct. In the cases of “Eureka shirt” (*Ford v. Foster*, 27 L. T. Rep. N. S. 219; L. Rep. 7 Ch. 611), “Excelsior soap” (*Braham v. Bustard* (*supra*)), “Anatolia liquorice” (*McAndrew v. Bassett* (10 L. T. Rep. N. S. 445)), the words in each case were not invented by the person first using them, but the words in question had been used so long on the articles sold that they had become something in which a proprietary right had been acquired. As to the second point, “post office” is a fancy name. The defendants need not have used this peculiar collocation of words to express the fact that their directory had been compiled with the help of the post office authorities. The fact that there has been a Post Office Directory at Bath and at Bolton, which have been allowed to go on without being proceeded against, is surely not to deprive the plaintiff of his right to prevent the defendants from taking his trade name.

*Our adv. vult.*

BACON, V.C.—The novelty of the question which has been raised in this case and the length of the arguments, together with the numerous authorities which have been referred to, induced me to postpone my decision for a short time, that I might give full consideration to the subject. [His Lordship then stated the facts and the history of the use of the words “post office” as above, and proceeded.] I have mentioned these particulars not only because they have been introduced in evidence and have been the subject of observation in the course of the discussion, but because they have a direct bearing upon the question of good faith on the part of the defendants, which in a case like the present cannot be disregarded. It cannot, I think, be said that there has been any want of good faith, or any sinister or underhand practice on the defendants' part. It cannot be said that a printer and publisher of Bradford or any other town is not at liberty to supply what he considers to be a town want by the publication of a directory. The only question I have to decide is whether by doing that which he has announced an intention to do he will unlawfully injure the plaintiff's property, that property being the title

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and appellation of the plaintiff's work. The plaintiff's case has been argued on two grounds. First, it is said that, having registered the title of his work under the Copyright Act, he is entitled to prevent all the rest of the world from using or appropriating any of the words protected by the registration; and, secondly, that he is entitled to the exclusive use of the name he has adopted, and which has become the trade mark of the commodity he offers for sale. The spirit and the policy of the Copyright Acts are clear and beyond all doubt. It is for the public benefit that the authors of all literary works should have the exclusive enjoyment and profit of their labours for the periods there mentioned. It comprehends all productions which assume a literary form from works of the highest genius in poetry, science, or art, down to the humblest productions of intellectual industry, all are placed upon the same footing, and in the eye of the law they are entitled to equal protection, provided they are original in the sense of being first made public by their respective authors. Mr. Tennyson's *Idylls* and the last edition of Paterson's *Road Book*, or the *Great Western Time Table* must not be copied or colourably imitated in the whole or in part without the consent of the proprietors. But in trying the question whether the legal right of the proprietor has been infringed or not, the courts have at all times inquired whether the act complained of has been committed *animo furandi*, to use Lord Ellenborough's expression in (*Cary v. Kearsley*, 1 Esp. 168). In the numerous cases which have occurred, as well under the former Copyright Acts as under the present, this principle has been applied as a test, and has guided the decisions pronounced, and indeed it must be so, or it would be impossible to review or criticise any printed work. Several cases were referred to in support of the plaintiff's contention that his title under the Copyright Act had been infringed. Amongst others *Muck v. Petter* (14 Eq. p. 431) was mentioned. The plaintiff was the proprietor of copyright in the *Birthday Scripture Text Book*. The defendant had published a *Children's Birthday Text Book*. That the latter was merely a colourable imitation of the former could not be disputed. Lord Romilly, in deciding that case, no doubt mentions the plaintiff's right as owner of the copyright; but it is impossible to read his judgment and to doubt that the injunction he granted was to restrain the defendants' "colourable imitation" of the actual book which the plaintiff had first sent into the world. In *Metsler v. Wood* (38 L. T. Rep. N. S. 541; L. Rep. 8 Ch. Div. 606) the same principle governed the decision. There was no registration, and the judgment of James, L.J. (in which the other judges concurred) states expressly the conclusion of the court that it had been proved that the defendant did dishonestly intend to pass off his as the work of the plaintiff, and that the fraud imputed to the defendant had been made out. In *Weldon v. Dicks* (39 L. T. Rep. N. S. 467; L. Rep. 10 Chan. Div. 247) the plaintiff was the undoubted owner of a copyright in a tale called *Trials and Triumphs*. The defendants had also published a tale under the identical title. The Vice-Chancellor was of opinion that the plaintiff's title under the statute must prevail, although he was satisfied that the defendant had acted in perfect innocence and in utter ignorance that the plaintiff or any other person had ever published

anything under the title which the defendant or his author had unconsciously adopted, and although there was no similarity whatever between the contents of the two works. There, however, the defendant had literally copied every word of the title of the plaintiff's copyright tale. In this case it cannot be said that the defendants' *Post Office Bradford Directory* is a copying of the plaintiff's *Post Office Directory of the West Riding of Yorkshire*—a distinction and difference which makes it wholly unnecessary for me further to observe on *Weldon v. Dicks* (*supra*); nor do I think that the cases of *Maxwell v. Hogg* (*supra*) and the other case respecting the title of a magazine called, or to be called, *Belgravia*, which was a dispute between two tradesmen, each of whom tried to circumvent the other, and in which both their bills were dismissed, has any application to the case I am called upon to consider. No case has been referred to in which it has been suggested that the taking a part of the title of a registered copyright work without fraud, without anything from which the *animus furandi* can be inferred, is an infringement of the present or any of the preceding Copyright Acts. But there remains to be considered the other ground upon which the plaintiff's claim to relief is founded. It is said that the plaintiff, having assumed the title of his directory, it has become as much his property as if it were a trade mark; that it is the device or symbol by which he vends his wares, and that no other person can adopt or use it without doing that which is calculated to deceive the public, and to induce persons who desire to become the purchasers of the plaintiff's book to be put off by having in its stead the defendants' sold to them. Reference was made to the well-known cases of the *Glenfield Starch* (*Wotherspoon v. Currie*, *supra*), *Excelsior Soap* (*Braham v. Bustard*, *supra*), the *Anatolia Liquorice* (*M'Andrew v. Bassett*) and others, in which the law which had been established and recognised for several centuries was applied. It cannot be doubted that a manufacturer or dealer who has stamped or otherwise marked upon his wares any device for the purpose of distinguishing them from all others of the same or the like kind may restrain other manufacturers or dealers from using the same or a like device upon wares of a similar description, and may recover damages for such use. But that applies only to wares which are identical or so nearly identical as that the one commodity may be easily mistaken for the other, or even where the resemblance between them is such that it is calculated to mislead or impose upon unwary purchasers; and it was upon this principle alone that the cases referred to were decided. It cannot be denied that the defendants were and are entitled to publish a directory for Bradford. Their right in this respect cannot be affected by the fact that in the plaintiff's large and comprehensive volume Bradford is included, nor by the fact that out of the plaintiff's 1704 pages 126 pages are devoted to Bradford. It is not the fact that in shape, size, or appearance, or in any material respect, except so far as the names and addresses are concerned, there is any resemblance. The names and addresses have been procured by the actual individual exertions and at the cost of the defendants, and without recourse to, or copying, or imitating the plaintiff's work. The plaintiff's work is addressed to the large community

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inhabiting or interested in the West Biding. The defendants' is compiled for the use only of the inhabitants or persons connected with the town of Bradford. The price of the plaintiff's book is 36s., and that of the defendants' is 7s. 6d. The only feature of what can be called resemblance is that the words "Post Office" are to be found in the title of each. To hold under these circumstances that any person desiring to possess the plaintiff's West Biding Directory might be misled or deceived into buying the defendants' Bradford Directory seems to me to be wholly unwarranted by the facts in evidence, and so grossly improbable as to be impossible to be concluded. I think it is quite unnecessary to inquire by what right the plaintiff calls his book the "Post Office" directory. If it were requisite to do so, I should perhaps be under the necessity of considering the evidence which has been given, that in Ireland, and in several towns in Scotland, Post Office directories have been published for many years; that for twenty-one years past there has been, and there is still, at Bath a Post Office directory published with the plaintiff's knowledge, and that there is a publication in Bolton under the same title. But, assuming that the plaintiff was and is, and until his right to do so shall be effectually disputed, entitled to use the title which he has chosen for his own work, I am of opinion that the defendant has a perfect right to call his intended publication the Post Office Bradford Directory; and that, the plaintiff having failed to establish any right to restrain that publication, the judgment in this action must be for the defendant.

Solicitors: *William Kelly; Seal, for Rawson, George, and Wade, Bradford.*

### COMMON PLEAS DIVISION.

*Monday, May 19.*

(Before DENMAN and LINDLEY, JJ.)

BELMONTE v. AYNARD AND ANOTHER; Gütschow and Ford Claimants. (a)

*Practice—Interpleader—Foreign plaintiff—Residence abroad—Security for costs.*

G., in Japan, consigned silk to A. and Co. in London, who made large advances upon it, and applied to F. G., the representative of G. at Hamburg, for further security. F. G. sent them bills to a large amount, and, after realising the bills and the silk, there remained a balance in their hands of 962l. 10s. Before realisation, F., the trustee in liquidation of certain creditors of F. G., had attached all moneys in the hands of A. and Co. belonging to F. G., and commenced an action against them as garnishees. B., the trustee in liquidation of F. G., having brought an action against them for the 962l. 10s. balance as belonging to F. G., an interpleader issue was directed, in which B. was made plaintiff, and F. and G. (who claimed as consignors of the silks) defendants. B. resided abroad.

*Held, that B. ought not to be compelled to give security for costs.*

*A plaintiff residing abroad will not be ordered to give security for costs unless he is substantially and in fact the plaintiff moving the proceedings.*

*APPEAL from order of a master refusing to order the plaintiffs to give security for costs. The*

judge (Maistry, J.) referred the question to the court.

The plaintiffs were the trustees in liquidation of F. Gütschow, the representative in Europe of the firm of Gütschow and Co., also trading in Japan. In May 1877 Paul Gütschow, in Japan, consigned silks to Aynard and Rüffer, in London, to be held to his order; and Aynard and Rüffer made advances to Paul Gütschow upon such silks to the extent of 90 per cent. of their value, according to agreement. Thereupon Aynard and Rüffer, considering themselves insufficiently secured for the amount of their advances, owing to a fall in the market in the price of silk, applied to F. Gütschow (residing at Hamburg) for further security, and F. Gütschow sent them bills to the amount of about 1200l. as further security. In 1878 Aynard and Co. sold the silks, and enough was realised from this source, and the bills to leave a balance in their hands of 962l. 10s., after repaying their advances. Before this realisation, however, Donner and Co., creditors in London of F. Gütschow, had attached all moneys in the hands of Aynard and Co. belonging to F. Gütschow, and commenced an action against them in the Mayor's Court as garnishees. Donner and Co. having subsequently gone into liquidation, this action was continued by E. Ford, their trustee. The plaintiffs thereupon, as trustees in liquidation of F. Gütschow, brought an action against Aynard and Co., in the Common Pleas Division, for the 962l. 10s. balance from the proceeds of the silk and bills remaining in their hands, which sum was also claimed by Paul Gütschow as proceeds of the silks consigned by him. Aynard and Co. having appeared in this action, the plaintiffs were ordered to give security for costs.

An interpleader summons was then taken out by Aynard and Co., and an issue was directed to be tried, in which Belmonte and others (co-trustees of F. Gütschow) were ordered to be plaintiffs, and Paul Gütschow and Ford (the trustee in liquidation of Donner and Co., the attaching creditors) the defendants. It was admitted that the plaintiffs resided abroad, beyond the jurisdiction of the court.

On a summons taken out by Ford, calling on the plaintiffs to give security for costs, the master made no order. On appeal, Maistry, J. referred the question to the court.

*Lamaison*, in support of motion, contended that the ordinary rule, under which foreigners residing beyond the jurisdiction were bound if plaintiffs to give security for costs, applied, and cited

*Benasech v. Bessett*, 1 C. B. 313.

*R. V. Williams* for the plaintiffs.—The rule only applies to actual, not nominal plaintiffs. Here the defendant Ford is the representative of the attaching creditors, who are endeavouring to get the money out of the hands of the garnishee. The plaintiffs therefore are not the attacking party. No litigant who is in possession of the subject-matter of litigation is required to give security for costs. He cited

*Williams v. Crossley*, 3 C. B. 956.

DENMAN, J.—The only question in this case is whether Belmonte, the trustee in the liquidation abroad of the firm whose name has been mentioned (Gütschow and Co.), is bound to give security for costs in favour of Ford, who claims it. Now, I think the principle on which security

(a) Reported by J. A. FORTH, Esq., Barrister-at-Law.

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for costs is given is very clearly this: that anybody substantially in the position of a plaintiff instituting a suit, who is also a foreigner residing abroad, should be bound to give security for costs to his opponent; and if Belmonte occupied that position here, we should order him as a matter of course to give such security. It appears to me, however, that he does not occupy that position. It is admitted that his position is the result of an agreement for the sake of convenience simply, because this is a convenient way in which these proceedings can be carried on. But in no other sense do I think that he is a plaintiff suing and residing abroad. The authorities cited by Mr. Lemaire are said by him to be in his favour; but I think that the *ratio decidendi* of these cases is not such as requires us to take a view of the law different from that which I have stated, but calls upon the court to say whether the party from whom security is asked can fairly and substantially be regarded as in the position of a plaintiff or not. In some cases the party occupying that position nominally does so substantially; in others he does not, but is really a defendant. The case of *Benazech v. Bessett* (1 C. B. 313) is entirely distinguishable. In substance, the party claiming there was a plaintiff, and not a defendant; and though he might be called a defendant in the interpleader, he was the party claiming in fact, and could be required to give security for costs. In the present case I think it is quite clear that Ford is the person attacking Belmonte—that he is the person who occupies the position of plaintiff as against Belmonte—and not *vice versa*. There is another case—that of *replevin*—in which it has been held that a defendant is bound to give this security; but in the case of *replevin* the defendant is the person for whom the proceedings are taken—the person who initiates them. Looking at this rule, who is the person who commenced these proceedings? It appears to me that Ford, if he had resided abroad, might have been called upon to give security to Belmonte, but that Belmonte occupies the contrary position, and is not liable to do so.

LINDLEY, J.—I am of the same opinion. I think the rule is to look at the parties with regard to the facts of the case, and see which is really plaintiff and which defendant; and this rule is well illustrated by the old Chancery practice. The rule in Chancery was the same as the rule at common law; but if the defendant filed a cross bill, that was still looked on as a sort of defence, and he was not called upon to give security for costs. So if a man filed a bill in Chancery to restrain an action which was being brought against him at law, he was regarded as one who was defending himself, and the liability did not attach. Here the proceedings have been taken at the instance of Ford; in substance and effect he is the plaintiff as between himself and Belmonte; and the form of the pleadings in which Belmonte is made the nominal plaintiff does not interfere with the principle upon which all these cases are decided. The appeal must be dismissed.

*Appeal dismissed with costs.*

Solicitors for the appellant, *Saunders, Hawkford, and Bennett.*

Solicitors for the plaintiff, *Ashurst, Morris, and Co.*

## EXCHEQUER DIVISION.

Monday, March 24.

(Before HAWKINS, J.)

DAVEY v. SHANNON. (a)

*Statute of Frauds—Agreement not to be performed within the space of one year—Verbal agreement not to carry on business within a certain distance of a particular place.*

*The defendant entered into the service of the plaintiff, who was a tailor and outfitter at D., as his foreman, on the terms, amongst others, that on the termination of his service he should not engage in the service of anyone carrying on, or himself carry on, the business of a tailor or outfitter within five miles of D.*

*On leaving the plaintiff's service the defendant set up and carried on business as a tailor and outfitter in D.*

*In an action for damages for breach of the agreement, the defendant pleaded that the agreement was not in writing, and relied on the 4th section of the Statute of Frauds.*

*Held, on demurrer to this defence, that the agreement was one not to be performed within the space of one year, from the making thereof, and should have been in writing.*

THE material portions of the statement of claim were as follows:

1. The plaintiff is an outfitter and tailor carrying on business at 47, Fox-street, Devonport.
2. In or about the month of Oct. 1866 the defendant entered into the employment of the plaintiff as a foreman tailor for a term of three years, on the terms amongst others that if he should leave the plaintiff's employment he should not engage in the service of anyone carrying on, or himself carry on, the business of a tailor or outfitter within five miles of Devonport aforesaid.
3. The defendant, on the expiration of the said period of three years, continued in the employment of the plaintiff on the like terms, except as to the period of employment, until the end of Oct. 1877.
4. At or about the end of Oct. 1877 the defendant left the plaintiff's employment, and shortly afterwards commenced to carry on business as a tailor and outfitter in Fox-street, Devonport, being the same street in which the plaintiff carries on his said business, and he has since continued, and still continues to carry on such business at the place aforesaid, contrary to the terms of the said contract, by reason whereof the plaintiff has been and will be injured in his said business and deprived of custom and of profits which he would otherwise have obtained.

The plaintiff then claimed damages and an injunction.

The 4th paragraph of the statement of defence was as follows:

The defendant says that neither the alleged contract of employment nor any memorandum or note thereof was or is in writing signed by the defendant or any other person by him authorised, and the defendant relies on the statute commonly known as the Statute of Frauds as affording a defence to this action on the ground that the alleged contract was an agreement not to be performed within the space of one year from the making thereof.

To this paragraph the plaintiff demurred.

A. Charles, Q.C. (*Ringwood* with him in support of the demurrer).—The period which the contract contemplates being quite indefinite must be deemed to be presumably for life, and therefore for more than one year, and so within the 4th section of the Statute of Frauds: *Eley v. Positive Assurance Company* (1 Ex. Div. 20), which was not overruled on appeal (1b. 89).

(a) Reported by W. WILLS, Esq., Barrister-at-Law.



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The mere fact that such an agreement is terminable at the will of one of the parties or otherwise defeasible does not exempt it from the operation of the statute (*Roberts v. Tucker*, 3 Ex. 632). This agreement is one for the joint lives of the parties, and its defeasibility by death or otherwise within the year does not except it from the general rule. There is no question here of presumption of life; the question is, what is the intention of the parties? They clearly intended the agreement to endure beyond the period of a year.

*Ansie* for the plaintiff.—There is with one only exception a long and unbroken series of decisions establishing the principle by which this class of cases is governed:

*Fenton v. Emblers*, 3 Burr. 1278;

*Ridley v. Ridley*, 34 L. J. 462, Ch.;

*Wells v. Houghton*, 4 Bing. 40;

*Bouch v. Strawbridge*, 2 C. B. 308.

There is no presumption as to future life; the life of a person is an uncertain event. There is moreover no distinction in this regard between continuous performance and continuous non-performance of any act. The cases show that where the period in question is a man's life there is no presumption as to its length, and therefore there is none that the agreement is not to be performed within a year. The only case opposed to this principle is the case which has been cited of *Eley v. Positive Assurance Company*. But there there was no contract proved, and the whole ground of the plaintiff's contention failed; and the question of the Statute of Frauds was hardly important. Nor does it appear to have been so treated; these cases do not seem to have been cited.

On March 31 HAWKINS, J. delivered the following written judgment.—The question raised by this demurrer is whether the contracts set forth in the 2nd and 3rd paragraphs of the statement of claim fall within the 4th section of the Statute of Frauds. The 2nd paragraph alleges that in or about the month of Oct. 1866 the defendant entered into the employment of the plaintiff as a foreman tailor for a term of three years on the terms, amongst others, that if he should leave the plaintiff's employment he should not engage in the service of any one carrying on, or himself carry on, the business of a tailor or outfitter within five miles of Devonport. The 3rd paragraph alleged that "the defendant on the expiration of the first period of three years continued in the employment of the plaintiff on the like terms, except as to the period of employment until the end of Oct. 1877." The breach alleged was that, having at the end of Oct. 1877, left the plaintiff's employment, he did set up in business, &c. I am of opinion that the contracts fall within the 4th section of the Statute of Frauds, as agreements not to be performed within the space of one year from the making thereof. Upon the first contract for three years it is impossible to raise a doubt. The case, however, has been argued as though it rested upon a new contract of employment for an indefinite period after the expiration of the three years, and an agreement on defendant's part, never after that employment should cease to set up business as a tailor or outfitter within five miles of Devonport. As thus presented I have considered the case. The law upon the subject is now well established. A contract which, according to its terms, is *prima facie* not to be performed within a year, is not the less

within the statute because it is made defeasible by a contingency which may occur within that period. Thus a contract of service for two years is none the less within the statute because it is made terminable by the death of either of the parties or by notice, or by the misconduct of the servant at any period of the service. *Dobson v. Collis* (1 H. & N. 81; 25 L. J. 269, Ex.) is an express authority to this effect. *Roberts v. Tucker* (3 Ex. 632) is a striking authority in support of the same doctrine. That was an action by a stipendiary curate against the incumbent of a parish, founded upon an alleged promise made by the defendant to the plaintiff to take all necessary measures for obtaining the payment of an annual grant from the Society for Promoting the Employment of Additional Curates, in each and every year, &c. At the trial before Coltman, J., he nonsuited the plaintiff upon the ground that the contract fell within the 4th section of the Statute of Frauds. On motion to set aside that nonsuit, Parke, B., and Alderson, B. upheld that ruling, the latter saying, "The case of a defeasible contract, where the contract may be defeated or put an end to within the year, is not for that reason taken out of the operation of the Statute of Frauds." *Sweet v. Lee* (3 M. & G. 452) further illustrates the same now well-recognised proposition. There the contract was for an annuity for life, and the court held it to be within the 4th section, though it *might*, by the death of the annuitant be terminated at any time. Upon the same principle in *Farrington v. Donohoe* (Ir. Rep. 1 C. L. 675) it was decided that the verbal agreement to maintain a child, aged five years, till she was able to do for herself, was within the statute, although the child might die within a year, for it was clear that if she lived the contract was not to be, i.e. could not be, in the contemplation of anybody, performed within that period. The same view was taken by this court in *Eley v. The Positive &c. Assurance Company* (1 Exch. Div. 20), where it was held that the engagement of the plaintiff as solicitor to the company during his whole professional life, and so long as the defendants continued a company, was a contract not to be performed within a year, though it might be determined by the death or resignation of the plaintiff himself, or by his dismissal for misconduct within that period. On the other hand, a contract which *prima facie*, and from its terms, may be performed within a year, however improbable that it will be so, and even though the parties to it at the time of making it expected its endurance beyond that period, does not fall within the statute, and it is immaterial that the performance of it is by the natural course of events delayed for a much longer period. The most familiar illustration of this proposition is the case of a servant hired generally, whose service may be determined by reasonable notice at any time. Such a contract does not fall within the operation of the statute, though the service may continue, and the contract remain untermiated for many years: (*Beeston v. Collyer*, 4 Bing. 309.) *Fenton v. Emblers* (3 Burr. 1278) well illustrates the law in this respect. That was an action brought by the plaintiff against the executor of a person named May, upon a promise of May by his last will and testament to give and bequeath to the plaintiff a legacy or annuity of 16l. by the year, to be paid and payable to her yearly and

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every year from the day of the decease of the said May, for and during the term of her natural life. It was objected that this agreement was within the 4th sect. of the statute, and ought to have been in writing, for that it was not to be performed within a year, since a whole year from May's death was to elapse before the annuity would become payable. It was answered, however, that the action was brought for May's not having done what he ought to have done in his lifetime, viz., make his will, which might have been done within the year. Denison, J. said the statute does not extend to cases where the thing may be performed within the year; and Wilmut, J. said, "The statute only extends to such promises where by the express appointment of the party the thing is not to be performed within a year;" see also *Ridley v. Ridley* (34 L. J. 462, Ch.) *Souch v. Strawbridge* (2 C. B. 808) was an action for the maintenance of a child placed by the defendant in 1842 under the care of the plaintiff upon an agreement by the defendant to pay 5s. 6d. a week, or one guinea per month until the defendant gave notice, or as long as the defendant should think proper. The child remained with the plaintiff till 1845. The Court of Common Pleas held that the case was not within the statute, for there was no certain time fixed for the duration of the contract, but it was to endure for an indefinite period, subject to be put an end to at any time at the option of the defendant, and that contingency might defeat the contract within a year. Upon the same principle *Knowlman v. Bluet* (L. Rep. 9 Exch. 1) was decided in this court. There the contract was, that the plaintiff should take charge of the illegitimate children of which the defendant was the father, and that the defendant should give her 300l. a year, payable quarterly to keep them. The court held the case not to be within the statute for the reason given by Bramwell, B., namely, that "the sum may be called an annuity, but really the engagement was not binding on either party for any definite space of time," and that the defendant might at the end of any quarter have refused to provide for the maintenance of the children any longer, and in like manner the plaintiff might have declined to continue to take charge of them. The contract might have been performed within the year, though no doubt both parties expected it would last longer. This judgment was appealed against (see L. Rep. 9 Ex. 307), but the appeal was disposed of upon another ground. In the case now before me the contract set out in the statement of claim amounts to an agreement on the defendant's part not to set up the trade of a tailor or outfitter within five miles of Devonport during the joint lives of himself and the plaintiff. *Prima facie*, therefore, it was not to be performed within a year, and therefore fell within the operation of the 4th section of the Statute of Frauds. My judgment, therefore, is for the defendant.

Solicitors for plaintiff, *Crowder, Anstie, and Vizard*, for T. C. Briar, Plymouth.

Solicitors for defendant, *Gush and Phillips*, for J. P. Pearce, Plymouth.

## House of Lords.

Nov. 5 and 6, 1878; April 7, 1879.

(Before the LORD CHANCELLOR (Cairns), Lords PENZANCE, O'HAGAN, and SELBORNE.)

PRYCE v. THE MONMOUTHSHIRE RAILWAY AND CANAL COMPANY. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Railway company—Tolls—Charge for fraction of a mile—Charges for stopping and unloading—Railways Clauses Consolidation Act 1845—Costs.*

*The private Act of a railway company gave them power "to demand any tolls for the use of the railway not exceeding" a fixed maximum rate "per ton per mile."*

*Held, by Lord Cairns, L.C. and Lord Selborne, that under this clause the company had power to make a charge for fractions of miles as long as the fixed maximum charge was not exceeded.*

*By Lords Penzance and O'Hagan contra.*

*Charges which the company was empowered to make for "stopping, loading, and unloading" are not tolls which ought to be exhibited on a board within the Railway Clauses Act 1845 (8 & 9 Vict. c. 20) sect. 93.*

*Judgment of the court below affirmed.*

*Observations by Lord Cairns, L.C. as to costs in the House of Lords when the House is divided in opinion.*

This was an appeal from an order of the Court of Appeal (James, Mellish, and Baggallay, L.JJ.) dismissing an appeal from a decision of the Exchequer Division, which had refused to grant a new trial in an action brought by the company against the appellant to recover the sum of 1082l. for certain tonnage alleged to be due for the carriage of iron, coal, and other merchandise in the defendant's trucks upon the plaintiffs' railway.

The appellant paid 515l. into court, and pleaded never indebted as to the rest of the respondents' claim.

The case was tried at the spring assizes at Gloucester in 1875, before Quain, J. and a common jury. It was admitted that the plaintiffs' claim was correct subject to the following contentions: First, that the plaintiffs were not under their Act entitled to charge the defendant tolls for fractions of miles: and, secondly, that the plaintiffs were not entitled to charge tolls for "stopping" without having published the same on a toll board, according to the Railway Clauses Consolidation Act 1845, sects. 93 and 95. The particulars debited the defendant with the carriage of 234,408 tons of coal at the rate of 2½d. per ton, being for tolls for the use of the railway and for locomotive power, being together 1 per ton per mile for a distance of two miles, three-quarters, and 116 yards, and if the plaintiffs were, as the defendant contended, not entitled to charge for fractions of miles, the whole distance being under four miles, then the excessive charge on this head alone amounted to 671l. Under their Act the company were authorised to charge "per ton per mile" a sum not exceeding a certain maximum. The question therefore was whether the company were or were not entitled to make a *pro rata* charge for fractions of miles.

The Exchequer Division decided in favour of

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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the railway company, and their judgment was affirmed by the Court of Appeal. Mellish, L.J. dissenting on the point as to the power to charge for fractions of miles.

*H. Mathews, Q.C. and Jelf* appeared for the appellant.

*Benjamin, Q.C. and A. T. Lawrence (J. O. Griffiths, Q.C. with them)* for the respondents.

The facts and arguments appear sufficiently from the judgments of their Lordships.

At the conclusion of the argument their Lordships took time to consider their judgment.

*April 7.*—Their Lordships gave judgment as follows :

**THE LORD CHANCELLOR (Cairns).**—My Lords, the cases which have decided that Taxing Acts are to be construed with strictness, and that no payment is to be exacted from a subject which is not clearly and unequivocally required by Act of Parliament to be made, probably mean little more than this—that inasmuch as there is not any *a priori* liability in a subject to pay any particular tax, no antecedent relationship between the taxpayer and the taxing authority, no reasoning founded upon the antecedent relationship of the taxpayer and the taxing authority which can be brought to bear upon the construction of the Act, therefore the taxpayer has a right to stand upon the literal construction of the words used, whatever may be the consequences. I cannot think that this principle applies to any considerable extent where the payment spoken of in the Act of Parliament is a payment to be made in return for services rendered, and above all in a case where Parliament does not step in to give the right to payment, but rather to moderate and limit a right to payment which otherwise might exist without limit, or at all events with only such limit as would be placed upon it by a *quantum meruit* assessment. Approaching the construction of the 104th section of the Act of the respondents from this point of view, it is obvious that it was intended to deal with the remuneration of the company for services performed, viz., the supplying and maintaining a railway for the passage of carriages, and further the conveyance of articles of merchandise upon the railway, in carriages belonging to the company itself. The first words are affirmative, “it shall be lawful for the company to demand;” but they are immediately followed by negative words, “not exceeding.” The result of the language of the section is to substitute for the remuneration which the company might have obtained by agreement in particular cases, or by asserting a right to be paid for the value of their services, a maximum payment for the use of their railway and their services as carriers, which payment they are not at liberty to exceed. The payment fixed by the Act of Parliament must therefore be in its nature analogous to and of the same character as that which the company would have required if the amount of their demand had not been limited; and it is obvious that they would have required, and have been entitled to require, payment for a part of a mile as well as for a completed mile. It appears to me, therefore, that unless the right to require payment for a part is excluded by words which are reasonably free from doubt, it must be assumed that it has not been excluded. It would be foreign to the whole object of such clauses to require that a company should carry merchandise

for a part of a mile not for a sum limited in amount, but for no sum whatever. The words of the section, however, appear to me in no wise to justify the contention of the appellant. They point, as it seems to me, to a rateable charge, rateable *quoad* the ton, and rateable *quoad* the mile; and, although the word “rate” is not expressly used in the 104th section, it is used in the 106th, where the words are “the rate of tolls hereby prescribed”—that is, prescribed in the 104th section. That being the reasonable construction of the 104th section, the 105th section does not in any way cut it down or alter it. It certainly does not in words profess to do so; and, with regard to the distance beyond four miles, the power is not to charge for fractions, but for fractions in proportion to quarters, and to charge for a fraction of a quarter as a whole quarter. To authorise this to be done express words are clearly necessary. On this part of the case—which is the only part on which at the time of the argument your Lordships entertained any doubt—I think that the decision of the Court of Appeal is right, and that the appeal should be dismissed.

**LORD PENZANCE.**—My Lords, there were two questions raised in this case. As to one of them, namely, the right of the company to make a reasonable charge for stopping, loading, and unloading, without publishing such charge on their toll board, there was no difference in the court below, and there is none in your Lordships’ House. The other point raised is one of more difficulty. The company were empowered by statute (8 & 9 Vict. c. clxix) to charge tolls for the carriage of goods at charges to be fixed by them not exceeding a certain sum per ton per mile, and the question is whether this power enables them so to fix these charges as to include a rateable payment for fractions of a mile when the distance travelled exceeds a mile. The argument mainly urged in favour of this right was this—that if this right were not accorded the company might carry a number of tons for some distance less than a full mile or complete number of miles without being entitled to any remuneration for so doing, and your Lordships are asked to conclude that the Legislature could not possibly have intended such a result. The weight of this reasoning was perhaps diminished in argument, it being pointed out that the company is not really bound to carry any goods except as carriers “for hire,” and that they would be entitled to payment on a *quantum meruit*, and also to relief under a clause in the general Act. The principle upon which clauses such as those now under consideration have hitherto been construed in courts of justice is beyond doubt. In *The Stockton Railway Company v. Barrett* (7 M. & G. 879; 11 Cl. & F. 590) Lord Brougham said that “in doubtful cases you must always lean against the construction which imposed a burden on the subject, and that the intention of the Legislature to impose a tax must be clear. It was so held in *The Hull Dock Company v. Brown* (2 B. & Ad. 58), which both parties in this appeal relied on for other purposes. Lord Tenderden said: ‘These rates are a tax upon the subject, and it is a sound general rule that a tax shall not be considered to be imposed (or at least not for the benefit of a subject) without a plain declaration of the intent of the Legislature to impose it.’ The like law was laid down in *Gidart v. Gladstone* (11 East, 675), where Lord Ellen-

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borough said: 'If the words would fairly admit of different meanings, it would be right to adopt that which would be more favourable to the interests of the public, and against that of the company, because the company, bargaining with the public, ought to take care to express distinctly what payments they were to receive, and the public ought not to be charged unless it be clear that it was so intended.' Many other cases might be cited which concur in the same reasonable view." Lord Lyndhurst relied upon the same principle of construction, and in like manner based his judgment upon it. No doubt in times now past there was a much greater tendency in courts of justice than at present to frame and act upon abstract rules for the construction of statutes, and the change has probably been beneficial. But I am unwilling to accept the gradual relaxation of some highly technical rules as a reason for abandoning a principle such as that I have referred to, which I think rests upon a sound basis of reason and fairness. Acts of Parliament, such as that under consideration, are framed and offered to Parliament by the companies who are asking for powers and privileges which the common law does not give them, and those powers and privileges are only conceded to them upon the footing that it is for the benefit of the public as well as themselves. This benefit they profess to secure to the public by giving the use of the line to all comers or undertaking to carry their goods upon payment of certain charges or tolls. The nature and limit of these tolls and charges they fix for themselves, and submit them to the Legislature in their Bill, expressed in their own language; and I think it is a fair and reasonable thing to say to them that by the language of that Bill when it becomes law they are strictly bound. If the language of their clauses, strictly construed, puts them to any disadvantage in their dealings with the public which the Legislature did not intend; it is the fault of those who had the opportunity of insisting upon language which would have adequately expressed that intention; and they are asking courts of justice to tread upon dangerous ground when they seek to supply a deficiency in the actual language of legislation by what they assert to be a reasonable intendment to be inferred from the probabilities of the case. It may well be that in dealing with the Legislature a charge, reasonable enough in itself in one direction, was surrendered by the company in consideration of benefits secured in lieu of it in some other direction, and in this state of things, unless the clauses as they stand do not admit of any reasonable meaning at all without the addition of something else which has not been expressed, I think the rule hitherto established and acted upon of giving effect to the language strictly construed, and nothing more, is one that ought to be adhered to. What, then, is the language of the clauses in question? The 8 & 9 Vict. c. clxix, s. 104, confers upon the company power to demand any tolls "not exceeding the following—that is to say, in respect of the tonnage of articles conveyed upon the railway or any part thereof, for all coal per ton per mile not exceeding three farthings." The form therefore which the clause takes is a permission to fix their own tolls, followed by the expression of a limit which they are not to exceed. In construing it no difficulty can arise except such as may be found in construing the limit intended to be expressed. It

is obvious that there are no words here which are expressly applicable to anything but tons and miles. It is not said "at the rate of" so much per ton per mile, which would be the natural and obvious way of expressing a rateable charge, and there is no express mention of any payment for fractions. The question is, whether a toll which in addition to a sum "per ton per mile" provides payment for parts or fractions of a mile does not exceed such a toll. I confess that I think that it does. I have not failed to consider with great care the distinction put forward by James, L.J. in the Court of Appeal. He says: "The words enable them to fix their own charge, within certain limits, for the use of any part of their railway. Can it be said that in fixing a halfpenny for half a mile they have exceeded a penny per mile?" His reasoning, as I understand it, is based upon the introduction into the clause of the words "or any part thereof" when speaking of the railway, which words he considered sufficient to confer upon the company the right to make a charge for part of a mile. But if the true meaning of the words "per ton per mile" does not include fractions of tons or miles, the application of these words by the context of the clause to the railway "or any part thereof" can only, as it seems to me, extend the toll to such "part thereof" as consists of completed miles. In other words, it is more reasonable, I think, to limit the generality of the words "or any part thereof" by the definition of the toll which is precisely described than to extend the toll beyond that description by words which may easily be so read as to conform to it. In the course of the argument it was urged that, though power to take a specific toll described as "per ton per mile" would not include fractions, yet that a power to fix a toll which did not exceed a toll "per ton per mile" might be lawfully exercised by fixing a toll which did include fractions. I feel unable to rest upon what seems to me so thin a distinction. Whatever a toll "per ton per mile" may mean, it must, I think, mean the same thing whether it is expressed as a toll which may be taken or as a toll which may not be exceeded. So far upon the construction of sect. 104 if it had stood alone, but sect. 105 appears to me to point strongly in the same direction. In sect. 105 certain regulations are declared to be applicable to the fixing of the tolls under sect. 104. These regulations are that for goods carried on the railway for a less distance than four miles the company may make certain special charges for stopping, loading, and unloading, and that "for a fraction of a mile beyond four miles" the company may demand "for such fraction of a mile in proportion to the number of quarters contained therein." A broad distinction is taken therefore between a distance of four miles or less, and any distance beyond four miles. When to this it is added that by the previous Acts of Parliament, by which the works ultimately represented by this company have been authorised, a provision has been uniformly inserted for fractions of weight or distance, and express power granted for making them the subjects of charge, the omission to confer any such power for this particular short distance of four miles, in respect of which other and unusual charges are authorised, looks very like an intention on the part of Parliament to withhold it. The conclusion therefore at which I arrive is this—that no express power has been conferred upon this company to

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fix a toll for fractions of a mile within the distance of four miles, and that such a power ought not to be supplied by intentment or implication. This appeal ought therefore, in my opinion, to be allowed, and the judgment of the court below reversed.

Lord O'HAGAN.—My Lords, on the question as to the right to enforce charges for stoppage, loading, and unloading without previous publication all the judges in the courts below were of the same mind, and I believe your Lordships all agree with them. The shifting and uncertain nature of these charges makes previous specification of them manifestly impracticable. The obligation to publish must apply to claims capable of being appreciated and prescribed beforehand, and the words of the statute are not inconsistent with the reasonable view that it should be limited to them. The more difficult question arises as to the construction of the 104th and 105th sections of the respondent company's Act. In approaching the interpretation of the statute, I do not feel affected by two considerations which appear to have exerted considerable influence on the judgment of the Court of Appeal. The first of these rests on the undoubted fact that the construction of the respondents has been accepted and acted on for many years as well by freighters and merchants, who have paid the fractional tolls, as by courts of justice. But it is admitted that the matter had not been *res judicata*, and we have no means of knowing from what motives the traders made the concession on which the courts proceeded, and we must not forget that the antecedent statutes which affected the company's railway and canal contained clauses expressly authorising the fractional charges. Under them the payment of those charges must have become habitual, and they may, not unnaturally, have induced the supposition that it might also be enforced under the latest Act. The second consideration is the unreasonableness of supposing that the Legislature could have intended quantities of goods to be carried for nothing, as they must sometimes be if fractional charges cannot be legally claimed. But at most the presumption raised by that consideration can only make us more careful in ascertaining the real meaning of the Act; and although that meaning, rightly appreciated, should involve such a result, we are not at liberty to reject it on that ground only. The company had the preparation of their own measure, and were bound to see that it fitly expressed the purposes of Parliament. They were not forced to adopt the Act if they had reason to complain of its harshness or injustice, and it behoved them to have any terms favourable to themselves and involving burthens on the public explicitly and unequivocally stated. If they have not done so the fault is theirs, and they must take the consequences. But besides, the insertion of the clause as to claiming for stoppages, &c., in the company's interest, may have been made to compensate for the denial of the fractional charges under the four miles within which they were to enjoy that new and important privilege. I do not think it necessary to discuss or decide the question as to recovery on the *quantum meruit*. I prefer to rest on the grounds I have stated, as showing that this second consideration is not decisive on the legal issue as to the construction of the clauses. But there is a third consideration

which seems to me of much materiality with reference to that construction. The statute immediately before us is only the last of a series, all *in pari materia*, and all directly dealing with the works of the company and its relations to the public. They should therefore be read together, and when we find the right to make fractional charges and take proportionate tolls expressly given in all of them but the last, we are bound, I think, to notice the significant omission. We must find, if we can, some better reason for it than the oversight or error of the Legislature, and we may recognise such a reason when we see, in the added provision for stoppage, an apparent compensation for the lost power of charging for less than a mile. If after the words "per ton per mile not exceeding three farthings" the words "and so in proportion" had been introduced, as in preceding Acts, the controverted right would have been beyond dispute; and is it unreasonable to presume that they were not inserted because the proportionate claim was not meant to be allowed? Reading, then, sect. 104 in connection with the previous legislation and the provisions of sect. 105, and finding that it gives power to charge merely "per ton per mile," there appears to me to be nothing startling in the assertion that the charge was to be for an entire mile, and not rateably or for a portion of a mile, and I do not think it is made so by the preceding words "not exceeding the following," and "upon the railway or any part thereof;" for if it was intended that the subject-matter of the charge should be merely carriage for a full mile, the excess forbidden would only apply to that mile, and the "part" of the railway must be such a part as would comprise a mile. In one sense, by fixing a halfpenny for half a mile, the company have not exceeded a penny per mile; but if their power to charge only extends to the whole mile, and only to a part of the line comprising a mile, they could not exercise it as to smaller portions merely because they might levy the toll. Whether or no the power was so limited is the question; and it seems to me very like a *petitio principii* to reason on the assumption that it was not. I do not affirm that the construction of the 104th section is free from difficulty. On the contrary, I think there is considerable ambiguity about it. But assuming this, and that it might be difficult of construction if we had nothing else to guide us, I think we are assisted to a reasonable interpretation by the section which succeeds. It provides expressly "for a fraction of a mile beyond four miles, or beyond any greater number of miles." It gives the company power to demand tolls on merchandises "for such fraction in proportion to the number of quarters of miles contained therein;" and as to the carriage of goods for a less distance than four miles, it authorises them to make a reasonable charge for stopping, loading, and unloading, but leaves them without any claim for fractions of a mile. Does not this express bestowal of the power to charge beyond the four miles involve the denial of it within that distance? The words make a clear distinction between the distance within and beyond the four miles, which the construction of the respondents would nullify, and they give different rights in connection with these differences which it would appear to confound. The specific grant of the power of fractional charge in the 105th section

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makes it improbable that if such a grant had been designed by the 104th it would not have been as clearly, as it might have been easily, given, and the argument I have derived from the presence of such a provision in previous statutes, and the absence of it in that with which we have to do, appears to me to acquire accumulated force from the contrast of the sections in this respect. If the 104th section had given the right of fractional charges in clear and express terms, it might have been difficult to say that sect. 105 took it away by implication. But, as I have said, I do not think it was so given. At the utmost the former section seems to me ambiguous and open to two constructions, and we are to take the language as we find it. We are not sitting here judicially to presume the intentions of the Legislature, but to collect them from the words of the statutes. Keeping in mind this established canon of construction, I cannot see that the very strong implication raised by sect. 105 is encountered by any argument, either from the reason of the thing or the language of the Act, which should make us refuse to accept it, while the introduction of the power to charge for stoppage, &c., within the four miles which it would relieve from proportional tolls, goes far, in my opinion, to confirm it, and explain the motive on which it may have been grounded. I believe that the ambiguity of sect. 104 has been very much removed by the clearness of sect. 105, but, if it still partially remained, I should say that the rule which requires the imposition of a tax or toll to be clear and distinct, and in cases of doubt compels the adoption of the meaning most beneficial to the public, should be applied to this case. The company sought the Act, directed the preparation of it, obtained large powers and privileges under it, had the option to accept or reject it, and may fairly be bound by a strict construction of its words in favour of the general community. I think that the doctrine which would so bind them even if the legislation were ambiguous, settled as it is by many cases, is wise and reasonable, and ought to be maintained. For these reasons I am of opinion that the appeal should be allowed and the judgment reversed.

LORD SELBORNE.—My Lords, I am of opinion, on the first point, that the effect of sect. 104 of the Act is not to fix a ton and a mile as separate units for the purpose of charge, but to enable the company to charge such tolls, and at such rates as they may think fit, in respect of the conveyance of the different classes of goods therein mentioned, so long as they do not exceed the maximum rates to which they are thereby limited. Therefore it is *secundum ratam*, and not only on a fixed quantity or distance, that they may charge. I will not dwell upon the mere reason of the thing, which does not seem to me to be at all favourable to the appellant's construction. I am content to rely upon what I consider the proper and natural meaning of the words used. The governing words are that "it shall be lawful for the company to demand any tolls for the use of the railway, not exceeding the following." The consideration for those tolls here expressed is not the conveyance of each separate ton of goods, but "the use of the railway" by the person whose goods are conveyed, and what the company may demand is "any tolls," so long as they do not exceed the prescribed limits. The charge actually made by the company did not exceed those limits, and it cannot be

disputed that the railway is used as much when the goods are conveyed over a fraction of a mile as when they are conveyed over an entire mile. These governing words are followed by others, which immediately introduce the enumeration of the maximum rates, viz., "in respect of the tonnage of articles conveyed upon the railway or any part thereof, as follows," showing that a maximum scale of tonnage rates was intended. A tonnage rate is as much applicable to half a ton as to a whole ton, and the same principle of interpretation which in this contest is applicable to quantity must be equally applicable to distance. Further proof of the same proposition seems to me to be derived from the words "the rate of tolls" in sect. 106. The next question is whether sect. 105 operates by implication to take away the right which without it sect. 104 would, in my opinion, confer, to charge in respect of distances less than four miles, for any fraction of a mile. To raise such an implication without necessity could not, I think, be right. It might be necessary if sect. 105 would not be sensible and officious without it, but it is both sensible and officious, though no such implication is made. The object of that section is not to cut down the tolls authorised to be taken by sect. 104, but to superadd certain provisions and regulations which shall be applicable to the fixing of such "tolls." So far as these provisions and regulations are applicable they are, of course, to be applied, but they leave untouched everything authorised by the preceding section to which they are not applicable. Their express words are not applicable to any charge of tolls for a fraction of a mile when the whole distance travelled over is less than four miles. They do not regulate or provide for it, but neither do they prohibit it. They regulate four special cases, and that always in such a way as to enable the company to charge more in those cases than they could have done under sect. 104 standing alone. First, if the distance travelled over is less than four miles, there may be a charge for stopping, loading, and unloading besides the tolls authorised by sect. 104. The next case is the conveyance of goods for any distance beyond four miles, in which case the company are by this clause enabled to charge for a fraction of a quarter of a mile as if it were a full quarter of a mile, a benefit which of course they cannot claim in a case, such as that before the House, to which the provision is inapplicable; but it does not therefore follow that the right to charge for a fraction of a mile according to the distance, being less than four miles in the whole, over which any goods may have been actually conveyed, is thereby taken away if given by the previous section. The third case is that of passengers, as to whom the company is by this clause enabled to charge for every fraction of a mile beyond an integral number of miles, as if it had been a whole mile. The fourth provision relates to the measurement of the quantity of goods conveyed. It enables the company to charge for every fraction less than a quarter of a ton as if it were a whole quarter of a ton, without reference to the distance over which the goods may have been conveyed. All these provisions, therefore, are in favour of the company, and they will all receive full effect in the cases to which they may apply, though they are not held to govern directly or by implication the case now before the House. Upon the second point I agree

with the judgment of the court below. My opinion therefore is that this appeal should be dismissed. I cannot think it right to refuse to sect. 104 what appears to me to be its proper effect according to the true and reasonable construction of its words merely because it may have been usual in other Acts of Parliament, some of them relating to undertakings now incorporated with this railway, to provide for the right to charge for fractions of miles in express terms, which is not here done, except in the particular cases regulated by sect. 105. And with respect to the principle laid down in some authorities, that statutes of this kind authorising tolls to be taken by undertakers of public works are to be construed as if they were taxing Acts imposing a burden on the subject, and therefore not to be extended so as to increase that burden beyond the strict meaning of their words, I have already stated that I think it would be necessary in the present case to place upon the words of the Act a forced and unnatural construction in order to arrive at a conclusion in the appellant's favour. If these authorities were to be understood as meaning more than that express powers of taking tolls conferred by the Legislature are not to be extended by any unnecessary implication beyond the fair and natural import of the words used, I should doubt whether they were sound in principle or binding on this House.

The LORD CHANCELLOR (Cairns).—My Lords, your Lordships being equally divided in opinion, of course, according to the ancient rule, the question that the decree appealed against be reversed will be determined in the negative. I am anxious to say a word upon the subject of costs. There is an idea that the reason why nothing is said about costs when there is an equal division of votes is that it is somewhat contrary to justice, or to the practice of the House, to give costs where there is any division of opinion. That is not the principle upon which your Lordships proceed in a case like the present. There are upon these occasions always two separate motions proposed to the House. The first is the motion that the decree appealed against be reversed. That motion may be rejected by a majority or may be carried by a majority, or the numbers may be equal, and thereupon the decree stands affirmed. But in all these cases, if anything is to be said about costs, a second motion is necessary. Now, it is obvious that, if your Lordships are equally divided upon the first motion, and the decree thereupon stands affirmed, the numbers would again be equally divided upon the second motion, and it would not be carried. Consequently, the effect would be the same as if nothing was said about costs. I am anxious to guard against the idea going about that the reason is the division of opinion, for there might well be a division of opinion among your Lordships and yet be an order that the appellant was to pay the costs. The true reason is that a motion ordering the appellant to pay costs could not be carried.

*Order of the Court of Appeal affirmed, and appeal dismissed.*

Solicitors for the appellant, *Hunt and Son.*

Solicitors for the respondents, *Thos. White and Sons.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

CORRECTION.—*ANGUS v. DALTON*.—At page 605, last line second column, for "Held (Brett, L.J. dissenting)," read "Held by Brett, L.J., dissenting."

#### SITTINGS AT LINCOLN'S INN.

Friday, Jan. 31.

(Before JESSEL, M.R., and JAMES and BRAMWELL, L.JJ.)

GILBERT v. SMITH. (a)

*Partition—Owners of small part of property desiring a sale—Offer by others to purchase—Partition Act 1868 (31 & 32 Vict. c. 40), ss. 3, 4, 5.*

*The 3rd section of the Partition Act, which empowers the court in a partition suit to direct a sale of the property on the request of any of the parties interested, notwithstanding the dissent of or disability of any others of them, is not controlled by the 5th section, which empowers the court, instead of directing a sale, to order a valuation of the share of the party requesting a sale on the other parties interested undertaking to purchase his share.*

*In an action for the partition or sale of a property consisting of three houses, the plaintiffs and others, who were entitled to three-sixteenth shares of the property, asked for a sale, but the owners of the remaining thirteen-sixteenths wished to retain the property undivided, and offered to purchase the plaintiffs' shares at a valuation under the 5th section of the Act.*

*The Court being of opinion that, owing to the number of the parties interested and the nature of the property, a sale would be beneficial to all parties:*

*Held (reversing the decision of Malins, V.C.), that a sale ought to be directed, with liberty to all parties other than those having the conduct of the sale to bid.*

*Drinkwater v. Ratcliffe (33 L. T. Rep. N. S. 417; L. Rep. 20 Eq. 528) approved.*

THIS was an appeal from a decision of Malins, V.C.

The facts of the case, which are briefly stated in the report of the hearing in the court below, as reported in 38 L. T. Rep. N. S. 308, were more fully as follows:

The action was brought for a partition or sale of three houses in Birmingham, and at the original hearing the usual reference was made to chambers to ascertain the interests of the various parties in the property.

The chief clerk divided the property into 336 shares, of which the plaintiffs Thomas W. Jones and George Biron, as trustees of a settlement made in Jan. 1871, and the plaintiff George Heaton, as mortgagee, were entitled to forty-two shares, and the defendants to the remaining 294 shares which were thus subdivided:

William Pitt was entitled to fifty-nine shares, William Pitt, and Peter Pitt, his mortgagee, to twenty-five shares, Peter Pitt, in his own right, to thirty-five shares, Peter Pitt, and Joseph Ballard Pitt, as trustees of a settlement made in July 1868, to thirty-five shares, Joseph B. Pitt to fifty-five

(a) Reported by H. PRAT, Esq., Barrister-at-Law.



shares, Mary Smith and T. Drinkworth to sixty-three shares, and H. Sutor and Emma his wife to the remaining twenty-one shares.

Thus the plaintiffs were entitled to two-sixteenths of the property, and the defendants were entitled between them to the remaining fourteen-sixteenths.

The property consisted of three houses, divided into five tenements, and was situate in the centre of the town of Birmingham, where certain new streets were about to be made by the corporation, which, it was alleged, would greatly increase the value of the property.

The plaintiffs, and certain of the defendants entitled to one-sixteenth, desired a sale as being likely to produce a larger sum than that at which any valuator would value the property, while the other defendants were desirous of retaining their shares, and offered to purchase the plaintiffs' shares at a valuation.

The Vice-Chancellor held that the case came within the 5th section of the Partition Act 1868, and he accordingly directed a valuation of the three-sixteenths shares and a sale of them to the defendants who had offered to purchase.

From this decision the plaintiffs appealed.

*Bristowe, Q.C. and Lewin* for the appellants.—This is a case in which a partition is practically impossible by reason of the nature of the property and the number of the parties interested. Therefore the case comes within the 3rd section of the Partition Act, and we have a right to have the property sold under that section. The 5th section does not apply to cases coming within the 3rd or 4th sections, but to cases not provided for by the prior sections, to cases in which a partition is feasible. There is nothing in the Act to compel a party to sell his share to another party, when a case is made out for a sale of the whole property:

*Williams v. Games*, 32 L. T. Rep. N. S. 414; L. Rep. 10 Ch. 204;

*Drinkwater v. Ratcliffe*, 33 L. T. Rep. N. S. 417; L. Rep. 20 Eq. 528;

*Roughton v. Gibson*, 36 L. T. Rep. N. S. 93; 46 L. J. N. S. 366, Ch.

*Davenport*, for the defendants who desired a sale.

*J. Pearson, Q.C. and Bardswell*, for the defendants Peter Pitt, Joseph Ballard Pitt, and William Pitt, together entitled to ten-sixteenths of the property.—The 3rd section empowers the court to direct a sale on the request of any of the parties interested, but the court has a discretion under that section. The 4th section binds the court to direct a sale, when the majority desire it. This case comes within the 5th section, and the order made by the Vice-Chancellor is that which it was right to make under the circumstances.

*Glasse, Q.C. and Woodroffe*, for the owners of the remaining shares, opposed the sale.

No reply.

*JESSEL, M.R.*—I do not wish to repeat what I have already said in *Drinkwater v. Ratcliffe* (*ubi sup.*), except that I take the same view of the law now, sitting here, as I did then, it being, to my mind at all events, clear that the 5th section of the Partition Act 1868 does not apply where the 3rd section does. The question is whether the appellants in this case are within the 3rd section. Now the real point that the court has to con-

sider is whether, under the circumstances I am about to mention, it would be more beneficial for the parties interested to have a sale than a partition. The circumstances to which the attention of the court is specially directed by the Act are, amongst others, two; one, the nature of the property, the other, the number of the parties interested. As regards the number of the parties interested in this case, they are very numerous, and their shares are very curious fractions. The utmost that can be said on that question in favour of the respondents is this: they say that by arrangement between themselves they can reduce the number of the parties to four. I am not satisfied that they can. It appears to me from the chief clerk's certificates that some of the respondents are trustees, but I will assume in their favour that they can to that extent reduce the number of the parties. Then there are four parties with these very odd fractions: two-sixteenths for the plaintiffs, one-sixteenth for Mr. Davenport's clients, three-sixteenths for Mr. Glasse's clients, and then there would be ten-sixteenths or thereabouts for Mr. Pearson's clients. The property in question consists of three houses somewhere near the centre of the town of Birmingham. The three houses are divided into five tenements. How they are to be divided by partition in any rational way, I myself do not understand, nor has anybody suggested that they can be. Of course you can always divide a house in the way one was divided in a well-known old case, by giving one part of the house to one man, and another part to another man; for then you might have such a complaint as was made there, that the partitioner did not give one of them any staircase, so that he could not get to the top, and the short answer was, that he could not divide the house in any other way if he made the shares of anything like equal value. That is all irrational. The meaning of the Legislature was, that when you see the property is of such a character that it cannot be reasonably partitioned, then you are to take it as more beneficial to sell it and divide the money amongst the parties. It does appear to me that, looking at the nature of the property, and to the fractions into which it must be divided, it is in this case beneficial for all the parties interested that there should be a sale and not a partition, and therefore I think that the appellants are entitled to what they ask, namely, to discharge the Vice-Chancellor's order and to direct a sale. Of course, when the case comes into chambers, the court has full power to give directions as to the mode of sale, and it can give the respondents, as I understand, they now desire, liberty to bid at the sale, or liberty to lay proposals before the judge in chambers as to buying the property. In either way they may secure the property to themselves if they are willing to pay the full value; and that is all, as I understand, that the appellants ask for.

*JAMES and BRAMWELL, L.JJ.* concurred.

Order for sale accordingly, with liberty to all parties, other than the parties having the conduct of the sale, to bid and to carry in any proposals before the judge in chambers.

Solicitors for the appellants, *Whately, Milward, and Whitehead*.

Solicitors for the respondents, *Gamlen and Son; Letts and Son; Robinson and Preston*.

[Ct. of App.]

KREHL v. BURRELL.

[Ct. of App.]

Friday, March 21.

(Before JAMES, BAGGALLAY, and BRAMWELL, L.JJ.)

KREHL v. BURRELL. (a)

*Right of way—Obstruction by erection of building—Mandatory injunction—Damages under Lord Cairns' Act (20 & 21 Vict. c. 27, s. 2).*

*Where a defendant, after action brought to restrain the erection of a building on land over which the plaintiff had a right of way, continued the erection of and completed the building:*

*Held (affirming the decision of Jessel, M.B.), that the plaintiff was entitled to a mandatory injunction, and that the court had no power under Lord Cairns' Act to compel him to accept damages instead of the injunction.*

THIS was an appeal from a decision of the Master of the Rolls.

The hearing in the court below is reported in 38 L. T. Rep. N. S. 407, and in L. Rep. 7 Ch. Div. 551.

The facts of the case were briefly as follows:

The action was brought by the owner and occupier of a public house in Coleman-street, in the city of London, known as the Three Tuns, to restrain the defendant from erecting a building on the site of an adjoining court, called Windmill-court, over which the plaintiff and his predecessors in title claimed an uninterrupted right of way to and from the back of the public house for forty years.

The plaintiff gave notice to the defendant of his rights when the defendant first began to obstruct the right of way, and issued the writ in the present action before the defendant's building was completed; but the defendant nevertheless completed his building, which was a large and expensive structure, blocking up the access to the back of the plaintiff's house.

The case came on for trial before the Master of the Rolls in Dec. 1877, when his Lordship found that the plaintiff had established his right, and gave a verdict for him accordingly; but before giving judgment ordered the case to stand over to give the defendant an opportunity of coming to terms.

On the 28th Jan. 1878 the case came on for judgment, and, the parties not having been able to come to any terms, the Master of the Rolls gave judgment in favour of the plaintiff, granting him a perpetual mandatory injunction against the defendant.

From this judgment the defendant appealed.

The appeal came on for hearing on the 6th Dec. 1878, when the court held that if the defendant desired to dispute the verdict, he ought to have moved for a new trial within twenty-one days after the delivery of the verdict, and that as he had not done so, the verdict was conclusive as to the fact that the plaintiff was entitled to a right of way. (See 39 L. T. Rep. N. S. 461; L. Rep. 10 Ch. Div. 420). The further hearing of the appeal was then adjourned to give the parties another opportunity of coming to terms, and several further adjournments took place from time to time for the same purpose.

The cause now came on again for argument, the parties having failed to come to terms.

The Attorney-General (Sir John Holker, Q.C.),

Chitty, Q.C. and Hemings, for the appellants.—The 2nd section of Lord Cairns' Act gives the court power to award damages in a case of this kind in substitution for an injunction. And the present is the very kind of case in which the court ought to exercise that power. The injury caused to the plaintiff by the obstruction of his right of way is one that could be compensated by reasonable damages, but it is very harsh to compel the defendant to pull down the expensive building he has erected. They referred to

*The Curriers' Company v. Corbett*, 12 L. T. Rep. N. S. 169; 2 Dr. & Sm. 355; s. c. on appeal, 18 L. T. Rep. N. S. 154; 4 De G. J. & S. 784.

Davey, Q.C. and Everitt, for the respondent, were not called upon.

JAMES, L.J.—I am of opinion that there is no ground for this appeal. The question as to the right of way was decided at the trial in favour of the plaintiff, and no appeal having been brought against the verdict of the Master of the Rolls within the proper time, it is binding upon this court. The plaintiff then being entitled to this right of way, the defendant obstructed, and continued to obstruct it, building on the piece of ground over which it existed. The plaintiff brought his action complaining of the obstruction in due time, but the defendant went on with the obstruction, relying upon the defence that the plaintiff had no such right of way as he claimed. Having taken upon himself to do this he must take the consequences. The plaintiff has established his right to have the obstruction removed, and the defendant must remove it in such way as he can, either by making a way through his building, or by removing the building. The plaintiff has a plain legal right, and is entitled to have the order of the court which the Master of the Rolls has made to enforce his right. It was not intended, and never could have been intended, by the Legislature, in giving the court power to award damages under Lord Cairns' Act, to compel a man who is wronged to sell his property to the person who has wronged him. No such right as is claimed by the appellant can exist in this country unless given by Act of Parliament. If it were otherwise, the consequence would be that a person would have a right to do a wrong to his neighbour at a price to be fixed by the court. The case of *Durell v. Pritchard* (13 L. Rep. N. S. 545; L. Rep. 1 Ch. 244) and similar cases do not, in my judgment, apply to the present case, where the defendant proceeded to do the wrong after action brought.

BAGGALLAY, L.J.—I am of the same opinion. I will only add that I adopt the view expressed by the Master of the Rolls as to the way in which the court ought to exercise the discretion which it has of awarding damages under Lord Cairns' Act.

BRAMWELL, L.J. concurred.

*Appeal accordingly dismissed with costs.*

Solicitor for the appellant, E. Burrell.

Solicitor for the respondent, C. M. Roche.

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LUKE v. SOUTH KENSINGTON HOTEL COMPANY.

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March 4 and 6.

(Before JESSEL, M.R., and JAMES and BRAMWELL, L.JJ.)

LUKE v. SOUTH KENSINGTON HOTEL COMPANY. (a)

*Practice—Pleading—Parties—Foreclosure action by one of several joint mortgagees—Misjoinder of parties—Rules of Court 1875, Order XVI., r. 13.**One of several joint mortgagees can maintain an action to foreclose the mortgage, making his co-mortgagees defendants if they are unwilling to be joined as co-plaintiffs, or have by some act precluded themselves from being made plaintiffs, and even (semble) if they are opposed to the foreclosure.**The act of a majority of trustees cannot bind the trust estate; in order to bind the trust estate it must be the act of all the trustees.**Decision of Fry, J. reversed.*

This was an appeal from a decision of Fry, J.

The hearing in the court below is reported in 38 L. T. Rep. N. S. 219, where the facts of the case are fully stated.

They were briefly as follows:

The plaintiff, William Luke, and the defendants, Edmund Davies Browne and Sampson Sandys, were the trustees of the will of Dr. Luke, the plaintiff's father, who died in 1829.

In the year 1866 there were standing in the names of the three trustees two sums of 7188*l.* 9*s.* 4*d.*, and 753*l.* 2*s.* 2*d.* Reduced Three per Cent. Annuities, and two sums of 2000*l.* and 373*l.* 1*s.* 3*d.* New Three per Cent. Annuities. Mrs. Blakeley, a granddaughter of the testator, was tenant for life of the sums of 7188*l.* 9*s.* 4*d.* and 2000*l.*, and also of one-fifth part of the two smaller sums of stock. The plaintiff was entitled to one-fifth of the two smaller sums, and the remaining three-fifths belonged to three of his brothers.In May 1864, the plaintiff and the defendants Browne and Sandys sold the four sums of stock, and invested the proceeds, which amounted to 9216*l.* cash, on the security of a second mortgage of leasehold property belonging to the South Kensington Hotel Company (hereinafter called the old company). This mortgage was dated the 23rd May 1864, and the interest payable under it was at the rate of 6½ per cent., reducible to 5½ per cent. on punctual payment.In the year 1869, the old company being in difficulties and unable to pay the interest on its mortgages, a new company (the defendant company in the present suit) was formed for the purpose of taking over its assets and liabilities; and, as part of the scheme of reconstruction it was proposed to the trustees of Dr. Luke's will to accept a composition of 5725*l.* upon their mortgage debt of 9216*l.*, and to leave that sum on the security of the mortgaged property for a term of ten years, at 5 per cent interest, reducible to 4 per cent. on punctual payment, the new company covenanting for payment of the interest.

Browne and Sandys assented to this proposal, but the plaintiff, who was then acting by a separate firm of solicitors, declined to assent. The new company, however, proceeded as if the assent of all the trustees had been obtained. The old company was wound-up, and, with the sanction of the court, its assets were transferred to the new com-

pany. A deed was prepared, dated the 24th Aug. 1870, and purporting to be made between the new company of the one part, and the plaintiff and the defendants Browne and Sandys of the other part, and it was expressed to be thereby witnessed that the plaintiff and the defendants Browne and Sandys did thereby release and discharge the old company, and the new company and the property comprised in the mortgage of the 23rd May 1864 from all interest then due on the mortgage, and also from 3456*l.*, part of the principal sum of 9216*l.* And the new company thereby covenanted to pay to the plaintiff and the defendants Browne and Sandys the sum of 5760*l.* on the 1st Jan. 1871, with interest at 5 per cent., and to pay interest at the same rate by half-yearly payments on so much of the sum of 5760*l.* as should from time to time remain unpaid. And the deed contained a proviso for reduction of the interest to 4 per cent. on punctual payment, and it was thereby agreed that the plaintiff and the mortgagees should not call in the principal until the end of ten years from the 1st Jan. 1870, if the interest was punctually paid.

This deed was executed by the new company and by the defendants Browne and Sandys, but the plaintiff refused to execute it.

On the 6th Feb. 1875 the plaintiff filed the bill in the present suit against the new company, C. N. Mayhew, who held a third mortgage on the property, and Browne and Sandys. Mrs. Blakeley was also made a defendant, but none of the other *cestuis que trust* were made parties. The bill prayed for a declaration that the deed of the 24th Aug. 1870 was invalid and ineffectual, and ought to be delivered up to be cancelled, and prayed for the usual foreclosure decree against the company and Mayhew under the original mortgage of the 23rd May 1864. No relief was prayed against Browne and Sandys or Mrs. Blakeley.

At the trial of the cause, Fry, J. held that the plaintiff was entitled to relief on the merits, but dismissed his bill on the ground that one of several co-mortgagees could not maintain a suit to foreclose the mortgage without making his co-mortgagees co-plaintiffs.

From this decision the plaintiff appealed.

*Kekewich, Q.C. and S. Dickinson* for the appellant.—There is no authority for the decision of Fry, J. that one of several joint mortgagees cannot maintain an action for foreclosure without joining his co-mortgagees as co-plaintiffs. It is a common thing for one of several trustees to bring an action respecting the trust property, making his co-trustees defendants. And what difference is there in principle between the case of trustees and that of mortgagees? They cited*Wilkins v. Fry*, 1 Mer. 244.*North, Q.C. and Bendall* for the defendant company.—There is no case in the books in which one of several joint mortgagees has obtained a foreclosure decree without joining his co-mortgagees as co-plaintiffs. At all events, it cannot be granted in the present case, for the deed of the 24th Aug. 1870 releases the mortgage debt at law, and even if the plaintiff is not bound by that deed, his co-mortgagees are. If the whole transaction was a breach of trust on the part of the mortgagees, the *cestuis que trust* ought to take steps to set it aside, but that cannot be done in the present suit. The deed, however, is binding on all parties,

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for the majority of the mortgagees executed it, and the plaintiff is bound by acquiescence. *Bigg v. Strong* (3 Sm. & Giff. 592) shows that acquiescence may make a deed binding on one who has not signed it.

*Fischer, Q.C. and Millar* for the defendants, *Browne and Sandys*.—We do not oppose the plaintiff's contention, but we say that, after what we have done, we cannot consistently concur as co-plaintiffs.

*Cookson, Q.C. and Bush* for Mrs. Blakeley.

No reply.

JESSEL, M.R.—This is an appeal from a decision of Fry, J., who was entirely with the plaintiff upon the merits, but dismissed the action on a technical point. Now I entirely concur with the judge below in the conclusion at which he arrived as to the merits. The plaintiff was one of three trustees who held a mortgage for 9216l. on some freehold property. The company, which was the mortgagor, was, there being prior mortgagees, unable to pay, and a proposition was made that the trustee mortgagees should take 12s. 6d. in the pound, and accept a new mortgage for that amount from a new company to be formed to take over the business of the old one. To that proposition a willing ear was lent, but it was never, in fact, agreed to, for the only letters on the subject, which are in evidence preceded the formation of the new company; and when the new company was formed, the solicitors of that company were informed that the plaintiff, one of the three trustees, desired not to come into the arrangement, and declined to do so by reason of his being a trustee, and not being able to obtain the assent of all his *cestuis que trust*. With this knowledge, two of the trustees, who, though they say they thought the plaintiff would come, only believed that he would and had not ascertained it, execute the deed of composition, and the company also execute it, and for sometime afterwards the reduced sum for interest was received from the new company in the ratio, I suppose of 12s. 6d. in the pound. The plaintiff then institutes this suit to foreclose the mortgage, and he insists that the original mortgage is unaffected because he never agreed to release it, and that the consent of his two co-trustees did not bind him for two reasons. In the first instance, any consent of the two was only conditional on the third agreeing also; indeed, the form of the indenture shows it. It recites an agreement by the three, which is intended to be carried out. It is undoubtedly well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind in equity, if the third refuses to execute it, and consequently on that ground the deed would not have bound the two. Then it was suggested that the two, not having dissented in sufficient time, would still be bound, having acted on the deed. To that it is answered that the two are trustees as well as the one, and that they have no power to bind their *cestuis que trust* by such an arrangement. All three together might or might not; that depends upon the nature of the arrangement. It is not every agreement for a composition, or to accept less than the full amount due, that is a breach of trust. But two out of three trustees have no power to bind *cestuis que trust*. There is no law that I am acquainted with which

enables the majority of trustees to bind the minority. The only power to bind is the act of the three, and consequently the act of the two, even if it could bind them by reason of delay or acquiescence, could not bind the trust estate, and therefore in no way was the trust estate bound or the mortgage released. So far I am of the same opinion as the learned judge. But he dismissed the bill on this ground; he said that it was a suit for foreclosure by one of three mortgagees, making the other two defendants, and that such a suit could not be maintained. Now I must say that I should have thought the law was quite settled the other way. It is very difficult to find authorities exactly in point. I recollect one very strongly in point. It was the case of *Fowler v. Wyatt* (24 Beav. 232, not reported on this point), which was a suit to set aside a release of an equity of redemption and to redeem. Fowler became bankrupt. He had two assignees, one the trade assignee, and the other the official assignee. The official assignee, being afraid of the cost of the litigation, declined to join as plaintiff, and the trade assignee alone revived the suit. That was objected to first at the Rolls, where the Master of the Rolls overruled the objection on the ground that one of two trustees acting in bankruptcy could maintain a suit to redeem. It was appealed to Lord Cranworth, then Lord Chancellor, who affirmed the decision, and the suit afterwards came on for hearing. There is another case, the well-known case of *Adams v. Paynter* (1 Coll. 530). Two trustees there filed a bill to foreclose. It was objected that the third trustee had not been discharged and should have joined them. How? The objection was, that he had not been made a party, and the objection was allowed, and he was made a party as defendant. They did not add plaintiffs in those days, and therefore that was considered sufficient. And on general principles I cannot see why not. It is quite familiar to us in equity for two of three trustees to file a bill to recover the trust estate, and if the third trustee has been implicated at all in the loss of it, to make that one trustee a defendant, although you order the trust fund to be restored to all for the benefit of the *cestuis que trust*. I cannot see any reason for altering what I consider a settled rule. As regards the reasons given by the learned judge in the court below, it appears to me that they are not well founded. He says, "Take the case, with which we are very familiar, of a mortgage for a large sum of money made to half a dozen persons as trustees for an insurance company, the name of the company not appearing on the face of the deed. You might have six foreclosure actions, one brought by each of the mortgagees against the mortgagor, naming the other five as defendants on the record." But five of such actions would assuredly be stopped, because the court would tell the plaintiffs in them that they must show some good reason for not joining the others as plaintiffs, and if the court found that all the other five were willing to be made plaintiffs, it would stop the other actions. There would be no difficulty in dealing with the case if it occurred. You might have no right capriciously to make persons defendants when they ought to be plaintiffs, and thus increase the costs of the other defendants. There must be some substantial ground for it, and when there is a substantial ground you make all parties to the

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suit, some plaintiffs and others defendants, and the evil which the learned judge thought would arise cannot arise. Then it is said that some of the mortgagees might not wish to foreclose, and others might. We will deal with that case when it arises, as to whether one can foreclose without the consent or against the wish of the others. That is not the case here. The other two mortgagees, who are defendants, do not oppose the foreclosure. They were not willing to be plaintiffs, but it is not the case of two out of three trustee mortgagees saying that they do not want to foreclose and object to that remedy. If two out of three trustees should decline to foreclose or to agree to any other remedy, it might be a reason for removing them from being trustees; but that is not the case here, and we have not, therefore, to consider that case, which may be dealt with when it arises. It appears to me that there is no ground whatever for preventing the plaintiff from obtaining the relief he asks, and that there is ground for maintaining this action. If it is not maintained, I do not see how he can by any possibility obtain the relief to which he is entitled. For these reasons I think the appeal ought to be allowed, and judgment ought to be given for foreclosure.

JAMES, L.J.—I am entirely of the same opinion. Upon the facts of this case I am quite satisfied that no binding agreement was ever entered into by anybody to reduce the amount of the mortgage money either as principal or interest, but that the company went on expecting the proposed reduction to be accepted, and bought the property with that expectation, but without taking care to have a binding agreement. That was their misfortune or their imprudence. They may have been misled, or they may have misled themselves, and they may have hoped and expected until they had gone too far. But they got the property subject to a mortgage which retained its original validity and amount. That was their position. And then beyond all question the mortgage money was part of the trust estate. Two of the trustees have so dealt with the matter as to make it an embarrassment for them to be made co-plaintiffs, and it always appeared to me to be an established rule of the old Court of Chancery, that if there were three trustees, who were trustees having a common right, two of whom had done something which might probably have prohibited them from going to law, the one who had not done anything to prejudice himself, or to prejudice his right of action, might be sole plaintiff, making the others defendants, in order that they might be present at the litigation, and concur in everything necessary for them to concur in. I remember a case in which there were three mortgagees holding a joint mortgage. Two of them afterwards by separate instruments and on their own separate account became assignees of the equity of redemption, second and third mortgagees of the property comprised in the original mortgage. In that case it was absolutely impossible for the three to join as plaintiffs in the suit, because they were both mortgagees and mortgagors. That difficulty was avoided by the one mortgagee filing his bill on behalf of the trust estate, making the others interested in the equity of redemption defendants. In the old Chancery practice there was this difficulty, that the misjoinder of plaintiffs was fatal, and if you had any one person

among the plaintiffs who had done anything which might have amounted to a release of his right the whole suit failed, and there was no remedy for it, and therefore, as a general rule, you selected, if you could, one person as plaintiff whom you knew to be free from any charge or imputation on his conduct, and made all the others defendants. There never was any objection to that in practice. Now that is rendered unnecessary by the fact that under the new practice (see Rules of Court 1875, Order XVI. r. 13) the courts may deal with misjoinder of plaintiffs according to the justice and equity of the case.

BRAMWELL, L.J.—I am of the same opinion, for the same reasons.

Solicitors for the appellant, *Janson, Cobb, and Pearson.*

Solicitors for the respondents, *Mayhew, Salmon, and Whiting; Sandys and Trevenen; W. and A. Ranken Ford.*

March 3 and 4.

(Before JESSEL, M.R., and JAMES and BRAMWELL, L.JJ.)

CRACKNALL v. JANSON. (a)

*Mortgage—Priority—Not communicated to mortgagees—Subsequent ratification—Recital—Estoppel—27 Eliz. c. 4—Consolidation—Scandalous affidavit—Person not injured—Prolis affidavits—Costs—Additional Rules of Court 1875, Order VI., r. 18*

*In 1872 T. mortgaged certain property to the plaintiffs, which they now wished to foreclose. At that time they had notice only of a prior mortgage to the R. society.*

*In 1874 T. filed a petition for liquidation of his affairs by arrangement, and his step-daughter P. then produced, for the first time, a mortgage of the same property, dated the 15th Aug. 1871, to secure a sum of money lent by her to T. in 1864. She proved her debt in the liquidation, and handed her security to the trustee, who now claimed to have it paid off. The deed contained a recital that T. had agreed to give her a mortgage as a security for the money.*

*Held (affirming the decision of Fry, J.), that on the evidence the deed had not been communicated to P.; that it was void under 27 Eliz. c. 4; and that, though the recital would have worked an estoppel against the mortgagor and persons simply claiming under him, it had no such effect against the plaintiffs, who obtained their title under the statute.*

*The plaintiffs sold the property contained in their mortgage, and paid the R. society not only what was due to them as prior mortgagees, but also a sum due to them on an equitable mortgage of other property. They now claimed to consolidate their mortgage with the equitable mortgage, and to hold the deeds of the latter until the whole amount due to them was paid.*

*Held (reversing the decision of Fry, J.), that, as the equitable mortgage was paid with money which, had the first mortgagees not claimed a right to consolidate, would have belonged to the second mortgagees, it was in fact paid by the second mortgagees, who by the fact of such payment*

*became equitable transferees, and were entitled to consolidate the mortgages.*

*The plaintiffs having appealed from so much of the judgment of Fry, J. as held they had no right of consolidation, and the respondent having given a cross notice of appeal against so much of the judgment as declared P.'s mortgage invalid as against the plaintiffs :*

*Held, that the judgment could be varied in the plaintiff's favour on a point not mentioned in their notice of appeal.*

*The trustee to pay the plaintiffs the costs of the action so far as it related to setting aside P.'s mortgage, instead of merely allowing the plaintiffs to add them to their debt.*

THESE were cross-appeals from a decision of Fry, J. (reported 39 L. T. Rep. N. S. 31). The facts were shortly as follows:

This was a foreclosure action.

The plaintiffs also claimed to have a mortgage of prior date to their own declared fraudulent and void as against them, under the statute 27 Eliz. c. 4.

The plaintiffs were mortgagees from J. Turnley, by a deed dated the 22nd Feb. 1872, of an estate at Norwood. They alleged that the only mortgage prior to their own was one to the Reliance Assurance Society.

The defendants were subsequent mortgagees, and the trustee in the liquidation of the mortgagor.

The trustee set up a mortgage deed dated the 15th Aug. 1879 to Diana Pellowe, a step-daughter of the mortgagor. The plaintiffs had no notice of this mortgage till 1876.

Diana Pellowe proved in the mortgagor's liquidation, and gave up her security to the trustee, who insisted on its validity.

It was decided by Hall, V.C. (*Cracknall v. Janson*, 37 L. T. Rep. N. S. 118; L. Rep. 6 Ch. Div. 735) that (assuming the validity of the mortgage) the trustee was entitled to it for the benefit of the general creditors in the liquidation.

It appeared that Diana Pellowe had lent the mortgagor 1500*l.* in 1864; but there was no evidence (except a recital in the mortgage deed) of any agreement that he should give her security, or of any pressure by her for security. When the deed was executed it was delivered by the mortgagor to his wife, the mother of Diana Pellowe, by whom it was retained. Its execution was not communicated to Diana Pellowe, and there was no evidence that she knew of its existence until Feb. 1874, when she proved in the liquidation. After the commencement of the action the plaintiffs, under a power of sale contained in their mortgage, sold the property. Out of the purchase-money the Reliance Society were paid the balance due to them on their mortgage, and also what was due to them from Turnley on a policy of assurance, which mortgage they claimed the right to consolidate with their mortgage of the Norwood estate. The policy was then delivered to the plaintiffs. A sum sufficient to answer the amount due on the mortgage to Diana Pellowe was placed in joint names, and the remainder of the purchase-money was paid to the plaintiffs. The plaintiffs claimed to be entitled to consolidate their mortgage with the mortgage of the policy, and to hold the latter until the whole amount due to them on their own mortgage

was paid. The only defendant who appeared at the trial was the trustee in the liquidation. The other defendants had been served, but did not appear. One of the affidavits filed by the plaintiffs contained matter reflecting on the character of a person not a party to the action. The trustee's counsel alleged that this was scandalous, and asked that the plaintiffs might be disallowed the costs of the affidavit. The plaintiff's counsel contended that the affidavit was relevant, and that no one but the person injured by the scandalous matter could be heard to complain of it.

In the court below, Fry, J. held that the mortgage of Diana Pellowe was void as against the plaintiffs; also that the plaintiffs had no right to consolidation, because they were never the owners of the equitable mortgage of the policy. With regard to the scandalous matter, he held that the court could act in such a matter, not only on the application of the aggrieved party, but on the application of any party to the action, or without any application at all. The plaintiffs appealed from so much of the judgment of Fry, J. as held that they had no right to consolidation. The trustee gave cross notice of appeal against so much of the judgment as declared Diana Pellowe's mortgage invalid as against the plaintiffs.

*Cookson, Q.C. and Creed, for the plaintiffs, relied upon*

*Watkins v. Nash*, L. Rep. 20 Eq. 262, 266;

*Eastwood v. Kenyon*, 11 Ad. & Ell. 438;

*Roscorta v. Thomas*, 3 Q. B. 234;

*Oldershaw v. King*, 2 H. & N. 517;

*Lamplugh v. Braithwaite*, Hob. 105;

*Alliance Bank v. Broom*, 2 Drew. & S. 289;

*Garrard v. Lord Lauderdale*, 3 Sim. 1; 2 Russ. &

My. 451;

*Magdalen Hospital v. Knotts*, 37 L. T. Rep. N. S.

428;

*Spirell v. Willows*, 11 L. T. Rep. N. S. 614; 3 De

G. J. & S. 393;

*Freeman v. Pope*, 23 L. T. Rep. N. S. 208; L. Rep.

5 Ch. App. 538;

*Coffin v. Cooper*, 6 Ves. 514;

*Wallwyn v. Coutts*, 3 Mer. 707;

*Bevor v. Luck*, L. Rep. 4 Eq. 537;

*Ex parte Simpson*, 15 Ves. 476;

*Atwood v. Ferrier*, 14 L. T. Rep. N. S. 728;

*Ex parte Le Houp*, 18 Ves. 221;

*Erskine v. Garthshore*, 18 Ves. 114.

*North, Q.C. and Rigby, for the trustee, cited*

*Doe d. Garnous v. Knight*, 5 Barn. & Cress. 671;

*Fletcher v. Fletcher*, 4 Ha. 67;

*Re Way's Trusts*, 11 L. T. Rep. N. S. 495; 2 De G.

J. & S. 365;

*Eaton v. Scott*, 6 Sim. 31;

*Forester v. Reid*, L. Rep. 6 Ch. App. 40;

*Christie v. Christie*, 28 L. T. Rep. N. S. 607; L. Rep.

8 Ch. App. 469.

JESSEL, M.R.—The case made by the plaintiffs is this. There was a mortgage by Turnley, of the freehold land called the Selhurst Park estate, for a large sum of money, to Mr. Tuffnell, as trustee for the Reliance Assurance Company, and there was another distinct mortgage to him in the same capacity for a comparatively small sum from the same mortgagor, which I will call a mortgage of securities. That being so, according to the well-established rule in equity, he was entitled to consolidate those mortgages against the mortgagor and those claiming under him. The same mortgagor made a second mortgage to the plaintiffs of the Selhurst Park estate, and included in the security some land near a station, and which has been called the station land, which was not

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subject to any prior mortgage. So that the plaintiffs were in the position of second mortgagees of one of the properties mortgaged to Mr. Tuffnell, and first mortgagees of the station land. Subject to that, for the sake of simplicity, we will take it that the mortgagor remained owner, and that on his bankruptcy that ownership passed to the defendant, Mr. Lovering, his trustee in bankruptcy. Then the plaintiffs, as second mortgagees of the Selhurst Park estate, put it up for sale under their power of sale, and converted it into money. The money produced by the sale was not sufficient to pay off the first mortgage on the Selhurst Park estate and the plaintiffs' mortgage. When the plaintiffs applied to Mr. Tuffnell to join in conveying the legal estate in the Selhurst Park estate to the purchasers, Mr. Tuffnell said, "No, there is due to me on the mortgage of the securities a sum of 273*l*. I will not convey the legal estate in the Selhurst Park property unless you pay me that sum in addition to the sum due on the Selhurst property." That is, he availed himself of the right to consolidate. It seems to me, assuming that there was any such sum due on the mortgage of securities, that he was entitled to claim payment of both sums before conveying. The plaintiffs accordingly paid him both sums out of the purchase money. Now that purchase money thus applied in paying the 273*l*. belonged to the plaintiffs absolutely, because, if there had been no such claim on the part of Mr. Tuffnell, the whole balance of the purchase money, after paying off the mortgage money on the Selhurst Park estate, being insufficient to pay the second mortgage belonging to the plaintiffs, would have belonged to them. It was, therefore, a payment by the plaintiffs out of their own money to Mr. Tuffnell so far as regarded this sum of 273*l*. What then were the rights of the plaintiffs as between them and the trustees in bankruptcy of the mortgagor? As they had paid, under compulsion of law, this sum of 273*l*. to Mr. Tuffnell, they were entitled to stand in his place as against the mortgage of the securities; in other words, they were what we call equitable transferees, even without a transfer being executed. As between them and the trustee of the bankrupt, they were entitled, as equitable transferees, to the amount of mortgage money due on the security mortgage, and to the benefit of that security. I may say that the transaction was properly carried out according to law, because, although no transfer of the mortgage of securities was executed, the securities were delivered over to the plaintiffs. At that time there was due to the plaintiffs on their first mortgage of the station land a very considerable sum, being the balance which the proceeds of the sale were insufficient to pay. They therefore were in this position: they were equitable mortgagees of the property comprised in the security mortgage for 273*l*., and they were legal mortgagees of the station land for the balance due to them on their own mortgage. They were consequently in the position of having two independent mortgages on two independent properties mortgaged by the same mortgagor. That being so, the rule of consolidation would apply, and they would be entitled to say to their mortgagor, "You cannot redeem one of the properties without redeeming both," and consequently they were entitled to consolidate as against him, and to require payment of all that was due to him out of the two properties com-

prised in the two securities. It seems to me that this is not only no extension of the rule of equity as to the consolidation of mortgages, but is the most simple application of it, and that this contention ought to have been allowed by the learned judge in the court below and directions given accordingly. Of course, if the defendant disputes the fact that any sum was due to Mr. Tuffnell on the security mortgage, there must be an inquiry as to whether such sum as he alleges, or any sum, was due, because, if anything was due to Mr. Tuffnell, the right to consolidate would arise. If, then, Mr. Lovering requests it, as I understand he does, he can take an inquiry at his own risk as to whether there was anything due on the security mortgage to Mr. Tuffnell at the time he was paid off; but if, on the result of the inquiry, it appears that anything was due, or if he does not take the inquiry, then there must be a direction to consolidate.

JAMES, L.J.—I am of the same opinion. I do not think it necessary for me to add anything to what the Master of the Rolls has said.

BRAMWELL, L.J.—I am also of the same opinion.

Cookson, Q.C., for the plaintiffs, then submitted that the next question was as to the costs of the issue whether Diana Pellowe made an advance to Mr. Tuffnell. Fry, J. gave costs against the plaintiffs on the ground that they had failed on the issue of fact, whereas the contention was that the plaintiffs had established their case.

JESSEL, M.R.—The most convenient course will be that the cross appeal should be opened, for Lovering claims under a mortgage, and it lies on him to show that the money was advanced and a good security given for it. The notice given by Lovering, was that he intended, on the hearing of the appeal, to contend that the decision of the court below should be varied by discharging that part of the order of Fry, J. which declared that the plaintiffs were purchasers within 27 Eliz. c. 4, and that the mortgage of the 15th April 1871 was void as against them, and that in lieu thereof it might be declared that Lovering was entitled in respect of that security to rank as an incumbrancer on the property in priority to the plaintiffs and the other defendants.

Rigby, for Lovering, submitted that the mortgage of the 15th April 1871 was not voluntary, and that it was quite sufficient to produce it when the bankruptcy took place. Having been made for valuable consideration, it could not be set aside under the 27 Eliz. c. 4, in favour of that of the plaintiffs.

The COURT stated that they did not require to hear Mr. Cookson on the question whether the mortgage was invalid as against the plaintiffs under 27 Eliz. c. 4.

Cookson, Q.C. contended that the plaintiffs were entitled to the costs of the suit, except the costs of the issue on which they failed, and that the defendant's costs of that issue should be set off. By the order of Fry, J. they were made to pay the costs of the issue on which they failed, and had only been allowed, where they succeeded, to add their costs to their already insufficient security. A cross-notice having been given by the defendant, it was open to the plaintiffs to raise this point now, as under the old practice, although it was not raised on their notice of appeal.



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*Rigby* submitted that *Lovering*, in complying with Order LVIII., r. 6, by stating in what respect he desired that the order of the court below should be varied, was not in the position of an appellant. [JESSEL, M.R.—I think you must be treated as an appellant. Even without a cross appeal the court, under Order LVIII., r. 5, can do justice.]

JESSEL, M.R.—The first question which we have to decide is, whether the judge of the court below came to a correct conclusion as to the actual advance of the sum of 1500*l.* made by the step-daughter to Joseph Turnley. Now, upon that, I should be very reluctant to differ from the decision of the judge of the court below on a question of fact, and indeed, I should not differ from him unless I was clearly convinced that he had arrived at an erroneous conclusion. The verdict is in favour of the respondent, and it is not for the Court of Appeal lightly to disturb a verdict on a question of fact; but I must say that, looking at the evidence, I think the balance of evidence was entirely in favour of the conclusion at which the learned judge has arrived. [After referring to the evidence, his Lordship continued:] On this point, therefore, I think the decision of the learned judge of the court below should be affirmed. We now come to the next point, which is the subject of a cross appeal. The appellant says that the mortgage security given to Mr. Turnley in favour of his step-daughter Diana Pellowe is a valid mortgage security. The learned judge has decided that that was avoided by the provisions of the statute of the 27th of Eliz. c. 4, and the question which is raised for our consideration is whether he was right in so doing. The facts are tolerably plain. The plaintiffs had brought an action for a very large sum of money in Jan. 1871 against Mr. Joseph Turnley, a sum of money which he was unable to pay. They had asked for security and had not obtained it. According to the decision on the main issue, Mr. Turnley had, in May 1864, received a loan of money from his step-daughter, for which he had given no security, and as to which there is no evidence that he had paid any interest or (with the exception of a paper given to his wife, the effect of which it is not very easy to state) had given any acknowledgment for it. After a lapse of more than six years, and on the 13th Aug. 1871, whilst the action against him is pending, Mr. Turnley makes a secret deed of mortgage. He draws it up himself, does not communicate it to his step-daughter Diana; it recites an agreement for a mortgage of 1500*l.*, and, subject to prior mortgages, conveys the Selhurst Park estate to the step-daughter by way of mortgage for securing the repayment of 1500*l.* and interest. That deed he kept in his own possession, subject to this, that he says he gave it to his wife to take care of, and the wife did not communicate it to the step-daughter, nor was any communication made to her whatever. Legally, therefore, it remained in the possession and custody of Mr. Joseph Turnley. The action having gone on to judgment, Mr. Turnley gives a security to the present plaintiffs, who were the plaintiffs in the action, on this very estate by way of second mortgage, for the balance of the sum due to them on their judgment, and in doing so he suppresses and conceals from the plaintiffs the existence of this mortgage to Diana, and covenants against incumbrances, except the incumbrances therein

mentioned, which were the incumbrances prior to the date of the mortgage in question. The plaintiffs being purchasers for value, assert that this is exactly within the terms of the statute 27 Eliz. c. 4. Now, let us see what the statute says. After reciting that great loss is incurred "by reason of fraudulent and covinous conveyances, estates, gifts, grants, charges, and limitations of uses," and so on, it states, "which said gifts, grants, charges, estates, uses, and conveyances were or hereafter shall be made or intended by the parties that so make the same to be fraudulent and covinous of purpose, and intent to deceive such as shall have purchased or shall purchase the same, or else by the secret intent of the parties, the same to be to their own proper use and at their free disposition, coloured nevertheless by a feigned countenance and show of words and sentences as though the same were made *bonâ fide* for good causes and upon just and lawful consideration." Now, I have no doubt whatever that the action of Mr. Turnley in this case was exactly that described in the second part of the preamble. Though he made this mortgage to be used, if he thought it convenient, in favour of the step-daughter, it was his secret intent that the same should be at his free disposition, so that, if he did not wish to bring it forward, he could keep it secret, and get an advance of money or forbearance by conveying the estate, either by way of mortgage or sale, to other parties. The whole of his acts point to this most conclusively, and I think they could not be explained on any other theory. The only other possible suggestion would be that he intended to make it so as to defraud the plaintiffs; that is, he intended to defraud the plaintiffs by allowing them to purchase an incumbered estate, and that would bring him within the first part of the recital, and would make the transaction equally void. It appears to me that this is exactly the case contemplated by the statute, and that the learned judge in the court below was quite right in so deciding, and that we ought to affirm his decision. The only other point which remains is the question of the costs. The costs in the court below have been given to the cross appellant, the respondent on the first appeal, so far as regards so much of the issue as related to the question whether the advance had been actually made by the step-daughter of Mr. Turnley; but the plaintiffs complain that equal justice has not been meted out to them by giving them the costs of the issue on which they succeed, viz., the declaring the deed void as being contrary to the provisions of the statute to which I have referred, and it seems to me that this complaint is well founded. According to the ordinary rule of the costs following the result, the plaintiffs having succeeded in the main part of the issue, that is, in setting aside the deed, which is the real contention between the parties, ought to have their costs generally, except so far as they have been increased by the issue on which they have failed, and the costs of the issue on which they failed will be given to the parties who succeeded in that issue, and one set of costs will be set off against the other. The plaintiffs having substantially succeeded, will have their whole costs of the appeal and the cross-appeal.

JAMES, L.J.—I am of the same opinion, and I may add that I never saw a case more clearly within the words of the statute.

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BRAMWELL, L.J.—I am also of the same opinion.  
Solicitor for the plaintiffs, *H. White*.  
Solicitor for the defendant, *J. W. Sykes*.

*Wednesday, March 5.*

(Before JESSEL, M.R., and JAMES and BRAMWELL, L.JJ.)

MASON v. HARRIS. (a)

*Company—Right of minority of shareholders—Suit by shareholders on behalf of all the shareholders—Frame of suit—Whether in name of company—Directors—Breach of trust.*

An action was commenced by two shareholders in a company on behalf of themselves and all other shareholders except those who were defendants, against H., the managing director, two other directors, and the company, for the purpose of setting aside an agreement, by which H. sold to the promoters certain freehold property and stock-in-trade, and which sale was adopted by the company. The statement of claim alleged that the agreement was entered into by the promoters on the faith of representations made by H., which were untrue; that H. wilfully made those representations knowing them to be false; that he had committed other improper acts, and that the two other defendant directors had aided and abetted him in those acts; and that the three formed a majority of the board, and possessed such a preponderance of votes that it was impossible for the plaintiffs or any shareholders to take any steps within the company to remedy the acts complained of.

H. put in a demurrer on the ground that the plaintiffs were not entitled, either alone or on behalf of the shareholders, to sue him in respect of the matters in question, but that the action ought in the first instance to have been brought in the name of the company. *Malins, V.O.* allowed the demurrer, with liberty to amend by striking out the name of the company as defendants, and adding their names as plaintiffs.

Held (reversing the decision of *Malins, V.O.*), that the suit was properly framed, and that, therefore, the demurrer could not be sustained.

Although the general rule is that, for a fraud committed to the detriment of a company, the company must sue, yet that rule does not apply where the acts complained of are acts which a majority of shareholders cannot sanction so as to bind the minority, and the allegations in the statement of claim show that it is impossible to get the company to impeach those acts.

This was an appeal from a decision of *Malins, V.O.*

The action was brought by Mason and Carter, two shareholders of the Hull Central Drapery Company Limited, on behalf of themselves and all other shareholders except those who were defendants, against Bevan Harris, the managing director of the company, and Shipstone and Mead, two other directors, and the company, for the purpose of setting aside, on the ground of alleged fraud, an agreement of the 1st May 1877; and to restrain Harris from continuing to act as managing director, and from negotiating or parting with any bills of exchange belonging to the company, and from retaining in his possession, or using for his

own purposes, any property of the company, and from transferring or selling the vendor's shares in the company. The statement of claim was to the following effect. It alleged that, by an agreement dated the 1st May 1877, between Harris, thereafter called the vendor, of the one part, and the plaintiff Mason, Walker, the defendants Shipstone and Mead, and Hancock and Bainbridge, thereafter called promoters, of the other part, it was agreed that the promoters should forthwith take the necessary steps for forming and incorporating a limited company under the above name, with a nominal capital of 30,000*l.* in 300 10*l.* shares; the board of directors to consist of not more than five, and not less than three members; Harris to be managing director for five years at a salary of 360*l.* a year, with such further remuneration as therein mentioned, if the dividend exceeded 7½ per cent. Harris agreed to sell to the company, when incorporated, and the promoters agreed that the company should purchase upon the terms therein mentioned, certain freehold business premises and the business and goods therein mentioned. The price to be for the freehold 7300*l.*; for the trade fixtures, plant, and utensils, 675*l.*; for the stock-in-trade, 6322*l.*; and for the goodwill, &c., 3511*l.* The sum of 5000*l.*, part of the purchase money, was to be paid in 1000 shares, treated as paid up to the extent of 5*l.* per share. 5000*l.* more was to be paid within six months by equal weekly instalments, and the balance within twelve months, each instalment to be secured by a bill drawn by the vendor upon and accepted by the company. The unpaid purchase money was to carry interest at 5*l.* per cent. per annum, and the 1000 vendor's shares were not to be saleable or transferable by the vendor till after the 14th May 1882.

The company was registered on the 12th June 1877. The memorandum stated the objects of the company to be the purchasing the above premises and business, and the carrying on such business, and the capital to be 30,000*l.* in 3000 10*l.* shares. The articles provided that the vendor's shares should not be transferable till after the 14th May 1882; and that, on every question to be decided by a poll, every member should have one vote for every two shares up to ten, one additional vote for every five shares beyond the first ten up to twenty, and an additional vote for every ten shares after twenty. Shortly after the incorporation of the company, the plaintiff Carter was appointed secretary, and he was the holder of fifty-eight shares. The plaintiff Mason was a director till shortly before the issue of the writ in this action, and was the holder of twenty-five shares. It was further alleged that the agreement of the 1st May 1877 was entered into on the faith of representations by Harris to the promoters that the profits for the years 1875 and 1876 had amounted to 3511*l.* The agreement between the parties was, that the sum to be paid for the goodwill should be two years' profits, and 3511*l.* was inserted in the agreement as the price of the goodwill, on the vendor's accountant certifying that the profit for the two years had amounted to that sum. The company, on its incorporation, commenced business, and shortly afterwards Carter discovered that the profits of the business in 1875 and 1876 had been but little over 300*l.* a year. At the first meeting of directors Carter informed them of this fact, and the directors directed that an accountant should be employed

(a) Reported by E. S. ROOPE, Esq., Barrister-at-Law.

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to ascertain the actual profit for 1875 and 1876; but it was alleged that no accountant had been appointed nor any further inquiry made into the matter; that Harris made the representation as to profits, knowing it to be false; that in Sept. 1877, the company being in want of money, the plaintiff Mason handed some title deeds of property of his own to Carter and Harris, that they might be deposited with the company's bankers, to secure an advance to the company; and that Harris took the deeds and deposited them to secure the balance of his own account; that on or about the 17th Nov. 1877 Harris took away about 200*l.* cash belonging to the company, and about the same time one of his sons, by his direction, took away some bills belonging to the company, and that at a meeting of directors on the 19th Nov. Harris admitted the money had been taken by him, and promised to replace the cash, and give the company an indemnity against the bills; but on the following day he refused to give such indemnity, and still refused to do so; that another meeting of directors was held to investigate the above matters, but in consequence of the conduct of Harris it had to be adjourned in confusion, and subsequently on the 27th Nov. Harris called in seven or eight persons, and compelled Carter under threats of personal violence to hand over the property of the company and leave the offices. The statement of claim concluded with the following statements: Harris, though often applied to, had not returned the deeds or bills. Only one dividend had been paid. It was declared by the directors under the influence of Harris, though no profit had been made. Harris had dealt with the vendor's shares in a way prejudicial to the company. Harris was in necessitous circumstances, and if allowed to retain the hills of exchange would negotiate them for his own private purposes, and if allowed to retain his position would further apply the property of the company to his own use. The defendant Shipstone was a near relative, and the defendant Mead was a shopman of the defendant Harris, and relative to Shipstone, and both were directors of the company, and as directors they had aided and abetted Harris in the acts thereinbefore mentioned, and they refused to take any steps whatsoever with reference to such acts, and they and Harris formed a majority of the board of directors. By reason of the 1000 vendor's shares which had been given to Harris, he had, under the articles of association, 106 votes at any general meeting of the company. Besides Harris there were in all about thirty-one shareholders in the company holding in the aggregate, about 311 shares. Out of the 311 shares, however, 151 or thereabouts were held by relatives or nominees of Harris, and the calls on such shares had not been duly paid up in accordance with the articles of association, and the holders of such shares were not entitled to vote at any general meeting of the company. Of the remaining 160 shares the plaintiffs and the shareholders agreeing with them represented over 100 shares, and, but for the votes of Harris, would have a majority of votes at a general meeting. In consequence of the preponderating number of votes possessed by Harris, it was impossible for the plaintiffs or any shareholders to take any steps within the company to remedy the acts of the defendant Harris, and if such acts were not forthwith remedied, and Harris removed from his office as managing

director, or restrained from interfering in the affairs of the company, the said company would be ruined, and the plaintiff's property therein destroyed. The statement of claim did not allege that the plaintiffs had made any attempt to induce the company to bring the action.

Harris put in a demurrer to the statement of claim, on the ground that the allegations did not show any cause of action in respect whereof the plaintiffs were entitled to sue, or to which effect could be given by the court against him; and further, as to so much of the statement of claim as sought to have the agreement of the 1st of May 1877 set aside, that the plaintiffs had no such interest therein, as would entitle them to sue the defendant Harris in respect thereof, and that even if they ever had such interest, they had by their laches, delay, and acquiescence, disentitled themselves to the relief claimed, and as to the whole of the statement of claim, on the ground that the plaintiffs were not entitled, either alone or on behalf of the shareholders or any of them, to sue Harris in respect of the matters in question. A demurrer was put in by Shipstone and Mead, on the ground that the facts alleged in the statement of claim did not show any cause of action to which effect could be given by the court against them, and because no such relief as thereby sought could be given at the suit of the plaintiffs, or any person or persons other than the company.

A statement of defence had been put in by the company, which submitted that no such relief as sought by the statement of claim ought or could be granted, if at all, except at the suit of the company. The demurrers came before the court below on the 22nd Jan. 1879.

MALINS, V.C. said:—This company was originally promoted by Harris, and his views were carried into effect by the formation of the company, and by raising the money by calls, and the company took the contract upon themselves. That was the point I decided in *Spiller v. Paris Skating Rink Company* (L. Rep. 7 Ch. Div. 368), where I held that a company had power to ratify a contract made by the promoters before the company was in existence. It is therefore a contract by Harris to sell, and by the company to purchase, this business. The bill then alleges that the value of the profits of the business were stated by Harris to have been 3500*l.* for two years, whereas they were in fact only a little over 300*l.* per annum, and that the larger amount was stated by Harris wilfully and fraudulently, knowing it to be false. So here I have an allegation that these statements were wilfully and fraudulently made. It is the common case of a man selling a business and grossly overrating the value of it. Then there is the charge of taking away cash and bills belonging to the company. Then there are allegations which for the present purpose I must assume to be true, and so also as to the charges introduced for the purpose of showing that the control of the company is in the hands of Harris, and the plaintiffs are therefore unable to obtain redress. The claim therefore is, that the agreement may be delivered up to be cancelled on the ground of fraud, and that Harris may pay back the money which he has fraudulently obtained, and an injunction to restrain Harris from retaining in his possession, or using for his own purposes, any property of the company. Now, upon the allegations in this claim, if they turn out to be true, it is

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clear that Harris will be bound to pay back every farthing he received under the contract he has obtained, because he has obtained the money, according to these allegations, under false representations, and if he has to pay back the money it will be to the company. I think in all such cases it is better that the company should be the plaintiffs, unless there are any special grounds for making such a course improper, as, for instance, where there is a majority overbearing the minority. That was the case in *Atwool v. Merryweather* (L. Rep. 5 Eq. 464 n.), and so again in *Menier v. Hooper's Telegraph Works* (30 L. T. Rep. N. S. 209; L. Rep. 9 Ch. App. 350) where the majority of a company proposed to benefit themselves at the expense of the minority, there the court held that the bill was rightly filed by one shareholder on behalf of the others against the company. Now, if it were necessary to decide the case, I should come to the conclusion that these plaintiffs are entitled to sustain the action. It does not come within those cases in which individual shareholders can sue instead of using the name of the company, and before *Duckett v. Gover* (L. Rep. 6 Ch. Div. 82) was cited I suggested that it would be better to have the name of the company used, in order to have the real question decided. That would, I thought, be the most reasonable course, but I have been referred to the case of *Duckett v. Gover*. There the case was that of a shareholder who brought an action on behalf of himself and other shareholders against the company's solicitors and vendors to set aside an alleged secret and fraudulent contract, and to recover a large sum of money for the company from their solicitors, the company being joined as defendants instead of plaintiffs. There was no reason alleged why the company had been made defendants instead of plaintiffs, nor was there any allegation that the plaintiff was unable to join them as plaintiffs. It was merely a mistake in the pleading, and the Master of the Rolls allowed the demurrer, and gave leave to the plaintiff to amend his writ and statement of claim by adding the company as plaintiffs. The Master of the Rolls in that case availed himself of the power given to the court by Order XVI., r. 2, to add a plaintiff to the record where the action has been commenced through a mistake; and in this case I am of opinion that it would be better that the company who have been defrauded should be made plaintiffs. This appears to me to be a much stronger case than that which was before the Master of the Rolls. If it were necessary to decide now, I should overrule the demurrer, but I think it better, under the circumstances, to allow the demurrer on the ground that the company ought to be made plaintiffs, and give the plaintiff liberty, if he chooses, to amend the record by adding the company as plaintiffs, and if the plaintiff does not amend within fourteen days the action will be dismissed. I will follow the terms of the order in *Duckett v. Gover*, and, as to costs, they will be reserved till the trial of the action. A similar order will be made upon the other demurrer of Shipstone and Mead. The plaintiffs appealed.

*Glassey, Q.C.* and *T. L. Wilkinson*, for the appellants, contended that the circumstance that Harris, who was alleged to have committed the fraud, had, upon the allegations, an overwhelming influence in the company, was enough to exclude the general rule that such an action must be brought in the name of the company. Harris having got

a majority of votes in his hands, there must be liberty to sue in this way, otherwise a fraud committed by a majority of shareholders on the minority would be without remedy. In the case of *Be Imperial Bank of China and Japan* (14 L. T. Rep. N. S. 211; L. Rep. 1 Ch. App. 339) two dissident shareholders were allowed to take proceedings for setting aside a resolution come to by the majority of the shareholders; and in *Menier v. Hooper's Telegraph Works* (30 L. T. Rep. N. S. 209; L. Rep. 9 Ch. App. 350) and *Moffatt v. Farquhar* (38 L. T. Rep. N. S. 18; L. Rep. 7 Ch. Div. 591) it was held that the bill was properly filed by one shareholder on behalf of himself and the other shareholders against the company. They submitted that *Duckett v. Gover* (L. Rep. 6 Ch. Div. 82) had no bearing on this case, for the bill there had no allegations corresponding to the principal allegations in this statement of claim. [JESSEL, M.R.—In *Duckett v. Gover* the suit was framed as it was merely by an oversight on the part of the pleader. The company there were in favour of the suit. I gave them an opportunity of deciding whether they would become plaintiffs, and they determined to become so.]

*Higgins, Q.C.* and *Ingle Joyce*, in support of the demurrer, contended that the plaintiffs ought either to have brought the action in the name of the company, leaving the company to disavow it, or to have taken steps to obtain the passing of a resolution of the company that the action should be brought in the name of the company. They could not in the first instance sue in their own names. In the case of *Gray v. Lewis* (29 L. T. Rep. N. S. 12; L. Rep. 8 Ch. App. 1049) James, L.J. said it was very important to adhere to the rule in *Moxley v. Alston* (1 Phil. 790) and *Foss v. Harbottle* (2 Hare, 461) by which the law was settled that when there was a corporate body capable of filing a bill for itself to recover property, either from its directors or officers, or from any other person, then that corporate body was the proper plaintiff, and the only proper plaintiff. The court, under Order XVI., r. 2, could order the company to be made plaintiff, and that was done in *Duckett v. Gover*. [JESSEL, M.R.—The fact is that in that case I gave fourteen days to see whether the company would not authorise their being joined as plaintiffs, and authority was duly obtained. There was afterwards an application to strike out the name of the company on the ground that they had been added as plaintiffs without authority. This application I refused, being satisfied that the company had duly sanctioned the step.] The case of *Pender v. Lushington* (L. Rep. 6 Ch. Div. 70) supported the view that the plaintiffs could have sued in the name of the company; and in *MacDougall v. Gardiner* (33 L. T. Rep. N. S. 521; L. Rep. 1 Ch. Div. 13) James, L.J. said there might be a variety of things which a company might well complain of, but which they might not think it right to make the subject of litigation, and it was the company as a company which had to determine whether it would take steps to prevent the wrong being done. Here the plaintiffs had not exhausted all the means in their power to obtain a remedy through the company. They cited on this point

*Atwool v. Merryweather*, L. Rep. 5 Eq. 464 n.;

and also referred to

*Lindley on Partnership*, 3rd ed. p. 965.

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THE SINGER MANUFACTURING COMPANY v. LOOG.

[CHAN. DIV.]

JESSEL, M.R.—It is impossible, on reading the judgment of the Vice-Chancellor, not to see that he would have decided in favour of the plaintiffs if he had not thought himself compelled by the technical rule to decide against them. The question is whether he was so compelled. I think that he was not, and I think that his conclusion in favour of the plaintiffs on the merits was correct. The rules applicable to the case are so well expressed in *MacDougall v. Gardiner* (33 L. T. Rep. N. S. 521; L. Rep. 1 Ch. Div. 13), that I will not attempt to improve upon them. As a general rule, the company must sue in respect of a claim of this nature; but general rules have their exceptions, and one exception to the rule requiring the company to be plaintiff is, that where a fraud is committed by persons who can command a majority of votes, the minority can sue. The reason is plain, as unless such an exception were allowed it would be in the power of a majority to defraud the minority with impunity. If the majority were to make a fraudulent sale, and put the money in their own pockets, would it be reasonable to say that the majority could confirm the sale? That the court can in such a case interfere at the suit of the minority is established by *Atwood v. Merryweather* (L. Rep. 5 Eq. 464 n) and *Menier v. Hooper's Telegraph Works* (30 L. T. Rep. N. S. 209; L. Rep. 9 Ch. App. 350). Here it is alleged that Harris, by fraudulent misrepresentations, sold property to the promoters of the company at a great overvalue, and received money which ought to be repaid to the company, even if the transaction is affirmed. It appears from paragraph 24 of the statement of claim that Harris has obtained such influence over the directors that a majority side with him, and will not do anything to remedy the wrong complained of. It further appears from other paragraphs that Harris holds such a number of shares that he can outvote those who wish the sale set aside. By reason, therefore, of his influence with the directors and his number of votes he has the sole control of the company. The case is precisely within the rule laid down by James, L.J. in *Mraier v. Hooper's Telegraph Works*. Is it reasonable to say to a minority of shareholders who are defrauded by the majority that they must apply to the company to institute proceedings? Even independently of the authorities, I should be prepared to say no. Facts are alleged which show it to be impossible to get the company to impeach the acts complained of. On demurrer the truth of these allegations is admitted, and the demurrer, on the ground that the suit is not in proper form, cannot be sustained. There is a minor point as regards the demurrer by Shipstone and Mead, and as to them it would have been better if the statement of claim had been more definite. They are stated to have been directors; it is not alleged in so many words, but must be taken to have been the case, that they were directors from the first. It is stated that the directors declared a dividend, although no profits had been made. It is agreed that they may have paid it out of their own pockets, and not out of the capital of the company, but that is not a natural reading of the statement. Then the 24th paragraph states that Shipstone and Mead have aided and abetted Harris in the acts hereinbefore mentioned. That refers to all the acts before mentioned, and, taking it most strictly against the pleader, it sufficiently refers

to the declaration of a dividend. Then it goes on to allege that "they refuse to take any steps whatever with reference to such acts." There is enough alleged against them to make them at all events liable to the costs of the action, and their demurrer cannot be allowed.

JAMES, L.J.—I am of the same opinion. No judge has ever laid down more strongly than I the rule that in general in these cases the company must be the plaintiffs. But an exception to the rule was established by *Atwood v. Merryweather*, and this case is within it. It has been suggested that the court has some means of directing a meeting to be called, in which the corrupt shareholders shall not be able to vote. If the court had any such power that mode of proceeding might furnish the best remedy in cases of this nature; but I cannot see how any directions for holding such a meeting could be given. Mead and Shipstone are directors of the company, and are parties to the instrument which it is sought to set aside, and those circumstances alone might make them proper parties to the action. But there is also an allegation that they are aiding and abetting Harris, and their doing so is one reason why the action cannot be brought in the name of the company. I am, therefore, of opinion that their demurrer cannot be sustained.

BRAMWELL, L.J.—I am of the same opinion.

Solicitors: W. Bohm; Richard Smith and Wilmer.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Thursday, May 8.

(Before BACON, V.C.)

THE SINGER MANUFACTURING COMPANY v. LOOG. (a)

*Practice*—Mode of trial—Judge or judge and jury  
—Issues of fact and questions of law mixed—Discretion—Rules of Court 1875, Order XXXVI, rr. 3, 26.

*Action commenced in the Chancery Division to restrain the sale and advertisement as "Singer Machines" of any sewing machine not of the plaintiffs' manufacture. Defence, that the name "Singer" never had applied exclusively to the plaintiffs' machines, and never had been used to denote machines manufactured by the plaintiffs exclusively. The plaintiffs had set down the trial before a judge alone. On the application of the defendants, under Order XXXVI, r. 3, asking that the issues of fact which they proposed might be tried before a judge and jury, and the action transferred to one of the common law divisions:*  
*Held, that, as the issues of fact were of a very complex kind, involving inferences of law, and as the case raised by the pleadings involved minute questions of law mixed up with questions of fact, and the examination of numerous specifications, that it was not a fit case to be tried before a jury.*

*The principle which should guide the court in cases of this kind as laid down in Garling v. Boyds (25 W. R. 123) approved.*

MOTION on behalf of the defendant that the issues of fact in this action might be tried before a judge

(a) Reported by W. COWELL DAVIES, Esq., Barrister-at-Law.

CHAN. DIV.]

THE SINGER MANUFACTURING COMPANY v. LOOG.

[CHAN. DIV.]

and jury, and that the action might be transferred to one of the common law divisions.

The action was commenced in the Chancery Division in March 1878, for the purpose of restraining the defendant from selling, advertising, or invoicing as "Singer Machines" any sewing machines not of the plaintiffs' manufacture, and from selling and offering for sale in any manner whatever any sewing machine not of the plaintiffs' manufacture, having branded, impressed, stamped, or printed thereon, or otherwise attached thereto the words "Singer Machine" and other corresponding relief. The defence was that the name "Singer" signified, and had been for many years, and was always understood in the trade to signify and describe a system of construction of sewing machines, presenting particular forms and arrangements of the parts; that the name "Singer," or "Singer Machines," had never applied exclusively to the plaintiffs' machines, and had never been used to denote machines manufactured by the plaintiffs exclusively.

Notice of trial of the action before a judge in the Chancery Division was given by the plaintiffs on the 2nd May. On the 5th May the present notice, under Order XXXVI., r. 3, of their desire to have the issues of fact tried before a judge and jury was given by the defendants. The issues proposed by the defendants were as follows:—1. Whether the word "Singer" as applied to or used in common with a sewing machine is a trade mark or designation of the plaintiffs' machines to which the plaintiffs are exclusively entitled; and whether the word "Singer" is in fact so used by the plaintiffs, or whether the word "Singer" when applied to a sewing machine has acquired in the trade the meaning of, and is used as descriptive of, a machine of a particular class or mode of construction or character? 2. Whether the defendant has or has not used the word "Singer," or "Singer system" for the purpose of appropriating to machines sold by him the reputation attached to machines of the plaintiffs' manufacture, or as descriptive only of the class or character of sewing machines used by him? 3. Whether the defendant by the use of the name "Singer," or "Singer system," induces, or has induced, any person or persons who purchased, or have purchased, sewing machines to purchase them as machines manufactured or made by the plaintiffs?

Sir H. M. Jackson, Q.C. and Everitt for the motion.—This is eminently a case to be decided by a jury. The notice and intention of the defendant, the question whether he has an *animus furandi* in the course of business he has adopted, is just what a jury ought to try. We are making our application within the time specified by Order XXXVI., r. 3, and under that order we are entitled to have these issues tried, unless it shall, under rule 26 of the same order, appear desirable to direct a trial without a jury. In the present case we submit that such a course is plainly not desirable. This case is exactly similar to *West v. White* (36 L. T. Rep. N. S. 95; L. Rep. 4 Ch. Div. 631), where an order similar to the one we now ask was made on the application of the defendants. This is not a case of a party changing his mind and asking for something different from what he first chose, as in *Dent v. The Sovereign Life Assurance Company* (W. N. Feb. 22, 1879). In *Spratt's Patent v. Ward and Co.* (40 L. T. Rep. N. S. 250)

the defendant made his application only at the last moment. They also cited

*Bordier v. Burrell*, L. Rep. 5 Ch. Div. 512.

*Aston, Q.C. Hemming, Q.C. and Rigby* for the plaintiffs.—The legal aspects of this case preponderate over the questions of fact. We therefore ask that the action may stay where it is. There is no real issue of fact that a jury can try. The serious question here is whether the plaintiff is entitled to this trade mark, the name "Singer," and that question is essentially one for a judge. In *West v. White* (*supra*) the only question was nuisance or no nuisance, essentially one for a jury: the same principle was recognised by Malins, V.C. in *Brooks v. Wigg* (38 L. T. Rep. N. S. 551; L. Rep. 8 Ch. Div. 516), where facts are mixed up with law and are scientific facts they ought to be tried by a judge. The defendant refers in his answer to no less than ten patents, and there must be a comparison of these numerous documents and specifications, and therefore for that reason it is not a proper case for a jury:

*Garling v. Royds*, 25 W. R. 123.

Sir H. M. Jackson, Q.C. in reply.—There is no difference in principle between this case and that of *West v. White* (*supra*).

BACON, V.C.—I regret that the provisions of the Judicature Act, which are meant of course for the general interest, should have given rise to such a question as I have heard argued for a very long time in the course of this morning. The enactments are clear and distinct. The right of the plaintiff to have a trial by jury is express. The right of the defendant, subject to the considerations mentioned in the 26th sub-rule, is also very plain, and the court, by the rule I have last mentioned, "may, if it shall be desirable, direct a trial without a jury of any question or issue of fact or partly of fact and partly of law arising in any cause or matter which previously to the passing of the Act could without any consent of the parties be tried without a jury." The case before me is as plainly a case belonging only to the Court of Chancery before the Judicature Act passed as can be conceived. In what respect has the statute altered that? No case has been referred to lead me to believe that the law has been in any respect altered. The case of *West v. White* (36 L. T. Rep. N. S. 95; L. Rep. 4 Ch. Div. 631) is referred to, from which of course I do not desire in any degree to withdraw. It was a most plain case, in which there were certain questions of fact which, if the case had remained here, must have been examined in this court, but which, from their very nature, it was convenient should be tried before a jury, and the court therefore listened to the defendant's claim to have it tried before a jury, yielded to it, and settled the issues for the jury. [His Lordship then stated the issues in that case, and continued:] Questions more plainly, merely and simply questions of fact, cannot by any possibility be stated, and the judgment which has been referred to by Sir Henry Jackson must be read having regard to the facts which I have read from the issues. But is this case anything like that? In this case I have looked over, very hastily but sufficiently for the present purpose, the statement of claim and the statement of defence, and in the statement of defence I find a long statement of the differences between the plaintiff's machine and

the defendant's machine — difference of construction and difference of title, showing that there are questions of law, and pure questions of law, which are to be decided by this court, and I am asked to send that to a jury, who are to listen to any evidence given before them, and to draw their conclusions of law, because they must be conclusions of law as well as of fact, from the evidence which may be submitted to them; and what then? I am told it can never come back here. But suppose it should come back, with a finding of the jury upon those facts. Is this court to shut its eyes to the plain evidence in the case, to abandon the duty which is cast upon the court to decide the law between the parties, because the jury have found certain questions of fact? The old evil which was so much complained of, that people were sent from one court to another, and expense was increased, and the burden thrown upon suitors, would be perpetuated if I listened to such an application as the present. In *Spratt's case* (40 L. T. Rep. N. S. 250; L. Rep. 11 Ch. Div. 240), although the decision went, as I have said, on a totally distinct point, there are certain observations from which I also do not desire to withdraw. But the words used in a judgment of Hall, V.C., which have been read to me from the *Weekly Reporter*, in *Garling v. Royds* (*supra*), express, in my opinion, distinctly the principle upon which the court must act when it finds that in the case submitted for its decision there are questions of law — minute, serious, important questions of law — mixed up with question of fact, and that it could not help the court in the discharge of its plain duty to have findings of fact in the particular circumstances insisted upon by the defendant, and so get rid of or at least baffle the plaintiff in his attempt to obtain what he says is his right. Now, the issues of fact stated here appear to be these. [His Lordship then read the first issue proposed by the defendant, and continued:] That is a question of fact no doubt, but it is a question mixed up with all those topics which are introduced by the defence, and the finding upon it in the defendant's favour upon this may possibly be utterly frivolous to the plaintiff if the other issues of law are decided in his favour. The second issue proposed is, "Whether the defendant used or has used the name 'Singer' for the purpose of appropriating the machines sold by him and attached to the machines of the plaintiff are of a description only of that class or character." That is an inference of law to be drawn from the facts. That is not a question for the jury. The jury have nothing to say to that, and no verdict of the jury would even bind the rights of the plaintiff on such an issue as that. The third is, "Whether the defendant by the name 'Singer' has induced any person or persons who purchase or have purchased sewing machines to purchase them as machines manufactured or made by the plaintiff, or upon the same principle." Now, that is also an inference of law — every man must be held to have done and intended that which is the consequence of the thing which he has done, and the court of law and not a jury is the proper tribunal to decide any such question as that. Then, as I am asked to exercise my discretion under the 26th clause (a discretion not to be exercised arbitrarily, and not to be guessed at), and, in the present case, it appears to me that there is no question of fact in

which either the plaintiff or defendant is concerned which is not so mixed up with others and not less important facts as that it is right that the whole question should be decided by one tribunal, and that one law only (not a verdict and then an argument on the law) should be applied to the issue found between the parties. I must, therefore, refuse this motion, with costs.

Solicitors: *John Nicholas Mason; Michael Abrahams and Boffey.*

April 8 and 28.

(Before FRY, J.)

Re BARBER'S ESTATE; DARDIER v. CHAPMAN. (a)

*Married woman — Administratrix — Intestate's estate.*

*Where a married woman was the administratrix of a deceased person's estate, and was also entitled beneficially to twenty-seven seventy-fifths parts thereof, and the whole of the intestate's estate was allowed to be received and managed by an agent:*

*Held, on the authority of Huntley v. Griffith (F. Moore's Rep. 452; Gouldsbrough, 159), that the receipt by the agent was a change of the property, and a reduction thereof into the possession of the husband.*

*Held, also, on the authority of Cooper v. Cooper (30 L. T. Rep. N. S. 410), that the fact of the wife being entitled to an undivided share only made no difference.*

WILLIAM BARBER died on the 3rd Nov. 1876, having by his will appointed his wife Mary Ann Barber and William Henry Chapman his executors, and devised and bequeathed to his wife his residuary estate. By a codicil of the 26th Oct. 1876 the testator appointed Sanderson Corpe an additional executor. Mary Ann Barber renounced probate and execution, and the will and codicil were proved by William Henry Chapman alone, leave being reserved to Sanderson Corpe to come in and prove.

An action was brought by a creditor of the testator against William Henry Chapman, Sanderson Corpe, and Mary Ann Barber, for the administration of the testator's estate, and on the 8th Feb. 1877 Malins, V.C. made an order for administration of the estate of the testator, directing, amongst other things, an account of the personal estate of the testator come to the hands of the executors.

The defendant Sanderson Corpe made an affidavit in answer, and was cross-examined. From this and other evidence it appeared that Mary Ann Barber had previously been married to one John Westbrook Corpe, who died intestate on the 21st Jan. 1857, and letters of administration of whose estate and effects were granted to his widow, who in 1865 intermarried with the testator; that certain portions of the estate of John Westbrooke Corpe consisted of money due from his partner; and that Mary Ann Barber was entitled to twenty-seven seventy-fifths of the personal estate of John Westbrooke Corpe; that for some time the estate of John Westbrooke Corpe was managed by Sanderson Corpe and George Corpe, and after George Corpe's death by Sanderson Corpe alone. He acted in such management of the estate as the agent of

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.



[CHAM. DIV.]

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the testator and Mary Ann Barber, his wife. In 1875 Sanderson Corpe received from the partner of John Westbrooke Corpe certain sums of money. With part of this money he paid some of John Westbrooke Corpe's debts. He lent 400*l.* on mortgage in his own name, and retained the rest, amounting to 163*l.*, in his hands.

The defendant Sanderson Corpe stated that he believed twenty-seven seventy-fifths of John Westbrooke Corpe's estate were payable to Mary Ann Barber, but on the 10th Dec. 1878 the plaintiff, being advised that under the circumstances these two sums had been reduced into possession and become part of the testator's estate, gave notice to Sanderson Corpe of his intention to surcharge him with (*inter alia*) twenty-seven seventy-fifths of the estate of John Westbrooke Corpe, to which the testator was entitled, consisting of the sum of 163*l.* or thereabouts, in the hands of the defendant Sanderson Corpe, and the 400*l.* secured on mortgage.

The chief clerk having allowed these surcharges, the opinion of Fry, J., to whom the administration action had been transferred, was sought for on the 10th March 1879 in chambers, when his Lordship adjourned the matter into court.

Cookson, Q.C. and T. A. Roberts for the plaintiff.—Sanderson Corpe was the agent of William Barber, and, acting as such, effected a reduction into possession. If he also acted as agent for the wife, it makes no difference. In *Lloyd v. Pughe* (28 L. T. Rep. N. S. 250; L. Rep. 8 Ch. App. 88) the wife, an executrix, had paid moneys received by her as such into a bank to an account in her own name, as executrix, but she was held to be merely the agent of her husband. [FRY, J.—Was not Sanderson Corpe the agent of the husband as representing the legal personal representative?] It would appear to be so, and that his acts are to be accounted as those of the husband. They also cited

*Huntley v. Griffith*, F. Moore, 452;  
*Bird v. Peagrim*, 21 L. T. Rep. O. S. 90;  
*Nicholson v. Drury Building Estate Company*, 37 L. T. Rep. N. S. 459; L. Rep. 7 Ch. Div. 48;  
*Baker v. Hall*, 12 Ves. 497;  
*Williams on Executors*, 7th ed. 973.

Higgins, Q.C. and Bromhead for the defendants Mary Ann Barber and Sanderson Corpe.—Sanderson Corpe was not the agent of the husband, but acted solely on behalf of the wife. When money had been received from a third person to be appropriated to the use of a married woman, and she died, and after her husband, it was held, in *Fleet v. Perrins* (20 L. T. Rep. N. S. 815; L. Rep. 4 Q. B. 500), that the wife's administratrix was the proper person to sue. It was a *chose in action*, and the subject-matter here is a *chose in action*, for the husband could not have obtained the money without bringing an action. They also cited

*Bond v. Simmons*, 3 Atk. 20;  
*Blount v. Bestland*, 5 Ves. 515;  
*Nash v. Nash*, 2 Madd. 133;  
*Prole v. Soady*, L. Rep. 3 Ch. App. 220;  
*Scrutton v. Pattillo*, 32 L. T. Rep. N. S. 140; L. Rep. 19 Eq. 369;  
*Re Elyn's Trusts*, L. Rep. 6 Ch. Div. 115;  
1 Roper on Husband and Wife, 204, 211.

J. Mander for the defendant Chapman.

*Our adv. vult.*

April 28.—FRY, J.—This is a question of surcharge. William Barber died on the 3rd Nov. 1872, leaving two gentlemen his executors. An

action was commenced for the administration of his estate. His widow, Mrs. Barber, was the administratrix of John Westbrooke Corpe, her former husband, and she was also beneficially entitled to twenty-seven seventy-fifths parts of John Westbrooke Corpe's personal estate. In 1865 she intermarried with William Barber. The dates are not very clear, but it seems to me that from 1865 to 1868 John Westbrooke Corpe's estate was managed by Sanderson Corpe and George Corpe, and, after the death of the latter, by Sanderson Corpe alone. He acted as administrator of the estate, and, as such, received certain sums of money by the authority of Barber and his wife. Certain sums of money were received, in 1875, from the partner of John Westbrooke Corpe. Sanderson Corpe invested some of this money; he also paid some debts, and he retained the rest, amounting to 163*l.* The question which I have to decide is, whether the estate of William Barber is entitled to the twenty-seven seventy-fifths of this sum of 163*l.* Was the receipt of that sum by Sanderson Corpe, acting in the manner he did, a reduction into possession by William Barber? The question whether such acts of an agent amount to a reduction into possession appears to have been answered by a very old authority, that of *Huntley v. Griffith*, which was decided in the thirty-eighth year of Queen Elizabeth, and which is reported in Sir Francis Moore's Reports (452), and in Gouldsbrough's Reports (159, pl. 91), where the condition of the wife at the time is rather differently stated. This case found its way into some of the Abridgments, and seems to have never been impugned. (1 Rolle's Abr. 342, tit. Baron and Feme (D) pl. 7; 2 Com. Dig. 5th edit. 225, tit. Baron and Feme (E. 3), chattels personal; 4 Vin. Abr. 2nd edit. tit. Baron and Feme, 39 (D), pl. 7, 110 (B. a) pl. 9.) The case is reported very shortly in Moore as follows: "Le case fuit que un legacy fuit devise al un feme sole que prist baron, et ils font letter d'attorney al un pur ceo receiver, que ceo receive accordant; la feme morust, le baron apres morust intestate, et son administrator port accompt pur l'argent. Et adjudge maintainable, quia le receipt alter le ppty. del legacy al baron sole. Sic sur obligacon. al feme et le baron fait letter d'attorney de recevoir l'argent, quel e receive le feme devise, le baron devise, son executer sura accompt pur l'argent." From the longer report in Gouldsbrough it appears that a sum of money had been bequeathed to a *feme covert*; the husband and wife made a letter of attorney to the defendant to receive the money from the executor, and the defendant received the money accordingly to the use of the woman. The husband and wife both died, and the administrator of the husband was held entitled to recover the amount in an action against the defendant. In that case the receipt of the money by the agent was deemed a conversion into possession. Then the question arises, whether the fact that the wife was only possessed as administratrix of the whole amount, and that she was only beneficially entitled to twenty-seven seventy-fifths of the sum, ought to make any difference. I think that the words of the Lord Chancellor, in moving the House of Lords in the case of *Cooper v. Cooper* (30 L. T. Rep. N. S. 410; L. Rep. 7 E. & L. App. 53), are an authority on the point. Lord Cairns says: "As regards substantial proprietorships, the right of the next of kin remains clear to every

item forming the personal estate of the intestate, subject only to those paramount claims of creditors. . . . This right of the next of kin I find extremely well expressed in . . . Bacon's Abridgment in the part of it which treats of executors and administrators. Speaking of the right of the next of kin, and of the statute regulating the succession to an intestate's estate, it says, on the clause of the statute which directs that no distribution shall be within a year after the death of the intestate: 'It hath been adjudged that if a person entitled to a distributive share dies within the year, yet it is such an estate vested in him as shall go to his executor or administrator, for the statute doth not make any suspension or condition precedent to the interest of the parties, but is a clause merely for the benefit of creditors; also this statute, being in nature of a will for all persons who die intestate, ought in this instance to be resembled to the case of a residuary legatee, in which it is always holden that if such a legatee die before the debts are satisfied, so that it doth not appear to how much the surplus will amount, yet the executor or administrator of such a legatee shall have the whole residue, &c., which remains over, and not the executor of the first testator.' And then the Lord Chancellor goes on to say that the Statute of Distributions ought to be looked on "as in substance nothing more than a will made by the Legislature for the intestate." I think that the fact of Mrs. Barber being beneficially entitled to twenty-seven seventy-fifths only does not affect the question, and I hold therefore that these twenty-seven seventy-fifth parts of the sum of 163*l.* belonged to the estate of William Barber. I think that, with regard to the sum of 400*l.* lent by Sanderson Corpe, my decision must be the same. The person surcharging must have his costs of adjourning the summons into court. The other costs will be costs in the action.

Solicitors: *F. L. Soames; Hare and Fell; C. J. Munder.*

*April 25 and May 14.*

(Before *Fry, J.*)

**PATEY v. FLINT AND RIDGE. (a)**

*Practice—Foreclosure—Non-appearance of defendant mortgagee.*

*In an action for foreclosure where the mortgagor entered no appearance, and the statement of claim was filed, the Court, after consideration, gave the usual judgment against him for foreclosure nisi only, and declined to give judgment for immediate foreclosure absolute.*

By an indenture dated the 31st May 1878, and made between the defendant Ridge of the one part and the plaintiff of the other part, certain leasehold hereditaments at Anorley were demised to the plaintiff, his executors, administrators, and assigns, for the residue of the term of the lease under which they were held (except the last three days), by way of mortgage for securing the repayment of 350*l.* and interest. The covenant by the mortgagor for repayment included the further advances to be made, if any. Subsequently, and prior to the 14th Dec., the plaintiff, having no notice of any further incumbrances on the property, advanced further sums, amounting, with the first sum advanced, to 630*l.*

On the 14th Dec. the plaintiff received notice that on the 22nd July 1878 the defendant Ridge had, by an agreement of that date, charged the mortgaged property with payment to the defendant Flint of 50*l.*, and such further sum as might be advanced, and interest.

On the 16th Dec. the plaintiff entered into possession of the mortgaged property, and gave notice to the tenant of one of the houses to pay him the rent. He also expended 39*l.* 10*s.* in necessary repairs.

On the 22nd Jan. 1879 the plaintiff issued his writ against Flint and Ridge for an account of principal, interest, and costs, and for foreclosure, and, as against the defendant Ridge, for payment of the 630*l.*, interest and costs.

The writ was served on both defendants under an order obtained for substituted service. The defendant Ridge did not enter an appearance in the action, and the statement of claim was delivered to the defendant Flint, and, as against the defendant Ridge, was filed on the 19th March 1879. The statement of claim claimed a foreclosure against both defendants in the usual terms, and a judgment against the defendant Ridge for 630*l.* and interest 39*l.* 10*s.*, and costs; and in the alternative, in case the defendant Ridge did not appear, a judgment that he and all persons claiming under him might be "immediately absolutely foreclosed of all right and equity of redemption in or to the mortgaged premises."

On the 1st April the plaintiff served the defendant Flint with a notice of motion (which was filed against the defendant Ridge) for judgment against the defendant Ridge; for the usual accounts and inquiries, and that upon the defendant Flint paying to the plaintiff the balance due to him within six months the plaintiff should surrender and reassign the premises to Flint or his appointees, but that, in default of such payment by the defendant Flint, he should thenceforth stand absolutely foreclosed; and for immediate foreclosure against Ridge.

The motion was now made in the terms of the notice of motion.

The defendant Ridge did not appear.

*Mulligan*, for the plaintiff, cited

*Fisher on Mortgages*, 3rd ed. 1108; Order XXIX., rr. 10 and 11.

*E. Bury* for the defendant Flint.

*Fry, J.* said an order might be made for immediate foreclosure absolute as against Ridge, and in the usual form for foreclosure *nisi* as against Flint.

*May 14.*—The case was referred to on the minutes.

*Fry, J.* said that, since the case had been last before him, the registrar had referred to the Orders, and that no precedent could be found for such an order as had been asked for. The order, therefore, as against both defendants, would be the usual one for foreclosure *nisi* only.

Solicitor for the plaintiff, *John Warren.*

Solicitor for the defendant Flint, *R. Wastell.*

(a) Reported by *FRANK EVANS, Esq., Barrister-at-Law.*

CHAN. DIV.]

Ex parte BRANWHITE; Re WEST OF ENGLAND, &amp;C., BANK.

[CHAN. DIV.]

April 26 and May 2.

(Before FRY, J.)

*Ex parte* BRANWHITE; *Re* THE WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK. (a)*Companies Act 1862—Unlimited company—Calls—Contributory—Set-off.**In the winding-up of a company with unlimited liability a contributory has no right to set off debts due to him by the company against calls made on him by the liquidators.**Gibbs and West's case* (23 L. T. Rep. N. S. 351; L. Rep. 10 Eq. 312) *not followed.*

THE West of England and South Wales District Bank was formed in 1836, and, in 1874, was registered as a company with unlimited liability, under the Companies Acts 1862 and 1867.

On the 9th Dec. an order to wind-up the bank was made by Malins, V.C. At the date of the winding-up order, Charles Branwhite was the holder of 131 shares, of 10*l.* each, in the bank, and had standing to his credit in his current account with the bank the sum of 762*l.* 12*s.* 6*d.* He held also three 5*l.* notes of the bank.

Under an order of the Court of the 14th March 1879 a call was made on him of 10*l.* on each of his shares. The call was payable by two instalments of 5*l.* each, the first of which was to be paid on the 1st April. Branwhite accordingly, on the 22nd March, took out a summons that the sum of 762*l.* 12*s.* 6*d.*, and also the sum of 15*l.* due to him upon the three 5*l.* notes of the bank, of which he was the holder, should be set-off as against the call of 10*l.* per share in respect of the shares held by him in the bank, and that the same sums of 762*l.* 12*s.* 6*d.* and 15*l.* should be set-off against the first instalment of the call. The summons was referred by the Chief Clerk to Fry, J. (to whose court the winding-up proceedings had been transferred), and by him adjourned into court.

*Cookson, Q.C. and Bush* for Branwhite.—The bank is not a limited company, and a contributory may set-off the amount of a debt due to him from an unlimited company against calls made by the liquidator. The Act recognises the right of the creditor to set-off the debt against the calls. The question was gone into in *Grissell's case* (14 L. T. Rep. N. S. 843; L. Rep. 1 Ch. App. 528), where Lord Chelmsford pointed out the difference between a limited and an unlimited company. In *Gibbs and West's case* (23 L. T. Rep. N. S. 351; L. Rep. 10 Eq. 312) Malins, V.C. made the same distinction, and decided that there was a right of set-off against calls in the case of a winding-up of an unlimited company. The winding-up of a company does not alter the legal rights of the shareholders and creditors. [FRY, J. referred to sect. 38 of the Act of 1862.] In Lindley on Partnership (4th edit. vol. 2, p. 1324) it is laid down that "when a company is unlimited, money due to a contributory, not as a member, but on some independent dealing or contract, may be set off as if such money were owing to a person unconnected with the company." The question of set-off in the case of a limited company, which was in voluntary liquidation, has recently been the subject of a decision of the

Master of the Rolls in *Re Whitehouse and Co.* (39 L. T. Rep. N. S. 415; L. Rep. 9 Ch. Div. 595), and he there examined the nature of the right. The winding-up, however, in that case was voluntary. [FRY, J.—Is there no clause in the Act about the distribution of assets?] The 98th and 133rd sections. [FRY, J.—I think the scheme of the Act is that voluntary winding-up shall have the same effect as compulsory winding-up.] The nature of the liability for calls is described in *Williams v. Harding* (14 L. T. Rep. N. S. 139; L. Rep. 1 E. & J. App. 9). The liability of the contributory in this case is under the deed of settlement of the bank, and the mere fact of its having been registered since under the Act of 1862, as a company with unlimited liability, does not take away from the contributories the right of set-off which they had before. They also referred to

The Companies Act 1862, ss. 102, 196;

*Brighton Arcade Company v. Dowling*, 17 L. T. Rep. N. S. 541; L. Rep. 3 C. P. 175;

*Black and Co.'s case*, 27 L. T. Rep. N. S. 509; 28 L. T. Rep. N. S. 50; L. Rep. 8 Ch. App. 254.

*Glassey, Q.C. and Bomer*, for the official liquidators, were not called upon.

FRY, J.—The question which this summons is intended to raise arises in this way: Mr. Branwhite, the applicant, holds 131 shares in the bank, which is an unlimited company, and upon those shares the liquidators have made, under the powers of the Companies Act 1862, a call of 10*l.* a share. Mr. Branwhite, under that, is liable to pay 1310*l.* It appears that that call is divided into two instalments—one payable in April and the other in June in this year. It further appears that the bank owes to Mr. Branwhite, on his current account, a sum of 762*l.* 12*s.* 6*d.*, and on certain notes 15*l.*, so that the bank owes him 777*l.* 12*s.* 6*d.* It is suggested that he is entitled to set off those two sums against the 1310*l.*, and thereby pay himself in full. It appears that the liquidators have declared a dividend of ten shillings in the pound upon the debts due from the bank. If this course be pursued, it will follow that Mr. Branwhite will be paid in June, whereas the other creditors will probably not be paid by that time. The question is, whether he is entitled to have that priority. Now, that appears to me to turn upon two sections of the Act, the 101st and the 102nd. I will advert to these more in detail hereafter; but, before expressing the view I take of the construction of those sections, it becomes very necessary to inquire what is the nature of Mr. Branwhite's liability to pay the calls. Is it a debt due from him to the company, or is it a debt not due from him to the company at all? In the former case much might be said in favour of set-off; in the latter case it is much more difficult to say anything in its favour. Accordingly, it has been contended by the counsel for Mr. Branwhite that Mr. Branwhite's liability for calls is under the deed of settlement, and that the liability he has as such is a liability to the company. The 16th section of the Act provides for articles of association being entered into, and it says that "when registered they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto; and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to

a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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*Ex parte BRANWHITE; Re WEST OF ENGLAND, &C., BANK.*

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conform to all the regulations contained in such articles, subject to the provisions of this Act; and all moneys payable by any member to the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland, to be in the nature of a specialty debt." Now, it appears that this company was formed as long ago as the year 1836, and that in 1874 it was registered under the provisions which enable pre-existing companies to register, and, according to the effect of the sections which deal with that event, the deed of settlement was placed in the same position as the articles of association of a company. Undoubtedly, therefore, on the registration of this company, there was created a liability on the various members, which did not exist before in the nature of specialty debts, to pay the calls which should be made by the company. The 38th section provides for the liability of members in the event of a winding-up. It says: "In the event of a company formed under this Act being wound-up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves," with certain qualifications. The liability thus created is undoubtedly a statutory liability applicable to the case of companies formed under this Act, and a corresponding liability exists in cases of companies registered under this Act. Then it is provided by the 75th section that "the liability of any person to contribute to the assets of a company under this Act, in the event of the same being wound-up, shall be deemed to create a debt, in England and Ireland, of the nature of a specialty." It appears to me to be clear that the liability to contribute to the assets of the company while it is a going concern, and the liability to contribute to the assets of the company when it is being wound-up, are separate and distinct liabilities—the one created in effect by the articles of association of the company and the deed of settlement and its registration under the 16th section of the Act; the other arising only in the event of the company being wound-up. Those two liabilities appear to me to be very different in their nature. The one requires payment of the amount of the calls to the company; the other requires payment of the amount of the calls to the liquidator or officer of the court; if a voluntary winding-up, to the voluntary liquidator. In the one case the payment must be made according to the discretion of the directors, and in the other not, but under the direction of the court or the voluntary liquidator. One is for the general purposes of the company, and the other is to meet the special demands of the fund created by the statute. This point appears to me to have been the subject of adjudication in a case to which I will refer, though it was not cited in the course of the argument, the case of *The Financial Corporation Limited v. Lawrence* (L. Rep. 4 C. P. 731, 739). There Sir Montague Smith, J., having referred to a previous judgment of Lord Justice Wood, said: "As soon as the winding-up of the company takes place the

existing liability of the shareholder is altered into a liability to contribute, and he himself is altered from a shareholder into a contributory." He had said before, speaking of the preceding liability, that "is altered as soon as the winding-up is commenced; and it is so, because as soon as the company begins to be wound-up the liability of the shareholders, which was not then an existing obligation, is altered by the statute into a different species of liability; it is to be then a debt, and in England and Ireland a specialty debt, and it is to be deemed to have accrued at the time when the liability commenced, and to be payable when calls are made for enforcing such liability," distinctly recognising the two liabilities, the one under the deed of settlement and the articles of association, and the other under the winding-up, as essentially distinct liabilities. There being those two liabilities, and it being possible that a contributory might be liable to the company for a debt contracted by reason of some other relationship to him of the company, the 101st and 102nd sections proceed to deal with the liabilities of the contributories under the Act in respect of calls made in the winding-up. The 101st section is in these terms: "The court may, at any time after making an order for winding-up the company, make an order on any contributory for the time being settled on the list of contributories, directing payment to be made, in the manner in the said order mentioned, of any moneys due from him or from the estate of the person whom he represents to the company, exclusive of any moneys which he or the estate of the person whom he represents may be liable to contribute by virtue of any call made or to be made by the court in pursuance of this part of this Act," and excluding therefore from the effect of that part of the section, moneys payable in respect of calls in the winding-up; "and it may" the section proceeds, "in making such order when the company is not limited, allow to such contributory by way of set-off any moneys due to him or the estate which he represents from the company, on any independent dealing or contract with the company, but not any moneys due to him as a member of the company in respect of any dividend or profit. Provided that when all the creditors of any company, whether limited or unlimited, are paid in full, any moneys due on any account whatever to any contributory from the company may be allowed to him by way of set-off against any subsequent call or calls." Then the 102nd section proceeds to deal with the mode of enforcing the liability created by the calls, and provides that "the court may, at any time after making an order for winding-up a company, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves, and it may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective

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portions of the same." In my judgment it is under that 102nd section that the order made upon Mr. Branwhite has been made by the court. Now, taking these two sections together, they appear to me to determine this. They provide in the first place for orders on the contributories to pay debts due from the contributory to the company. In the next place they make provision for a set-off against those debts of any debts due from an unlimited company. Thirdly, they provide for payment of the calls made by the court in the course of the winding-up. They also provide for a set-off against those calls where all the creditors have been paid in full. But, by the silence of those two provisions, they seem to me to provide that there shall be no set-off against debts due to a limited company of debts due from it, and there is to be no set-off against calls made in the course of the winding-up till all debts are paid. That appears to me to be the clear inference from those two sections. Now, in the present case what is sought to be done is this, to set off a debt due from the company, not against a debt due to the company, but against a call made by virtue of the liability which did not exist at all until the winding-up arose. The debts are not payable by or between the same persons. So much for the construction of the statute. I have pointed out that the earlier clauses of the statute create two liabilities, and it appears to me these sections deal with the two liabilities separately, superadding the liabilities which exist by virtue of other things. Now, I must consider what the general scope of the statute is in order to arrive at the conclusion whether there ought to be any such set-off as is here suggested. It appears to me that the general scope of the statute requires that the debts of all parties should be paid *pari passu*. In the case of a voluntary winding-up, that is expressly directed by the 133rd section of the Act. With regard to a winding-up by the court no such express direction is contained. Why? Is it because the Legislature intended that the payment of debts should take place in a different method? I think not. I think it was because the Legislature felt it was perfectly safe in trusting the court, the maxim of which has long been that the highest equity is equality, which has been in the habit of making payments *pari passu*. That direction, which it thought necessary in the case of a voluntary liquidation, it did not think necessary in the case of a liquidation under the direction of the court. What would be the result if I gave effect to Mr. Branwhite's contention in this case? The one debt, his debt, would be paid immediately; the debts of the other contributories, *claudo pede*, in the long course of the winding-up, by different instalments. That would not be *pari passu*, or anything like it. Then, is there any principle of law or equity which would induce me to say there ought to be a set-off in this case? It is not suggested, and could not be in this case, that this comes within any of the statutes directing set-off, because, if I am right, the one debt is a debt due to the company, the other is not a debt due to the company, but by virtue of a special liability. It follows from that that the Statutes of Set-off are not applicable. Then is there any equitable ground of set-off? Equitable set-off, as we all know, only arises where there are certain equitable circumstances which give a right to the person who sets them up against his antagonist. Is there any

equity here which justifies Mr. Branwhite in saying he should be paid in full and his creditors not? I find no such equity. There is, undoubtedly, some authority in favour of the contention of Mr. Branwhite. There is a decision of Vice-Chancellor Malins, to which I need not say I attach great weight; and, if it stood alone, it may be that I should have thought it proper to follow that decision, whatever my opinion might have been. But from that decision marked dissension has been expressed by another judge, namely, the Master of the Rolls. That appears to liberate me from any binding effect which that decision of the Vice-Chancellor might have on me, and leaves the question free from any decision. I am therefore, in that state of circumstances, at liberty to act on my own view of the law, and, acting on my own view of the law, I must refuse the application; but, considering the application has been made for the purpose of determining a question without which the winding-up could not progress, I think it right that the costs of Mr. Branwhite should be costs in the winding-up.

Solicitors for Branwhite, *Torr, Janeway, Tagart, and Co.*

Solicitors for the liquidators, *Clarke, Woodcock, and Ryland*, agents for *Fussell, Pritchard, Swann, and Co.*, Bristol.

## COMMON PLEAS DIVISION.

Friday, April 25.

(Before DENMAN and LOPES, JJ.)

YORKSHIRE BANKING COMPANY v. BEATSON AND MYCOCK.

LEEDS AND COUNTY BANKING COMPANY v. THE SAME. (a)

*Bill of exchange—Partnership—Name of individual used as name of firm—Acceptance—Onus of proof.*

*M. carried on partnership with the defendant Beatson as chemical manufacturers, under the partnership name or style of "William Beatson." The defendant Beatson accepted and indorsed certain bills without the knowledge of M. in the name of "William Beatson" (being, as he swore, for his own accommodation), the proceeds of which were paid into the banking account of the defendant Beatson, continued under the same heading since the partnership as the banking account of the firm, and also of the individual. The plaintiffs, who then knew nothing of the partnership, or of the defendant Mycock, discounted the bills for value, and afterwards sued both partners upon their dishonour. One of the bills was addressed to "Mr. William Beatson, Chemical Works, R." The jury found that, having regard to the direction of the last-mentioned bill, the signature "William Beatson" on both bills must be held to denote the signature of the firm.*

*Held, that the burden of proof lay upon the plaintiffs to show affirmatively that the bills were the bills of the firm, not upon the defendants to show that they were the bills of the individual.*

*Held, further, that there was no evidence to go to the jury in support of the finding that the signature was the signature of the firm, and that the defendant M. was entitled to judgment.*

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

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ACTION upon two bills of exchange, one of which was indorsed and the other accepted in the name of "William Beatson," the latter being addressed to "Mr. William Beatson, Chemical Works, Rotherham."

The defendant Mycock carried on business in partnership with the defendant Beatson, under the partnership name of "William Beatson," as chemical manufacturers, at the above address, where the defendant Beatson also resided. The plaintiffs gave value for the bills; but knew nothing of the partnership or of the defendant Mycock until the bills were dishonoured. The bills in question were accepted and indorsed by the defendant Beatson without the knowledge of the defendant Mycock, being, as the defendant Beatson swore, renewals of prior bills accepted or indorsed by Beatson for his own accommodation. Before Mycock entered into the partnership, the defendant Beatson had carried on a banking account at the Sheffield and Rotherham Bank for many years; and this account, being continued after the constitution of the partnership under the same heading ("William Beatson, Esq."), was used as the account both of the firm and the individual. The proceeds of the bills were paid into this account, but Beatson had drawn out of the account for his own purposes, before the bills were dishonoured, a much larger amount than the proceeds of the bills.

The jury, in answer to the following questions: (1) Was the name William Beatson put to the bills to denote the firm or to denote William Beatson only? (2) Did the bank take the bills as the bills of the chemical works, whoever the proprietors might be, or as the bills of William Beatson only? found as follows: "The bill dated March 13, having been drawn upon William Beatson at the address 'Chemical Works,' R., we agree that William Beatson's acceptance of it must be taken to denote the acceptance of the firm." Being asked afterwards what they said as to the other bill, they said that, "from the fact of its being put in connection with the other, they supposed that it must follow the same result." On this a verdict for the amount of the bills was entered for the plaintiffs; and a rule was afterwards obtained to set aside this verdict as against the defendant Mycock (Beatson having suffered judgment by default), on the ground that it was against the weight of evidence, and that there was no evidence to go to the jury of the defendant Mycock's liability.

*Digby Seymour, Q.C. and Tindal Alkinson* showed cause.—The name of the firm in which Mycock was a sleeping partner was "William Beatson," and therefore Mycock, who had authorised Beatson to bind him by that signature, was *primâ facie* liable on the bill. The verdict was therefore right. [DENMAN, J.—The jury seem to have been asked whether the name was intended to denote the firm or the individual. I should have thought the safer form of question would have been, "Did the name upon the bills in fact denote the firm or the individual?"] *Primâ facie* it denoted the firm, and the verdict of the jury amounts to such a finding. They cited

*South Carolina Bank v. Case*, 8 B. & C. 427;  
*Miles's case*, 31 L. T. Rep. N. S. 9; L. Rep. 9 Ch. 635;  
*Hall v. West*, cited in *Lindley on Partnerships*, 4th ed. vol. i. p. 343;

*Cox v. Hickman*, 3 L. T. Rep. N. S. 185; 8 H. of L. Cas. 304;  
*Baird's case*, 23 L. T. Rep. N. S. 424; L. Rep. 5 Ch. 725, 733;  
*Edwards v. Bushell*, L. Rep. 1 Q. B. 97;  
*Swann v. Steele*, 7 East, 209;  
*Stevens v. Reynolds*, 5 H. & N. 513;  
*Ex parte Bolitho*, 1 Buck. 100;  
*Wintle v. Crowder*, 1 Cr. & J. 316;  
*Nicholson v. Ricketts*, 1 L. T. Rep. N. S. 544; 2 E. & E. 497;  
*Lindley on Partnerships*, 4th ed. vol. i. pp. 340-344;  
*Bytes on Bills*, p. 40.

*Waddy, Q.C. and Gainsford Bruce* in support of the rule.—The signature equally denotes the firm and the individual, and there is no *primâ facie* presumption that it denotes the former. The onus of proof therefore lies on the plaintiffs to show that it was used to denote the firm, and of this they have given none. The fact that one of the bills was directed to William Beatson, at "the Chemical Works, Rotherham," is immaterial, inasmuch as Beatson's private residence was at the works. The only evidence that was given went to show that the bills were drawn for the private accommodation of Beatson, the individual. They cited, in addition to the cases already mentioned,

*Sheriff v. Wolke*, 1 East, 48;  
*Vere v. Ashby*, 10 B. & C. 288;  
*Lloyd v. Ashby*, 2 C. & P. 138.

*Digby Seymour, Q.C.*—The judgment of Bayley, J. in *Wintle v. Crowder* (*ubi sup.*) shows that *Lloyd v. Ashby* must be regarded as overruled.

*Our. adv. vult.*

April 25.—DENMAN, J. delivered the judgment of the court (Denman and Lopes, JJ.).—In these two actions, the second of which was to abide the event of the first, the plaintiffs were the holders of bills of exchange. Beatson had allowed judgment to go by default. The question was whether Mycock was liable as Beatson's partner. The first action was brought upon two bills, one for 276l. 15s., at four months, dated the 6th March 1878, drawn by one Kelly on one Wilson, and indorsed "William Beatson;" the other for 484l. 13s., at four months, dated the 13th March, drawn by one Carr, addressed to "Mr. William Beatson, Chemical Works, Rotherham," and accepted and indorsed "William Beatson." The bills were discounted by the plaintiffs on the 14th and 18th March respectively. It appeared that these bills were renewals of earlier bills originally in accommodation transactions between the defendant Beatson, and Carr, Kelly, and Wilson, and that the bills were accepted and indorsed by Beatson without the knowledge of Mycock. Before Jan. 1878 Beatson had carried on the business of a chemical manufacturer at Rotherham. On the 1st Jan. the two defendants entered into partnership in the business, on the terms that the style of the firm was to be "William Beatson," that the defendant Beatson should have the whole management of the business, and that neither partner should have authority to draw, indorse, or accept bills without the previous consent in writing of the other. The plaintiffs never heard of the existence of any partnership until long after the discount of the bills, viz., on the 17th July, and knew nothing of Mycock until then. Beatson had kept an account at the Sheffield and Rotherham Bank for fifteen years. After the formation of the partnership no change was made, either in

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the heading of his account at the bank or in the method of keeping it. It was headed "William Beatson, Esq." The firm had no separate account. The proceeds of the bills went into the account, and Beatson drew on the account from time to time to pay for goods supplied to the business, but his account with the bank was overdrawn, and he had drawn out of the account for his own purposes a much larger sum than was brought into the account by the proceeds of the bills in question. It appears to us that the liability or non-liability of the defendant Mycock in this case must turn mainly on the question whether, when the name of a firm is identical with that of an individual member of it, and that individual member accepts or indorses bills of exchange directed to or indorsed by him in his own name, being also that of the firm, these are to be taken to be *primâ facie* the bills of the firm, or the bills of the individual member—in other words, on whom is the burthen of proof? on the plaintiff, to show that the bill is one which the individual member had authority to draw so as to bind the firm; or on the defendant to show the contrary? In the case now under consideration, the learned judge put two questions to the jury—first, was the name William Beatson put to the bills to denote the firm or to denote William Beatson only? and, secondly, did the bank take the bills as the bills of the Chemical Works, whoever their proprietors might be, or as the bills of William Beatson only? The jury found as follows: "The bill dated the 13th March, having been drawn by Josiah Carr and Son upon William Beatson, at the address Chemical Works, Rotherham, we agree that William Beatson's acceptance of it must be held to denote the acceptance of the firm. The bill dated the 6th March gives no evidence upon the point put by the judge." If the case turned upon whether these findings were satisfactory or not, for the purpose of giving judgment, we should be of opinion that they were not; and that, even if there was evidence which required to be submitted to a jury at all in the case, there must have been a new trial. The reasons given by the jury show that they were not answering the questions put to them by the learned judge, but rather laying down the proposition that the fact of Carr addressing the bill to Beatson at the works, and the bill being accepted by him, was evidence that it was a bill intended to be addressed to the firm, and therefore binding upon the firm. The bill was in fact addressed to "Mr. William Beatson, Chemical Works, Rotherham," which was his residence, and we think that this mode of addressing the bill is really no evidence at all as against Mycock that the bill was a bill of the firm, or one which the plaintiff had any ground for considering to be a bill binding on anyone but William Beatson personally. The jury being asked afterwards what they said as to the bill of the 13th March, said that from the fact of its being put in connection with the other, they supposed it must follow the same result. Both sides contended that it was not necessary to have left any question to the jury at all, Mr. Seymour, for the plaintiff, urging that, because "William Beatson" was the first name and the defendant Mycock a sleeping partner in a firm of that name, he was liable as in an ordinary case of partnership with an ordinary firm name, such as "A. and C.," or "A. and B.," or "A. B. and C.;" Mr. Waddy, for the

defendant, on the other hand, contending that "William Beatson" was *primâ facie* the name of the man William Beatson, and that it lay on the plaintiff to establish that a bill accepted or indorsed by him in that name was a bill of the firm and not of the individual. The rule was granted on the ground that the learned judge was wrong in leaving the questions he left to the jury, and that the verdict was against the evidence. But it was also contended upon the argument for the defendant Mycock that he ought to have judgment upon the ground that there was no evidence at all which could properly have been left to the jury in support of his liability, and that upon the undisputed facts the judgment ought to have been entered for him. Several authorities were cited on both sides, which we propose briefly to consider. The question is stated as follows in the 12th ed. of Byles on Bills, p. 48: "If a man be at the same time a partner in two distinct firms, but each firm use the same style, and he draw a bill in the common name of both, it has been held that an indorsee may charge either firm at his election. But where the name of the firm is the same as the name of the individual, and the bill is drawn by the individual for his separate benefit, perhaps the firm is not pledged." In *Windle v. Crowder* (1 O. & J. 313) Bayley, B., p. 318, draws a distinction between the case where a partnership name is pledged, and the case of *Ex parte Bolitho* (1 Buck. 100), in which a joint and separate trade was carried on in the name of the same individual. In that case it was held that the firm was not liable unless it could be shown that the bill was drawn as a bill of the firm, and not as a bill of the individual only. On the other hand, in the case of *Furze v. Sharwood* (2 Q. B. 417), where the defendants were trustees to carry on the business of an embarrassed firm, A. M. and K., in the name of M. alone, and they employed M. to carry on the business, it was held, under the particular circumstances of the case, that the indorsements of certain bills by M. in his own name were *primâ facie* the indorsements of the defendants, and that the onus of showing that the indorsements were made on account of the separate business and not on that of the trustees, which was the general and ostensible business, was on the defendants. The court, however, in that case lay stress upon the fact that the bills were discounted with persons who were in the habit of discounting for the firm who had assigned their effects to the defendants, and said that the cases cited (*Ex parte Bolitho*, 1 Buck. 100, included) were not inconsistent with this view they took of the case under consideration; so that we think that case can hardly be regarded as laying down that in every case, the onus is upon the defendants, where a bill is drawn by a person whose name is the same as that of the firm to which they belong, to show that the bill is not the bill of the firm. In the present case the only evidence beyond the bill itself given to show that it was or was not a bill intended to bind the firm was the evidence of Beatson himself, who swore that he did not so intend; that the bills in question were not signed by him in respect of any trade transactions, but accommodation bills, never brought into any partnership book or account. Of course, it was competent to the jury to disbelieve Beatson, but unless the onus of proof lay upon the defendants we think there was no evidence upon which the jury could have found



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properly for the plaintiffs upon that question, and nothing which could have been properly put to the jury as evidence to contradict Beatson in that respect. The only evidence relied upon by the plaintiffs for the purpose was the fact that Beatson had paid the proceeds of the bills into the account kept in his name at the bank; but inasmuch as that account was always overdrawn so far as he was concerned, but so far as the business was concerned there was always a balance in hand, we do not think that his improper conduct in raising money on bills for his own purposes in his own name can properly be held to have had the effect of binding the partnership, or to amount to evidence that the bills were accepted or indorsed for the purposes of the firm. Many other authorities were cited from the English Reports, none exactly in point, but bearing more or less upon the question whether in such a case as the present presumption is in favour of or against the liability of the dormant partner. In *Emly v. Lye* (15 East, 7), where one of two partners drew bills in his own name, which he procured to be discounted by a banker through the same agent who had procured the discount by the same banker of bills drawn in the name of the partnership, it was held that the banker had no remedy upon the bills so drawn, though the proceeds were carried to the partnership account, the money being advanced solely on the security of the persons whose names were on the bills by way of discount and not of loan to the partnership, although the bankers conceived at the time that all the bills were in fact drawn on the partnership account. In that case Lord Ellenborough, C.J. said: "Nothing passed from the defendants to induce the plaintiff to believe that it was a partnership concern, and to lend his money on that account." Grove, J. adds: "At the time when the discount took place the partnership had made no contract with the discount, who, therefore, must be taken to have purchased the bills of the one partner only." Le Blanc, J. says: "To charge the defendants on these bills they must appear to have been drawn for and on account of the partnership;" and Bayley, J.: "There was no contract between the parties at the time." This case appears to us to be strong to show that where no credit is given to a partnership, on the face of the bill, the presumption of law must be that the individual signing the bill is the only person liable for it, in the absence of express proof of authority from his partners to bind the firm by bills given in his own name as well as of the particular bill, being, in fact, a bill signed for the purposes of the partnership. The case of *South Carolina Bank v. Case* (8 B. & C. 427), which was strongly relied upon by the plaintiffs' counsel, appears to us not to assist the plaintiff in the present case, because there the transaction in question was in its commencement one entered into for the partnership under such circumstances as to make them liable for the dealings of the individual member. It has been doubted whether that case was rightly decided (see *Miles's case*, 31 L. T. Rep. N. S. 9; L. Rep. 9 Ch. App. 649), but it is enough to say that it turned upon the question whether the individual who signed the bills had, at the time he signed them, an authority to pledge the credit of the firm by an indorsement in his own name (see per Bayley, B. in *Smith v. Craven*, 1 C. & J. 507); and the case was one in which the bills were not accommodation bills, as

in the present case, as between the party whose signature was relied upon and the other original parties to the bill. In *Stephens v. Reynolds* (5 H. & N. 513) it was held that where A. and B. carried on business in partnership in the name of B., and A. accepted a bill in B.'s name for goods supplied to the partnership, B. was liable, though the bill was not addressed to the place where the partnership business was carried on, but a place where he carried on a separate business. There is some difficulty in understanding the report of that case, and Bramwell, B. did not agree with the judgment pronounced, but it does not assist us, because it is clear that the main ground of the decision of the majority of judges was that the bill had been accepted for goods supplied to the firm. The case of *Edmonds v. Bushell* (L. Rep. 1 Q. B. 97) was not a case of partnership, but a partnership name was used where the whole business was the business of the defendant, so that the persons advancing money on the bills were necessarily led to suppose that they were advancing money to a collection of persons in business or on the faith of a business being carried on, and not, as in this case, without anything to lead them to suppose that they were dealing with the individual only whose name appeared on the bills. The case of *Suan v. Steele* (7 East, 210) is also a case in which the bills sued upon were accepted in a partnership name properly so called, and is therefore not in point. *Vere v. Ashby* (10 B. & C. 253) is open to the same observation; so also is the case of *M'Nair v. Fleming*, cited by Lord Redesdale in 3 Dow. 229. In the last edition of Lindley on Partnership, p. 342, the learned author lays down the law as follows: "Again, persons may carry on business in partnership in the name of one of themselves, and, if they do, they will be liable on bills accepted by him in that name if it was in fact used to denote all the partners, but not otherwise." This does not mean that the liability of the firm depends simply upon the question whether the person accepting had in his own mind an intention of improperly making his partner liable on bills accepted for his own accommodation. The meaning is that the firm will be bound if the bill was given for a partnership purpose, or for what purported to be a partnership purpose, and was not known to be otherwise by the person taking the bill. This statement, moreover, only applies to ordinary trading partnerships which were *prima facie* bound by bills given by one partner in the name of the firm. The learned judge himself, having read this judgment, has authorised us to give this explanation of the passage in question. We think there is great force in Mr. Waddy's argument that if the mere fact that there is a partnership carried on in the name of one partner were to make the firm liable for all bills accepted by that partner, it would be possible for him to bind his partner to an unlimited extent for all his own private debts, unless the partner could show affirmatively facts which should disentitle the plaintiffs, who never heard of his existence, to make him liable upon the bill. It may no doubt be said it is his own fault for allowing his partner to carry on business in his own name. But this seems to us to be no ground for making the innocent partner liable for debts incurred by the guilty partner wholly for his own purposes, and not for the benefit of the partnership, in a case where the

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name used in no way invites the person advancing money on the bills to consider that there is any plurality of persons undertaking the liability, and where there are no circumstances to lead that person to suppose that he is dealing with a firm. In *Miles's Claim* (31 L. T. Rep. N. S. 9; L. Rep. 9 Ch. App. 643) James, L.J. forcibly states the law as follows: "It is the law of this country, and it has always been the law of this country, that nobody is liable upon a bill of exchange unless his name or the name of some partnership or body of persons, of which he is one, appears on the face or the back of the bill." We think that this is a true statement of the law, subject only to the qualification that in cases where a partnership is carried on in the name of an individual, without a partnership style, and it is affirmatively proved that the bill in question is one executed for partnership purposes, or with the authority of the partner, the name of the individual may have the same effect as the name of a partnership or body of persons in ordinary cases has without such proof. In America it has long since been decided and uniformly held that where the name of one partner is identical with that of the firm, the burthen of proof is upon the plaintiff to show that the bill is the paper of the firm and not of the individual partner. Parsons on Bills of Exchange (p. 131) so states the law, and it was so laid down by the Supreme Court of New York in *Oliphant v. Matthews* (16 Barbour, 610), and by Story, J. in *U. S. Bank v. Binney and others* (5 Mason, 183), who explains the law as follows: "Where the contract is made in the name of the firm, it will *prima facie* bind the firm, unless it is ultra the business of the firm. Where the firm imports on its face a company, as A. B. and Co. or A. B. and C., there the contracts made by the partners in that name bind the firm, unless they are known to be beyond the scope and business of the firm. But where the business is carried on in the name of one or two partners, and his name alone is the name of the firm, it is necessary not only to prove the signature, but that it was used as the signature of the firm by a party authorised to use it on that occasion and for that purpose. In other words, it must be shown to be used for partnership objects, and as a partnership act." (See also Story on Partnership, ss. 106 and 142.) We think that this is in accordance with the true principles of the law of agency, of which the law of partnership is a branch, and that the weight of English authority is in favour of the American view of the law. Mr. J. A. Russell, in the 11th ed. of *Chitty on Bills*, lately published by him, p. 37, states the law, as we think correctly, to the same effect. We are of opinion then that this was a case in which the plaintiffs were bound affirmatively to prove the defendant's liability on the bills in question, by proving something more than that the defendant was a partner in business with Beatson. It is not indeed argued on behalf of the plaintiffs that there was evidence in the case that the proceeds of these bills were applied for the purposes of the firm, or of such a dealing between the defendants as that an authority might properly be inferred. If we thought this was so, we should still have thought it necessary, owing to the manner in which the questions were put to and answered by the jury, to have made the rule absolute for a new trial; but, for the reasons given above, we are of opinion that there is no

evidence at all proper to be submitted to the jury in favour of the plaintiffs' contention. The bills were clearly accommodation bills for Beatson's benefit, and there was nothing on the face of them to indicate that any but Beatson was to be bound. The only evidence given as to the intention to bind Mycock was against such intention; and there was no general or special authority to Beatson to draw bills, or evidence of a mutual intention that Mycock should be so bound. Under these circumstances we feel bound, under the power given to us by Order XL., r. 10, to enter judgment for the defendant Mycock, with costs, and to set aside the judgment for the plaintiffs as against him.

*Rule absolute.*

Solicitors for the plaintiffs, *Jacobs and Vincent*.  
Solicitors for the defendant Mycock, *Leahey, Leahey, and Peace*.

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### PROBATE BUSINESS.

*Tuesday, Feb. 18.*

(Before the Right Honourable the PRESIDENT.)

In the Goods of JOHN SEE. (a)

*Administration—Executor abroad and not competent to take administration—20 & 21 Vict. c. 77, s. 73.*

*Where the sole executrix and universal legatee under a will had died in the testator's lifetime, and the next of kin was abroad, the Court granted letters of administration, with the will annexed, to the guardians of the persons next entitled in distribution.*

JOHN SEE duly executed his last will and testament on the 8th Dec. 1877, and appointed his wife sole executrix and universal legatee thereof. Testator died at 4, Princess-street, in the parish of St. Marylebone, on the 28th Nov. 1878, his wife having predeceased him.

There were two children of the marriage, one of whom, Ann Elizabeth See, also died in the lifetime of the testator, leaving three children minors. The testator's other child, John Allanby See, was in America, and could not be found. The testator's property partly consisted of a leasehold house, and an immediate representative was necessary to receive the rent and pay the ground rent.

Searle moved for letters of administration, with the will annexed, to be granted to George Thurston See, as guardian of the children of Ann Elizabeth See. There was no executor competent to take probate, and the case came within sect. 70 of 20 & 21 Vict. c. 77. He quoted

*In the Goods of Sawtell*, 2 Sw. & Tr. 448;

*In the Goods of Pine*, 17 L. T. Rep. 31; L. E. 1 P. & D. 338.

The PRESIDENT (Sir James Hannen).—I think the guardian is entitled under the 73rd section.

*Application granted.*

Solicitors: *Smith, Fawdon, and Low*.

(a) Reported by L. D. POWLES, Esq., Barrister-at-Law.

DIV.] BRANFORD v. BRANFORD AND SHEPHERD—*Ex parte* DE BOOS; *Re* SHALLOW AND INGLE. [BANK.]

Monday, July 7, 1878.

(Before the Right Honourable the PRESIDENT.)

In the Goods of WILLIAM BELL. (a)

*Executor according to the tenor.*

*Where a testator bequeathed all his real and personal estate to two persons to apply the same, "after payment of debts," to the payment of "legacies:"*

*Held, that they were executors according to the tenor, and probate granted to them accordingly.*

WILLIAM BELL, late of Yatton Lodge, Rudgwick, in the county of Sussex, deceased, duly executed his last will on the 16th Nov. 1877.

This document made no mention of executors, but gave "all my real and personal estate . . . (except what I otherwise bequeath and devise by this my will) unto William Fry Buchanan . . . and the Rev. Henry Holle Winwood, upon trust to pay and apply the rents, interest, and annual produce thereof to the following purposes." Then followed a series of bequests, and a gift of the residue, and a similar devise and bequest to the same persons, "after payment of my lawful debts and liabilities."

Searle moved for a grant of probate of the will of the testator to the two persons named therein as executors according to the tenor. He quoted

*Pickering v. Towers*, 2 Lee, 401;

*In the Goods of Fry*, 1 Hagg. 80;

*In the Goods of Adamson*, L. Rep. 3 P. & D. 253.

The PRESIDENT (Sir James Hannen).—I think that, by the true construction of the will, these gentlemen are appointed to collect the assets and pay the debts and legacies, and that therefore probate should be granted to them as executors according to the tenor.

*Application granted.*

Solicitors: Bowker, Peake, Bird, and Collins.

#### DIVORCE BUSINESS.

Thursday, April 3.

(Before the Right Honourable the PRESIDENT.)

BRANFORD v. BRANFORD AND SHEPHERD, and the QUEEN'S PROCTOR intervening. (a)

*Evidence—Private conversation between solicitor and client—Privileged communication.*

*On the Queen's Proctor's intervention, his counsel will not be permitted to ask the petitioner whether he confessed to his solicitor on a former trial that he had been guilty of adultery. Such a question is inadmissible, the communication being privileged.*

In this case the petitioner obtained a decree nisi for a divorce on the ground of his wife's adultery. The Queen's Proctor subsequently obtained leave to intervene, on the ground (*inter alia*) that the petitioner had himself been guilty of adultery.

In the course of the trial, which took place before the President and a common jury, a witness was called on behalf of the Queen's Proctor, who had acted as solicitor to the petitioner on the former occasion when the decree nisi had been obtained. It was proposed to ask him whether the petitioner had not the day before the last trial confessed to him that he had been guilty of adultery. The question was objected to by the petitioner's counsel. It was

contended on behalf of the Queen's Proctor that he was acting as a public officer, and if it were a criminal case the question would be clearly admissible, and that suits for divorce were quasi-criminal.

On behalf of the petitioner it was urged that the Queen's Proctor was only in the same position as one of the public, and that a matrimonial cause was a civil proceeding.

Gorst, Q.C. (with him Bargrave Deane) appeared for the Queen's Proctor.

Inderwick, Q.C. (with him Keogh) for the petitioner.

*Mordaunt v. Moncrieffe* (L. Rep. 2 Sc. & D. 374) was quoted in the argument.

The PRESIDENT (Sir James Hannen).—I think the question is concluded by the decision in the House of Lords, that proceedings of this kind are not criminal; and, if not criminal, then they must be civil, for there cannot be quasi-civil or quasi-criminal cases. In civil actions the rule is well established that in order to protect persons who are threatened with legal process communications between them and their solicitors with reference to these matters are privileged. The evidence therefore must be rejected.

Solicitors: for the petitioner, Saunders and Co.; Queen's Proctor.

#### COURT OF BANKRUPTCY.

Monday, June 16.

(Before the CHIEF JUDGE.)

*Ex parte* DE BOOS; *Re* SHALLOW AND INGLE. (a)

*Bankruptcy—Proof—Rejection of—Delay—Bankruptcy Rules 1870, rr. 22, 72, 73, 75, 118.*

*The Bankruptcy Rules are not imperative, but directory only.*

*A trustee does not, by allowing three months to elapse after a proof is sent in, lose his right to reject it.*

This was an appeal from a decision of the judge of the County Court of Cambridgeshire holden at Cambridge, affirming the decision of the trustee under the bankruptcy, rejecting the proof of the appellant.

Mr. Joseph Foster was the trustee under the bankruptcy of the firm of Messrs. Shallow and Ingle, ironmongers and whitesmiths, at Cambridge.

The appellant Ellen Eliza De Boos, on or about the 21st Nov. 1878, sent in to the trustee her proof of debt amounting 564*l.* 5*s.* The trustee took no notice of the proof until the 22nd Feb. 1879, when he forwarded to Miss De Boos a notice of his rejection of her claim against the estate of the bankrupts upon the ground that she was not entitled to prove for that, or any other sum, but not alleging any other reason.

Miss De Boos in an affidavit filed on the 19th Feb. 1879, in support of her proof, stated that upon searching the file of proceedings in the bankruptcy no memorandum of allowance, or disallowance of her debt had been filed by the trustee, as required by the 118th Bankruptcy Rules 1870, and that the provisions of the 75th rule had not been complied with. It was further stated, that the memorandum of rejection

a) Reported by L. D. FOWLES, Esq., Barrister-at-Law

a) Reported by A. A. DORIA, Esq., Barrister-at-Law.

[BANK.]

*Ex parte* DONNITHORNE; *Re* GREEN.

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tion of the debt was not in fact filed until the 10th April 1879. The debt for which Miss De Boos sought to prove arose in respect of covenants contained in a lease dated the 6th March 1877, and made between Miss De Boos as lessor, and the bankrupts and another as lessees. The lease was for twenty-one years from the 29th Sept. 1876, and contained a covenant that the lessees should within the first five years of the term lay out and expend the sum of 500*l.* in and about pulling down and removing certain existing buildings, and erecting new buildings in lieu thereof; there were also the usual covenants to repair and keep in repair. A sum of 64*l.* 5*s.* was also claimed for dilapidations, making a total of 564*l.* 5*s.* so covenanted to be expended upon the premises by the lessees.

At the trial before the County Court judge, the merits of the case were not gone into, but it was contended before him, on behalf of Miss De Boos, that inasmuch as the trustee had not complied with the provisions of the Bankruptcy Rules 72, 75 and 118, the debt must be taken to have been admitted. The judge, however, refused his assent to that argument, or to hold that delay in the rejection of the proof amounted to an implied admission of it, and declined to make any order. From that decision this appeal was brought.

*Francis Rosburgh, jun.*, for the appellants, contended that the words in the 72nd Bankruptcy Rule, "as soon as may be," must be controlled by rule 118, whereby the trustee is required within seven days of his allowing or disallowing a proof to file a memorandum thereof with the registrar, and that the trustee, having allowed three months to elapse before expressing any intention to reject the proof, and then rejecting it without stating any special grounds for so doing, as required by rule 72, must be held to have admitted the proof. The proper course for the trustee would have been to admit the debt, and then if he subsequently considered it to have been improperly admitted to apply under rule 73 to have it expunged. He cited

*Ex parte Kemp*; *Re Sir W. Russell*, 28 L. T. Rep. N. S. 487; 42 L. J. 2, Bank.

*Ex parte Good*; *Re Armitage*, 36 L. T. Rep. N. S. 338; L. Rep. 5 Ch. Div. 46.

*De Geo.*, Q.C. and *W. Cockerell*, for the respondent, submitted that the merits not having been gone into in the court below, the only question for decision upon the appeal was, whether a delay of three months by a trustee in disallowing a debt constituted an admittance of it. In both the cases cited, the creditor had proved and voted in respect of his debt, and besides the delay was very much longer than in the present case.

*F. Rosburgh* in reply.

The CHIEF JUDGE.—This is a case of special pleading upon a feigned issue which cannot possibly succeed, and it would be against the interest of the public generally were it to do so. There were two plain points before the County Court judge, first, whether the creditor should be allowed to prove, and secondly, the amount for which the proof should be allowed; but the issue tried before him was upon one of these points alone, and the only question before me now is whether a trustee is precluded from disallowing a debt after the lapse of three months from the time when the proof was sent in. The appellant declined going

into the merits of her proof in the court below, and therefore I have nothing to do with them. In this case a claim was sent in to the trustee, but he has not at any time admitted it to proof. Then after the lapse of three months the proof or claim is disallowed. The Bankruptcy Rules are not to be regarded as imperative, they are merely directory, and the trustee is not to be precluded altogether from disallowing a debt by not having strictly adhered to the requirements of those rules. The debt in the present case was clearly one which could not be admitted to proof without investigation; the amount of claim for dilapidations would have to be inquired into; also the covenant in the lease to lay out money in rebuilding was to be performed within a certain period of time, which has not yet elapsed. Questions might arise upon both of these claims, such as whether the right to make the claim subsists, notwithstanding bankruptcy. Other questions also would arise which could not be determined off-hand. However, as I said before, the only issue now before me is whether this proof of debt is to be admitted, three months having elapsed before it was rejected by the trustee. The cases cited on behalf of the appellant do not apply, for in both of them the proof had been admitted. In the present case that point has not been arrived at. Then the question arises, does the delay between the 21st Nov. 1878 and the 22nd Feb. 1879 constitute an admission of the debt? During that time the trustee was silent, having for aught I know investigated the claim. But without speculating upon what else he has done, he has certainly not admitted the debt; I think this claim is unreasonable, and cannot be entertained. The appeal will be dismissed with costs.

Solicitors for the appellant, *Phillips and Son*, agents for *Ellison, Burrows, and Freeman*, Cambridge.

Solicitor for the respondents, *R. Davies*, for *C. Turner*, Cambridge.

Monday, June 23.

(Before the CHIEF JUDGE.)

*Ex parte* DONNITHORNE; *Re* GREEN. (a)

*Bankruptcy—Appeal—Time for entering—Notice to registrar—Delay—Evidence to explain—Practice—Bankruptcy Act 1869, sect. 71—Bankruptcy Rules 1870, rr. 143, 144, 147.*

*Where the order appealed from was made on the 21st April, and notice of appeal was duly left and entered with the registrar of appeals, but no notice of the appeal was served upon the registrar of the court appealed from until the 19th May:*

*Held, that the appeal was out of time, and could not be heard.*

*The court will not admit evidence not before the court below in order to explain the delay.*

THIS was an appeal from the decision of the judge of the County Court of Wiltshire, holden at Salisbury, annulling the adjudication of the bankrupt.

Arthur Green, of Salterton, near Salisbury, was, on the 22nd June 1878, adjudicated a bankrupt upon the petition of the appellants, Arthur Bampton Donnithorne. Neither at the first meeting, nor at the adjourned meeting of creditors,

(a) Reported by A. A. DORIA, Esq., Barrister-at-Law.

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was there a quorum, the petitioning creditor alone being present at both meetings.

On the 9th Aug. 1878 the registrar of the County Court reported the fact to the court for its direction under sect. 84 of the Act.

An application by the bankrupt on the 12th Aug. 1878 to annul the adjudication upon the ground of irregularity was dismissed with costs. Nothing further was done in the matter until the 14th April 1879, when the bankrupt again gave notice to the registrar of an application to annul the adjudication and dismiss the petition for want of prosecution; and on the 21st the order appealed from was made, whereby it was directed that the adjudication should be annulled for want of prosecution.

An appeal against this order was lodged on the 12th May, but no notice of motion was served upon the registrar of the County Court until the 19th May. The appeal sought to have it declared that so much of the order of the 21st April 1879 as provided "that the adjudication of the bankrupt should be set aside for want of prosecution" might be reversed or varied.

*De Gez*, Q.C. for the appellant.

*Winslow*, Q.C. took the objection that the appeal was out of time. Although the appeal was lodged with the registrar of appeals within the time specified by rule 143, yet no notice was given to the registrar of the court below, in accordance with rule 144, until the 19th May. As no trustee had been appointed by the creditors, the registrar must be regarded as trustee. The object of the rule was that all parties interested should have due notice of the proceedings; and, as was said by the Master of the Rolls in *Ex parte Viney, Re Gilbert* (L. Rep. 4 Ch. Div. 794; 36 L. T. Rep. N. S. 43), it is of no use for the appellant to keep his appeal notice in his pocket. The present case was clearly governed by

*Re parte Silence, Re Silence*, L. Rep. 7 Ch. Div. 258; 37 L. T. Rep. N. S. 676.

*De Gez*, Q.C. and *Bigham* submitted that the appeal was in time. The notice of appeal was lodged in due time, and the deposit duly paid. The 144th rule directs that upon entering an appeal a copy of the appeal notice shall be sent "forthwith" by the appellant to the registrar of the court appealed from, and the notice having been sent to the registrar some seven days after the entering of the appeal, it comes clearly within the meaning of the word "forthwith." In the course of the argument it was proposed on behalf of the appellant to read an affidavit of the clerk to the appellant's solicitors for the purpose of explaining and accounting for the delay in not having served the notice of appeal upon the registrar; but, the affidavit not having been mentioned in the order appealed from, the Chief Judge refused to admit it. His Lordship said, by the 147th rule, no new evidence is to be received upon an appeal unless the Court of Appeal shall so direct, and the only exception to that rule is where affidavits are produced in order to explain what took place before the court below.

*De Gez*, Q.C. submitted that the 147th rule only applied to affidavits going to the merits of the case, and that affidavits filed for the purpose of explaining the circumstances which occasioned the delay in giving the notice of appeal were not meant to be excluded.

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The CHIEF JUDGE, after ruling that the affidavit could not be read, proceeded to give judgment.—This case is one which is as clear as can be. When the case was before the registrar of the court below, it appeared, from the affidavit stating the facts, that since the 12th Aug. in the preceding year no steps had been taken in the bankruptcy by any one, and I do not understand that there is any dispute between the parties as to the dates, or any suggestion of their being mis-stated. The present appears to me to be a case in which the strictest application of the Bankruptcy rules ought to be resorted to. It appears that only one creditor has proved his debt and was present at the first, and subsequently at the adjourned meetings. More than twelve months elapsed from that time before any steps were taken in the matter, and during all that time the creditor did not move hand, or foot, or finger. The bankrupt was therefore, in my opinion, perfectly justified in preferring his claim against the petitioning creditor to have the adjudication annulled for want of prosecution. The words in the 144th rule are, that a copy of the appeal notice shall forthwith be sent to the registrar of the court below. That rule has not been complied with, and the person most interested in knowing whether an appeal is about to be brought or not has no notice of it until several days after the time limited for giving the necessary notices. The objection, in my opinion, is perfectly valid, and ought to prevail. This appeal must be dismissed as being out of time.

Solicitors for the appellant, *Wild, Browne, and Wild*.

Solicitors for the respondent, *H. Montagu, for Geo. Nodder, Salisbury*.

## House of Lords.

Tuesday, April 29.

(Before the LORD CHANCELLOR (Cairns), Lords SELBORNE and GORDON.)

TURNER v. CRUSH AND ANOTHER. (a)

APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Inclosure Act—Private right of way—Effect of allotment.*

*The General Inclosure Act (8 & 9 Vict. c. 118) enacts (sect. 68) that "all private or occupation ways over, through, and upon the lands to be inclosed which shall not be set out" by the valuer as provided by the section "shall be for ever stopped up and extinguished."*

*The appellant purchased lands, "together with all ways, &c.," from H. At the time of the purchase an inclosure of the waste of the manor in which the lands sold were situated, was in contemplation, and H. expressly reserved to himself the allotments to which he would be entitled under the award in respect of the lands so sold. He afterwards sold the allotments to the respondents. The occupiers of the lands sold to the appellant had for forty years, and down to the time of the award under the Inclosure Act, enjoyed a private right of way over the part of the waste comprised in the respondents' allotment, but the award did not set out any way over that allotment.*

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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*Held (affirming the judgment of the court below), that the effect of the award was to extinguish the right of way previously enjoyed by the occupiers of the appellant's land.*

THIS was an appeal from a judgment of the Court of Appeal (Brett, Cotton, and Thesiger, L.JJ.), reported in 39 L. T. Rep. N. S. 192, and 3 Ex. Div. 303.

The action was brought by the respondents against the appellant in the County Court of Essex for damages for a trespass on the plaintiff's land. The defence set up was a right of way over the land in question.

The facts are fully set out in the reports in the court below, and shortly in the head-note above.

The County Court judge decided in favour of the plaintiffs, assessing the damage at 10*l*, and he stated a case for the opinion of the Exchequer Division, under sect. 14 of stat. 13 & 14 Vict. c. 61. Upon argument, Kelly, C.B. was in favour of reversing the judgment of the County Court judge, and Huddleston, B. in favour of affirming it. The judgment accordingly stood affirmed, and the defendant obtained leave to appeal to the Court of Appeal. Upon the case coming on, the question was raised whether the appeal would lie since the passing of the Appellate Jurisdiction Act 1876, sect. 20; but the court decided that it had power to hear the appeal (38 L. T. Rep. N. S. 595), which was heard on the merits, and affirmed.

This appeal was then brought to the House of Lords.

The question at issue between the parties was whether certain paths claimed by the appellant over certain land, formerly part of the waste of a manor, which had been included in an allotment made under the General Inclosure Act (8 & 9 Vict. c. 118) were extinguished by the award made under that Act, not having been set out by the valuer under the provisions of sect. 68.

*Philbrick, Q.C. and H. Tindal Atkinson* appeared for the appellant.

*Grantham, Q.C. and Croome* for the respondents.

At the conclusion of the arguments, their Lordships gave judgment as follows:

THE LORD CHANCELLOR (Cairns).—My Lords, it is necessary in this case to observe what exactly it was which happened in the year 1869, when Mr. Hardcastle sold these lands, which were purchased by the appellant. At that time Mr. Hardcastle was the owner of these lands, and of others in the same neighbourhood. He was not the lord of the manor, but in the neighbourhood of these lands were the wastes of the manor, and among others was the waste along the side of the road in the vicinity of his lands. In that state of things he put up the lands subsequently bought by the appellant for sale by auction, but he reserved to himself expressly the allotments which were to be made of the waste lands under the proceedings then going on for the purpose of inclosure. Notice was, therefore, taken of these proceedings on the face of the sale, and the purchaser was warned that allotments were expected, and that, therefore, if allotments came to be made in respect of the lands offered for sale, these allotments would not pass to the purchaser, but be retained by the vendor. Now, all that was authorised by the General Inclosure Act (8 & 9 Vict. c. 118). That Act enables persons who expect allotments to be

made to them to sell their lands, reserving to themselves the right to the allotments when they come to be made. The purchaser, therefore, was warned that the allotment was in progress, and was put on his guard to be vigilant as to any rights in which he might be interested in respect of that allotment. In that state of things the appellant bought the lands to which I have referred, and subsequently, the allotment having gone on, and having been completed, an award of the pieces of land, the wastes of the manor, intervening between the road and the lands thus sold, was made to persons who claimed under Mr. Hardcastle, and are the present respondents. But before I refer to the allotment I must direct your Lordships' attention to the form of conveyance made to the present appellant. That conveyance passed the property sold to him with the general words, "together with all lands, buildings, yards, gardens, orchards, walls, fences, hedges, ditches, timber, and timber-like trees, woods, underwoods, ways, paths, passages, drains, watercourses, lights, easements, privileges, advantages, and appurtenances, to the said farm lands and hereditaments hereby conveyed, or any of them, belonging or in any wise appertaining, or held, used, or occupied therewith, or known, accepted, or reputed as part, parcel, or member thereof." The County Court judge finds in the special case that, at the time when the conveyance which contained these words was executed, there were track ways, or private roads over a piece of waste to which I have referred, intervening between the road and the lands sold to the appellant, which were used for the purposes of this land; and he finds that these trackways had been so used for upwards of forty years. I think it better therefore to take it that these were valid private rights of way at the time of the conveyance. Beyond all doubt, therefore, as it seems to me, the conveyance carried to the appellant the land which he purchased, and the ways appurtenant to that land, and among other ways those private ways over this waste piece of ground. But then it did that subject to whatever might be the legal consequences of the inclosure then in progress. If that inclosure went off, if it came to nothing, or if the piece of land to which I have referred was not inclosed, then of course the right of the appellant to his private ways would remain unaffected. But if it came to pass that these pieces of waste land were inclosed, as happened under the allotment, then it appears to me that both the appellant and Mr. Hardcastle, or any person claiming under them, must be bound by whatever is the legitimate consequence of the inclosure which was then proceeding under the provisions of the Act of Parliament. Now, what says the Act of Parliament on the subject? It says (sect. 68) that it is to be the duty of those who are making an inclosure to take up the question of private roads over the lands which they are inclosing, and the valuer is to "set out such private or occupation roads and ways through the land to be inclosed as he shall think requisite for the use of the persons interested in such lands, or any of them." And if there be any question whether these roads extend to other lands, that seems to be removed by another enactment. Then it provides for the expenses of setting out those private ways; and it provides that "after such setting out as aforesaid all private or occu-

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pation roads or ways over, through, and upon the lands to be inclosed, which shall not be set out as aforesaid, shall be for ever stopped up and extinguished." These are the words of the Legislature, and are as clear and distinct as any words can be; and unless there was some special contract between Mr. Hardcastle and the appellant at the time that he purchased, which bound Mr. Hardcastle not to take advantage of the provisions in this Act of Parliament, or not to allow the title which this Act would give him to be set up as against the appellant, then it appears to me that the operation of the Act is absolutely unfettered so far as Mr. Hardcastle is concerned, and that the appellant has no right to complain of any consequences of that operation. It was for him, knowing that the inclosure was in progress, to set up any case he could before the valuer and commissioners as to the necessity of private roads across these pieces of waste in question. He took no such proceeding, and therefore must, as it seems to me, be held to have remained content with the other means of access he possessed to the land he bought. I can find nothing whatever in the transaction which took place which binds Mr. Hardcastle, or which can be said to bind the respondents taking under him, not to avail themselves of whatever are the legal consequences from the proceedings in the matter of the inclosure. That is the whole case. I must say that I think the judgment of the Court of Appeal is entirely right, and I therefore move your Lordships that the appeal be dismissed with costs.

LORD SELBORNE.—My Lords, I agree for the reasons given by Huddleston, B. in the Exchequer and by Thesiger, L.J. in the Court of Appeal. The words "all ways" are ordinary general words, and as soon as the deed of 1869 was executed these particular rights of way passed to the appellant as legally appurtenant to the land conveyed, and not otherwise, exactly in the same way as such rights of common over the part of the waste now in question, or over any other parts of the wastes to be inclosed, also passed to him thereby. Now, as to all these other rights over the surface of the wastes, it would be inconsistent with the nature and object of the proceedings under the Inclosure Act to suppose that the reservation between these parties of the allotments to be made under these proceedings to the vendor, could possibly have the effect intended by it if all these rights were to remain in the purchaser's favour, as if there had been no inclosure. If so,

cannot see any ground whatever for making a distinction as to rights of way which were equally liable to be extinguished by the process of allotment. The appellant obtained at the time of the conveyance, and by virtue thereof, everything which then belonged to the land, but he did so subject to the pending inclosure, and to the rights which Mr. Hardcastle might acquire in respect of any allotments, wheresoever situate, which might be made to him. If he desired to save the rights of way over this part of the waste which passed to him by the conveyance, as against any title which either Mr. Hardcastle or anyone else might acquire thereto by allotment, it was for him to take the necessary steps thereto for his own protection, as much as if he had been the original owner of the purchased land, and not a purchaser from Mr. Hardcastle. The appellant's argument treats the general words in the deed of conveyance as if

they had been a contract or covenant by Mr. Hardcastle to grant new easements over any land which he might acquire by allotment under the Inclosure Act; but for such a construction there is, in my opinion, no ground.

LORD GORDON concurred.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellant, J. Scarlett.

Solicitors for the respondents, Duffield and Bruty.

## Supreme Court of Judicature.

### COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Friday, May 16.

(Before JAMES, BRETT, and COTTON, L.JJ.)

GEE v. MAHOOD. (a)

*Will—Construction—Annuity—Direction to set apart investments to produce annuity—Deficiency of income—Claim of annuitant to have deficiency made up out of corpus.*

*A testator empowered his trustees, at such times as they should think proper, to sell his real and personal estate, and directed them to invest the proceeds, and "to set apart a sufficient portion of such investments as will produce the annuity of 1200L, which I bequeath to my wife for her life, payable quarterly," such annuity to be reduced to 150L in case of his wife's second marriage. "And as to the entire residue of my said trust estate, and also as to that part thereof set apart in favour of my said wife, after her death, and as to such part thereof as shall be no longer required to be set apart in consequence of her second marriage," in trust for his children. The testator's estate proved insufficient to produce the annuity of 1200L:*

*Held (reversing the decision of Hall, V.C.), that the widow was entitled to have the deficiency raised out of the corpus of the trust estate.*

THIS was an appeal from a decision of Hall, V.C.

The hearing in the court below is reported in 39 L. T. Rep. N. S. 90, where the facts of the case and the Vice-Chancellor's judgment are fully set forth.

The Vice-Chancellor having held that the testator's widow was not entitled to have the deficiency raised out of the corpus of the trust estate, an incumbrancer on her annuity appealed from his decision.

*Farwell* for the appellant.—This is a legacy of an annuity to the wife, and not a gift of a life interest in a particular fund, and therefore the deficiency must be made good out of the fund. [JAMES, L.J., referred to *Baker v. Baker* (6 H. of L. Cas. 616).] In *Baker v. Baker* there was no gift of an annuity as here, but simply a direction to set apart a sum of money which should be sufficient to pay an annual sum, and to pay the income of the sum so set apart to a person for life. "That is not a gift to an annuitant of a sum of money specifically mentioned," as Jessel, M.R. says in *Re Mason* (L. Rep. 8 Ch. Div. 411, 414), "but

(a) Reported by H. PRAT, Esq., Barrister-at-Law.



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It is a direction to set apart a capital sum, and what is given, and what the person to whom the income is to be paid takes, is the income of that capital sum which accrues due during his life, and nothing else. That is the true explanation of the decision in *Baker v. Baker*." The present case is more like *Wright v. Callender* (2 De G. M. & G. 652), where the testator directed his executors to stand possessed of his personal estate upon trust to invest a sufficient portion thereof in the funds to produce an annuity of 2l. per week to be paid to one of his sons, and after that son's decease the sum invested was to fall into the residue, and the sum invested proving insufficient, the annuitant was declared entitled to have the deficiency made up out of the capital. As James, L.J. said in *Re Tootal's Estate* (L. Rep. 2 Ch. Div. 628, 633), "an annuitant must be paid in preference to the residuary legatee, who can take nothing till all the legatees and annuitants have been paid in full." *May v. Bennett* (1 Russ. 370), *Mills v. Drewitt* (20 Beav. 632), *Perkins v. Cooke* (2 J. & H. 393), and *Bright v. Larcher* (3 De G. & J. 148) are all in favour of our contention that the deficiency should be made good out of the fund. [BERR, L.J.—The Vice-Chancellor says that the present case is undistinguishable from *Tarbottom v. Earle* (11 W. Rep. 680.) There the fund set apart for payment of the annuity was kept distinct, and did not fall into residue; but at all events that case is not binding upon the court of appeal even if it be undistinguishable.

*W. Pearson, Q.C. and Vaughan Hawkins*, for the Carmichael family, adduced the same arguments as in the court below, laying particular stress upon the gift over of that part of the estate "set apart in favour of my said wife," as distinct from the residue.

*Maidlow* for the trustee.

No reply was called for.

JAMES, L.J.—I cannot bring myself to doubt what the meaning of this will is. The testator says, I direct my trustees to invest sufficient of my estate to produce an annuity of 1200l. a year, which I give to my wife. There is no magic in the position of the words; it is the same thing whether he says, I give it or I direct it to be invested. With regard to the meaning of the words of this will, it appears to me to be quite clear that the testator did intend to give 1200l. a year to his wife for her life, and then, in order to provide for that 1200l. a year for life, which is a general legacy—I do not know why it is called an annuity, or annual or yearly sum; it is a legacy of 1200l. a year for so many years as she shall live that the testator has given to his wife—in order to provide for the legacy of 1200l., he directs his executors and trustees to sell the estate as they shall think fit, and from time to time, as they shall think fit, to make investments and change those investments. But in the meantime he says she is to have the annuity, and the annuity is to be paid to her on the first quarter day after his death; and in a particular event that annuity is to be reduced to another annual sum, which he still calls an annuity, of 150l. to be paid to her. There is an actual express gift to her of an annuity of 1200l. a year, and that is what is to be paid to her from the first quarter-day after his death. Now, Mr. Pearson's argument is this: We are to say that

that does not mean 1200l. a year to be paid quarterly, but it means that she is to have the income of the investments, which may not be made for years, that she is to have nothing but the income of investments which are to be made as the trustees shall find it convenient in the proper and due exercise of their trust, to be obtained by realising the estate. That is not construing the words of the will, but is introducing an entirely new phrase into the will without any ground for it. The testator does not say, "I direct my trustees to make an investment so as to produce 1200l. a year, and which shall produce 1200l. a year, and I give her the income of that investment." Nothing of the kind is said. The question is whether we are to put those words into the will which we do not find there. I am of opinion that it is an unreasonable thing to suppose that the testator intended that his wife should have nothing until the investment was made, and that if the investments produced more at some time she was to have more than 1200l. It seems to me that on that part, which is the foundation of the argument, Mr. Pearson's contention fails. The testator gives a plain gift of 1200l. a year for as many years as his widow shall live, that is to say, a pecuniary legacy of that character. But it is said that from the language of the will one sees it was intended that she should only have the income. I see nothing in the gift over. I cannot bring my mind to doubt, with all deference to the Vice-Chancellor, that it is really an entirely residuary gift. The testator thought the residue would be payable at different times. First, he said, when you invest, invest enough to produce 1200l. a year for my wife, and set apart 5000l. for my daughter. Having done that, there may then be a residue immediately available, and I give that surplus to my residuary legatees, and when the residue falls in I give that which falls in also to my residuary legatees. It seems to me that we should be following the words and not the spirit of the bequest if we held that the gift of the part set apart was not included in the residuary gift. It seems to me that this case must be determined on that which Mr. Pearson said was the question, viz., on the construction of the will. Is it a gift of an annuity or yearly sum of 1200l. out of the estate, or is it only a gift of the income of particular investments, or a gift of the income of particular investments to be limited from time to time to 1200l.? I cannot doubt it is a gift answering the description Mr. Pearson has given of a pecuniary legacy measured by the number of years she shall live, multiplied by 1200l.

BERR, L.J.—The question in this case, it seems to me, may be thus stated. Is the wife entitled for life to an annuity of 1200l. to be procured, if possible, out of the whole estate, or is she entitled for life to the income of an investment which is directed to be made when and if that investment is once made? Mr. Pearson wishes us to decide, or says we ought to decide, that all that she is entitled to is the income of an investment. Now, in the first place, the terms which are used in the will are that she is to have an annuity, and the terms are not that she is to have the income of an investment. If you take the simple terms which are used in the will in their ordinary sense, it is an annuity, and it is not the income of an investment. Then it is said that

if you look at other parts of this will you must see that what was intended was the income of an investment; but then, when Mr. Pearson was pressed with the result of such a construction, he was obliged to admit that, inasmuch as here the trustees are given a discretion as to the time and mode of the investment, if they did not for a considerable time invest, the wife would not be entitled to anything until they did invest. That seemed to me to be a fatal admission, because it is not only an incomprehensible idea on the part of the testator, who certainly was providing for his wife, but it seems to be inconsistent with the terms of the annuity which is granted; as was pointed out by my Lord, at all events for the first quarter there is a direction that she is to be paid on the first quarter day after the death of the testator. It would be impossible almost that the investment should be made by that time, and that of itself seemed to me to be a fatal admission in this case. But then Mr. Pearson was obliged further to admit that, if his construction be true, and if the trustees were anxious to make an investment, which at the time of the investment produced 1200*l.*, if afterwards the income from the investment was to increase the wife would be entitled to more than 1200*l.*, and to the full income of the investment, whatever in the result it might turn out to be. That seems also to me to be quite an incomprehensible idea on this will. Therefore, Mr. Pearson's interpretation, if carried out, shows two results, both of them, as it seems to me, practically absurd, and one of them inconsistent with the other terms of the will. Those are tests to show that the ordinary language is to be followed, and that this is to be held to be an annuity, and not to be the income of an investment. Now, other tests have been proposed on one side and on the other, which have been applied in other cases to other wills, or, in other words, authorities have been cited in order to enable us, if possible, to construe this will. It seems to me that they are cited with the usual effect, that is to say, they are inapplicable to this will. This decision will probably go into the reports, and it will hereafter be attempted to be applied to other wills with the same effect as those have been attempted to be applied to this, that is to say, it will afford no help till another will is found practically in the same terms as this.

COTTON, L.J.—Of course, it is important, if there is any general rule laid down applicable to any particular construction, that the court should not depart from the general rule; but I can hardly see that there is any general rule of construction laid down applicable to the present case, except this, possibly, that where a legacy of an annuity is given then *prima facie* the annuitant is entitled to have that made good, not only out of income, but out of capital, although there may be words sufficient to cut down the claim of the annuitant to a claim against the income only. And there is another general rule, that residuary legatees, that is to say, persons taking as residuary legatees, cannot take anything until all legacies have been provided for. Now, what has been pointed out in the present case by Mr. Pearson, who has pressed us with every argument that could have been brought forward, is this, that in this case the widow stands in the position of tenant for life of a particular fund set apart out of the estate, which fund is given after her death or second

marriage as a fund separate from the residue, and not as a part of the residue. The first question we have to consider is whether originally the gift to the widow is a gift of an annuity to be provided for in a particular way, if that way is sufficient, or whether there is a gift to her of the annual produce of the fund which is directed to be set apart. Now, I quite agree with Mr. Pearson that, in considering a will, you ought to deal with it as with any other document, to see what the words are, and unless there is anything plainly incongruous in so doing you must put on the words their fair grammatical construction. Now, what are the words of the will? "On further trust to set apart a sufficient portion of such investments as will produce the annuity of 1200*l.*" That is the direction. Then what is the gift to the wife? "Which I bequeath to my said wife for her life, payable quarterly," on every quarter day, "the first payment to be made and become due on the first of such days as shall happen after my decease." Now, what is given there to the wife is this. If you take it grammatically and strictly as really a short expression, it is this: "And this annuity of 1200*l.* a year I bequeath to my said wife." So that if you take it grammatically and expand the relative by substituting the antecedent, it is really a gift not of the annual produce of a fund which has not been mentioned—not annual income or dividend arising from a fund which has never been mentioned—but only that antecedent which has been mentioned, the annuity of 1200*l.* a year. If you not only depend on the substitution of the antecedent for the relative, but if you look at the rest of the sentence, it all points to the gift of the annuity as such, that is to say, an annual sum as a legacy, and not as tenant for life of a particular fund. It is given to her as a gift for life, but she is not made tenant for life of the produce of the fund, because the testator directs the first payment to be made to her on the first quarter day after his death. I agree that if you once ascertain that what is given to her is not an annuity, but a tenancy for life of an ascertained investment, no alteration can be produced in the gift to her by any direction made as to the time when it is to be paid to her. But when it is doubtful and ambiguous if it is a gift to her, and as to when she is legatee and how she is legatee, then you must look at all parts of that which constituted her legatee. Then again, when you come to the subsequent part of the gift to her, where the reduction is made in the event of her second marriage of the amount which is to be paid to her, it is treated throughout as an annuity, and not a payment or gift to her as tenant for life of an ascertained fund. So that, in my opinion, it is a gift of an annuity, with a direction as to how the annuity is to be provided for. Then, again, when you come to the persons who are contending that they can take something before the annuity is provided for, the question is, are they residuary legatees? Do they take as residuary legatees, or do they take what is directed to be set apart to provide for the annuity as a specific sum known to be intact and handed over to them as intact? Although there is a gift of an annuity, yet there may be expressions in the will that show that what the testator has provided as a fund for payment of the annuity is to be handed over to those who are to take after the death of the annuitant

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the fund as intact and entire as it was when it was invested. In my opinion, all that is given to Mr. Pearson's clients (except that which is given to one of them as a pecuniary legatee) is given to them as residue. It is true that there is a reference, and an unnecessary reference, to the fund set apart to provide for the annuity given to the widow; but I quite agree with James L.J. that that is what is often done, namely, a gift immediately of what remains after setting apart what the testator had directed and contemplated would be set apart, and then a statement that the persons to whom the gift is made must wait for the enjoyment of it until it can be seen whether the 1200*l.* a year has been provided for by means of the fund directed to be set apart and retained. They cannot come into the enjoyment of the fund set apart till the death of the widow, and the testator throws in the reference to that fund for the purpose of showing that it will ultimately fall into the residue, and come to be enjoyed by those who are entitled to the residue. The will, like all others, depends on the construction of its own words, and it is unnecessary to refer to authorities, but I think it right, as the Vice-Chancellor relied on the case of *Baker v. Baker* (6 H. L. Cas. 616), and the case before Stuart, V.C. (*Tarbotton v. Earle*, 11 W. Rep. 680), which he thought depended on and was the same as that case, and as Mr. Pearson has much pressed us with *Baker v. Baker*, to refer to that case. That, in my opinion, is an entirely different case from this. It was the same, however, in principle, because there on the construction of the will the Court held that the widow was tenant for life only of a particular fund, and that it was given after her death as a fund intact, and if originally set apart it remained so; and that she could have no claim on the corpus of the fund of which she was tenant for life. And the words of the will in that case, to my mind, bear that interpretation, because there was a direction to set apart such a sum of money as, when placed out or invested, would realise a clear annual sum of 200*l.* a year. There was no fund for an annuity to the widow, but only a direction, that "they shall permit and suffer my said wife to receive and take such dividends, interest, or annual income" of the fund "by two equal half-yearly payments for and during the term of her natural life, provided she shall so long continue my widow, but not otherwise. And from and after her decease or second marriage, whichever shall first happen, it is my will and I further declare that in case I shall die without issue the said trustee shall stand possessed of the said principal or trust moneys, and the stocks, funds, or securities in or upon which the same shall be invested upon trust for himself," and certain other persons therein named. Although those persons afterwards took the residue this was not given as part of or in conjunction with the residue, or under the clause which gave them the residue, but as a separate and distinct fund. That was a clear case of a tenancy for life of a fund, the amount of which was to be ascertained by the annual income which it would produce, and it was not in any way a case of a gift of an annuity to the widow, and certainly it was not a case of a gift subject to an annuity or a gift to persons who were to take the fund as residuary legatees.

*Appeal accordingly allowed. Costs of all parties to come out of the estate.*

Solicitors: *Stokes, Saunders, and Stokes; Hicks and Son; Billinghurst and Wood.*

Friday, March 21.

(Before JAMES, BAGGALLAY, and BRAMWELL, L.JJ.)

Re THE LONDON AND CALEDONIAN MARINE INSURANCE COMPANY. (a)

*Company—Voluntary winding-up—Dissolution of company—Companies Act 1862, ss. 142, 143.*

*When a company has been voluntarily wound-up under the 142nd section of the Companies Act 1862, and has been dissolved under the 143rd section of the Act, the court has no jurisdiction to make a compulsory winding-up order, unless the dissolution can be impeached on the ground of fraud.*

*Decision of Jessel, M.R. affirmed.*

*Re Pinto Silver Mining Company (38 L. T. Rep. N. S. 336; L. Rep. 8 Ch. Div. 273) explained and followed.*

THIS was an appeal from a decision of the Master of the Rolls, refusing a petition for the winding-up of the above company, which was presented under the following circumstances:

On the 9th April 1868 the company passed a special resolution for a voluntary winding-up, and liquidators were appointed. The resolution was afterwards duly confirmed.

On the 2nd Sept. 1875 a meeting of the contributories was held, and a resolution was unanimously passed that the liquidators should be empowered to take and set apart the sum of 3362*l.* 17*s.* 9*d.* for the purpose, during the existence of the company, of paying such claims and liabilities as might be presented and allowed, and if any balance should remain, then for the purpose of remunerating themselves for their services in the liquidation.

On the 3rd Feb. 1876 a general meeting of the company was held in accordance with the provisions of the 142nd section of the Companies Act 1862, for the purpose of passing the final accounts of the liquidators, and a resolution was passed adopting and confirming the balance-sheet and accounts; and on the 10th Feb. 1876 a return of such meeting having been held was made to the Registrar of Joint Stock Companies, in accordance with the provisions of the 143rd section of the Act.

On the 15th April 1878 the Association for the Protection of Commercial Interests in respect of Wrecked and Damaged Property presented a petition that the company might be wound-up by the order of the court, claiming to be unpaid creditors of the company under the following circumstances:

In 1866 the company insured the cargo of the ship *Isabel* for various sums amounting to 29,142*l.* On the 5th Aug. 1866 the ship was lost under circumstances which induced the company and other underwriters to refuse to pay the insurance and to institute proceedings in the court in Havana to have the policies set aside as fraudulent.

The association (the petitioners in the present case) undertook to conduct the proceedings on behalf of the underwriters, and the company gave them an undertaking to bear their share of the costs and expenses.

The proceedings proved very lengthy and costly.

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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and the petitioners incurred costs amounting to over 8700*l.*, besides which they were liable to a claim by their agent for commission, the amount of which was disputed.

In Aug. 1866 the company paid the petitioners 94*l.* 10*s.* on account of their share of the costs, and in Feb. 1873 the liquidators paid them a further sum of 94*l.* 10*s.*

The liquidators deposed that at the time of paying this sum they thought it was a final payment, and did not know that the petitioners had any further claim upon the company, and that in Feb. 1876, when the general meeting was held for passing the final accounts, and when the return was made to the Registrar of Joint Stock Companies, they did not know of any proceedings being prosecuted in the courts in Havanna with regard to the policies of insurance of the *Isabel*, and that they had then received no claim from the petitioners.

The petitioners alleged that the sum still remaining due to them from the company for their share of the costs and expenses of the proceedings in Havanna was 618*l.*

The petition was heard on the 25th March 1878, before the Master of the Rolls, who held that, as the petition did not in any way impeach the dissolution of the company on the ground of fraud, he felt himself bound by the decision of the Court of Appeal in *Re The Pinto Silver Mining Company* (38 L. T. Rep. N. S. 336; L. Rep. 8 Ch. Div. 273), which he considered precisely in point, to dismiss the petition, and he accordingly dismissed it with costs.

From this decision the petitioners appealed.

*Chitty, Q.C.* and *Millar* for the appellants.—In *Re The Pinto Silver Mining Company* the court of Appeal did not decide that it had no jurisdiction to make a winding-up order after a company had been dissolved under the 143rd section of the Act. It was not necessary there to decide the question of jurisdiction, for the decision proceeded on the acquiescence of the petitioner in the dissolution. The 142nd section of the Act provides that “as soon as the affairs of the company are fully wound-up the liquidators shall make up an account showing the manner in which such winding-up has been conducted and the property of the company disposed of; and thereupon they shall call a general meeting,” &c. Therefore it is a condition precedent to the dissolution that the affairs of the company have been fully wound-up. And that condition cannot be said to be fulfilled while there is a debt unsatisfied of which the company had notice. And the property of the company cannot be said to have been disposed of when a large sum, as in the case here, has been left in the hands of the liquidators to meet future claims. If we must make out a case of fraud, we say that the attempt, by using the machinery of a dissolution, to get rid of a debt of which the liquidators had notice, is fraud in the legal sense of the word. They also cited

*Re Westbourne Grove Drapery Company*, 39 L. T. Rep. N. S. 30;

*Re Crookhaven Mining Company*, 15 L. T. Rep. N. S. 169; L. Rep. 3 Eq. 69;

*Re Haylor Granite Company*, 13 L. T. Rep. N. S. 515; L. Rep. 1 Ch. 77;

*Buckley on the Companies Acts*, 3rd ed. p. 265; *Companies Act 1862*, sub-sect. 107, 131, 133.

*Davey, Q.C.* and *Buckley*, for the liquidators, were not called upon.

*JAMES, L.J.*—I have considered this case, and it seems to me that really in all respects it is governed by the decision of this court in *Re The Pinto Silver Mining Company* (38 L. T. Rep. N. S. 336; L. Rep. 8 Ch. Div. 273). When a point has been decided by the court once, it ought not to be reargued on immaterial distinctions, which practically make no more difference to the real subject-matter of the decision than the difference between the names of the parties to the suit; and what was decided in *Re The Pinto Silver Mining Company* was this, that we could not put upon the words “as soon as the affairs of the company are fully wound-up” the construction contended for, namely, to make that a condition precedent and construe it to mean that everything had been done which was to be done. In that case we were of opinion that we could not put such a meaning upon those words as to hold that, if there was a single asset outstanding or a single debt unpaid, the affairs of the company were not to be considered as wound-up. Take the case of an insolvent company—insolvent because there were contributories at that time insolvent who had not paid their calls, so that the thing could not be wound-up; or suppose that on the winding-up of affairs there had been judgment recovered against a hundred contributories, and a return made by the sheriff that they had no assets, and that he could not levy the amount of the judgments, yet at the same time the judgments remained unsatisfied judgments against insolvent contributories of an insolvent company, it would be absurd to say that as long as a thing of that kind continued the company could not be fully wound-up. Or suppose an outstanding liability under a lease under the covenants in which the company might be liable any number of years afterwards, can it be said that the company could not on that account be fully wound-up? We must put some practical, sensible meaning on the words “as soon as the affairs of the company are fully wound-up,” and in my opinion they mean as far as the liquidator can wind them; that is, when the liquidator has done all that he can do to wind-up the company, when he has disposed of the assets as far as he can realise them, got in the calls as far as he can enforce them, and paid the debts as far as he is aware of them, and has done all that he can do in winding-up the affairs, so that he, as liquidator, has nothing to do, that he is and ought to be *functus officio*. Then it is his duty to call a meeting, to give in his account of the affairs of the company, and then make a return to the Registrar under the Act. We thought that was the meaning of “fully winding-up,” and that that was how a company is practically wound-up as far as it can be done. That being so, we thought there was no power to go behind the dissolution, except in the case which I suggested as a possible case—the case of absolute fraud, which the company could be fixed with. If there were a case of that kind, then very likely the whole thing might be set aside—that is to say, it might be clear that the whole winding-up was null and void—and then on proper proceedings the company would be restored again to its position, subject to the claims of creditors and contributories, or any other persons who might have rights to enforce or equities to be adjusted in relation to the company; but in the

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absence of any case of fraud of that kind, it seems to me that the court has no jurisdiction whatever. It is said that there may be some hardship in refusing a winding-up order. I doubt whether there could be any hardship on the creditors, because there was nothing to prevent any creditor at any moment during the existence of the company from presenting a petition for a compulsory winding-up on the ground of any debt due to him, or taking proceedings to obtain an injunction—as mentioned in one of the cases—to prevent the completion of the winding-up and the dissolution of the company. More than that, if there had been any miscarriage on the part of the liquidator—if the liquidator had knowingly and wilfully left unpaid a debt of which he had full notice—I am not prepared to say that that liquidator is not himself personally answerable to the creditor who has been unpaid, because the liquidator has violated a plain statutory duty, which is to pay the debts *pari passu* out of the assets of the company as they come into his hands. The creditor might say, "You had assets out of which you ought to have paid me; you did not pay me, and I have my remedy against you for that." Certainly, if the liquidator were guilty of anything amounting to *mala fides*, dishonesty or fraud—I do not care which word you use—if he were guilty of anything like that, or any persons were his accomplices in that *mala fides*, dishonesty or fraud, he and those persons who were his accomplices could be made liable, no doubt, for the consequences to the person defrauded thereby. I am therefore of opinion that the decision of the Master of the Rolls was quite right, and that the appeal must be dismissed with costs.

BAGGALLAY, L.J.—Although I was not a member of the court at the time when the case of *Re The Pinto Silver Mining Company* was disposed of, I am of course bound by that decision; but I desire to express my entire concurrence in the principles enunciated by the several judges in that case. Whilst thinking that, after the period of three months limited by the Act has expired, the court had no jurisdiction to order a winding-up, I agree with that which was said by James, L.J., to the effect that where there was some particular reason why that which was done should be undone by reason of fraud; for instance, as far as regards the proceedings, there would be some way of setting aside those proceedings. And I not only agree with the principles enunciated in *Re The Pinto Silver Mining Company*, but also in the application of those principles to the facts of the case before the court, and I am entirely unable to distinguish the facts of this case from the facts of that case.

BRAMWELL, L.J.—I am of the same opinion.

*Appeal accordingly dismissed with costs.*

Solicitors for the appellants, *Waltons, Bubb, and Walton.*

Solicitors for the respondents, *Phelps, Sidgwick, and Biddle.*

Wednesday, March 19.

(Before JESSEL, M.R., BAGGALLAY and BRAMWELL, L.JJ.)

Re PRICE; PRICE v. PRICE. (a)

*Extinguishment of debt—Husband's debt vested in wife—Business in chambers.*

A. gave a bond to B. to secure repayment of a certain sum by instalments with interest, and made default in payment of the instalments during the life of B. In 1869 B. died, having by her will bequeathed all her property to A.'s wife, who proved the will, and passed the residuary account without including therein the amount of the bond. A., in right of his wife, took possession of the bond and all the other estate of B. In 1871 A. died intestate, and his widow took out administration to his estate, and passed his residuary account without including the amount of the bond. In an action brought by some of A.'s next of kin to administer his estate, his widow and administratrix claimed to prove for the balance of principal and interest due under the bond.

Held (reversing the decision of Hall, V.C., in chambers), that there had been a reduction into possession of the bond by the husband A., and consequently the bond debt was extinguished.

Quere, whether a question of this importance, and raising so nice a point of law, ought to be dealt with in chambers.

This was an appeal from a decision of Hall, V.C., made in chambers.

In 1865 John Price gave to his wife's mother a common money bond to secure a sum of 2413l. due from him to her, which was to be paid by instalments. [In Sept. 1869 the wife's mother died, having by her will bequeathed the residue of her estate to her daughter, whom she appointed her executrix. During the mother's life the husband of her daughter had not paid the instalments under the bond regularly, though he had paid something on account of them. The wife, with the assent of her husband, proved the mother's will. In Sept. 1870 the residuary account of her estate was passed at Somerset-house. This account treated the estate as then clear of debts, and the residue as then belonging absolutely to the wife, and on this footing legacy duty was paid upon the sum which was stated to be the clear residue. But the account made no mention of the bond, or of the debt due upon it. After the death of the mother the bond came into the possession of the husband, who thenceforth kept it locked up in a desk of his, but he did not cancel it by cutting off the seal, or in any other way. He, however, made no payment in respect of it after the mother's death. He converted to his own use all the rest of the residue of her estate. In April 1871 he died intestate. In an action which was brought by two of his next of kin against his widow and administratrix for the administration of his estate, the widow carried in a claim for the sum which remained unpaid on the bond, as being a debt still due from the estate to the estate of the mother.

The chief clerk, by his certificate, allowed her to claim as a creditor for that amount. The plaintiffs applied by summons to vary the certificate in this respect, and the application was refused by Hall,

(a) Reported by E. S. ROOME, Esq., Barrister-at-Law.

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V.C., on the ground that there had been no reduction into possession of the bond by the husband.

On appeal,

*W. Pearson, Q.C., and Dryden*, for the plaintiffs, contended that there was clearly a reduction into possession. When Mrs. Price administered the estate of her mother, the debt disappeared entirely, and was treated as extinguished both by the husband and wife. They relied upon

*Wankford v. Wankford*, 1 Salk. 299;  
*Aitchison v. Dison*, 23 L. T. Rep. N. S. 97; L. Rep. 10 Eq. 589;

*Nicholson v. Drury Buildings Estate Company*, 37 L. T. Rep. N. S. 459; L. Rep. 7 Ch. Div. 48.

*Mulligan*, for other next of kin, having liberty to attend the proceedings in chambers, asked that they might be allowed their costs.

*Dickinson, Q.C. and Langworthy*, for Mrs. Price, contended that the bond was not extinguished, but only suspended during her husband's life, and that she was therefore now entitled to claim as a creditor against his estate. On this point they relied upon *Richards v. Richards* (2 B. & Ad. 447). At all events the instalments accruing subsequently to his death were recoverable, because, as they did not become due until after the determination of the coverture, they were not capable of being reduced into possession:

*Fitzgerald v. Fitzgerald*, L. Rep. 2 P. C. 83.

[JESSEL, M.R.—Your argument must go this length, that if the husband had destroyed the bond, the debt would not have been released. BRAMWELL, L.J.—If this bond had belonged to the married woman in her own right, the debt would have been extinguished, although by statute the penalty in a bond is only a security for payment of the instalments. The exception in *Fitzgerald v. Fitzgerald* does not apply where the penalty has been forfeited.] The husband could not be treated as having possessed himself of the reversionary instalments. They referred to

*Baker v. Hall*, 12 Ves. 497;

*Carey v. Goodings*, 3 Bro. C. C. 110;

*Melbourne v. Ewart*, 5 Term Rep. 381;

*Cage v. Acton*, 5 Ld. Raym. 515.

JESSEL, M.R.—The facts of the case may be very shortly stated. The husband was indebted to his wife's mother on a money bond to secure the payment of a sum by yearly instalments. Default was made in the mother-in-law's lifetime. She made a will appointing her daughter sole executrix and residuary legatee, and died in Sept. 1869. The daughter proved the will, and the husband survived the mother-in-law nearly nineteen months. The husband and wife, in Sept. 1870, passed the residuary account, from which it appeared that the estate was clear, that the debts had been paid, and that the residue belonged to the wife, and duty was paid on that footing. Some time after the death of the mother, probably immediately after it, the husband obtained possession of the bond, and kept it till his death, and he converted to his own use all the rest of his mother-in-law's property. The residuary account makes no mention of this bond. The husband died in April 1871, his wife took out letters of administration, and now claims in the capacity of legal personal representative of her mother to prove against his estate on the bond. The question is, whether the debt had not been extinguished, and I am of opinion that it had. An obligation in

which the husband is obligor and the wife obligee is destroyed by marriage. That is the general rule of law. But exceptions have been introduced on the ground that this must not affect the rights of third parties. Where the wife is entitled to the bond as legal personal representative, and the extinguishment of the obligation would prejudice creditors or legatees, it will not take place. But where the wife, besides being personal representative, is residuary legatee, and it is shown that the debts and legacies have been paid, there, the reason for the exception ceasing, the exception ceases. That was the view of Lord Holt. It is said that there is not here sufficient evidence that the debts had been paid and the estate cleared. I think there is most cogent evidence that that was the case. The husband and wife passed a residuary account which showed that the debts had been paid, and the husband applied the residue to his own purposes, treating it as a clear fund. There is no circumstance in favour of the wife except that the husband did not destroy the bond by going through the form of cutting off the seal, but that I do not think material. It appears that the Vice-Chancellor decided this question in chambers. I cannot but express my surprise that a question involving the right to so large a sum, and raising so nice a point of law, should have been decided in that way. It is quite contrary to my own practice. I think that, if such matters are to be dealt with in chambers, the judge may as well conduct the whole of the business of his court in chambers. I am of opinion that the judge of first instance already takes quite enough business in chambers, without hearing cases of such magnitude and importance there. I should have thought that this was clearly not a case to be heard in chambers. A question as to costs has also arisen. Besides the next of kin who are plaintiffs, some other next of kin obtained leave to attend the proceedings in chambers. They appear by counsel upon this appeal and ask for their costs, but I cannot allow them. I desire to state most emphatically that the court will not encourage the attendance of a number of persons on the taking of accounts simply for the purpose of getting costs. Each interest ought to be represented by one solicitor only. The widow will pay the plaintiffs' costs, but not the costs of the other next of kin.

BAGGALLAY and BRAMWELL, L.JJ. concurred.

Solicitors: *J. Whitehouse; Le Riche and Son.*

Monday, April 7.

(Before JAMES, BAGGALLAY, and BRAMWELL, L.JJ.)

Re MAXWELL; STIRLING-MAXWELL v. CARTWRIGHT. (a)

Administration—Jurisdiction—Domicile—Scotch assets—Limited administration.

Where the Probate Division of the High Court of Justice had granted a general probate of the will of a testator domiciled in Scotland, the Chancery Division made the ordinary administration decree, without limiting the decree for administration to the assets in England, and notwithstanding the opposition of a majority of the executors.

THIS was an appeal from a decision of Hall, V.C.

(a) Reported by E. S. ROCHES, Esq., Barrister-at-Law.

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The testator in the action, Sir William Stirling-Maxwell, of Pollock and Keir, was a domiciled Scotchman, and he made, while in Venice, a holograph will which was unattested, but was validly executed according to the law of Scotland.

By this will he appointed six persons his executors and the guardians of his infant sons, whose mother was dead, and to whom he left nearly the whole of his property.

The testator had real estate of great value in Scotland, and personal estate there of the value of 200,000*l.*; he had no real estate in England, and his personal estate there consisted chiefly of a leasehold house, furniture, and library in Grosvenor-street, and was under 20,000*l.* in value. Confirmation of the will was obtained by the executors in Scotland, upon production of which, probate of the will in the ordinary form was granted to them by the Probate Division of the High Court of Justice, purporting to give them administration of all and singular the personal estate and effects of the deceased, the amount thereof being sworn under 20,000*l.*

This action was then brought by one of the six executors, as the next friend of the infant sons of the testator, against the other five executors, in order to have his personal estate administered, and proper provision made for the maintenance and education of the infant plaintiffs.

In the court below,

*Dickinson*, Q.C. and *J. D. Davenport*, for the plaintiffs, asked for the ordinary administration decree, without limiting it to the English personality.

*Hastings*, Q.C. and *Macnaghten*, for the defendants, contended that the decree for administration ought only to extend to property in England. The suit was entirely unnecessary, as due provision had already been made for the custody and education of the infant plaintiffs; but if it was to continue, then, as the testator was a domiciled Scotchman, and all his real estate, and by far the larger portion of his personal estate, was in Scotland, any decree for administration to be made in this action should be limited to the English personality, which alone could come to the executors by virtue of the English probate; and after payment thereof of the English debts, the balance of the English assets should be applied by the executors in accordance with the law of Scotland. On this point they referred to *Preston v. Melville* (15 Sim. 35; 8 Cl. & F. 1). The administration of the personal estate of a domiciled Scotchman belonged to the Scotch courts, and it was shown by *Enohin v. Wylie* (6 L.T. Rep. N. S. 263; 10 H. of L. Cas. 1) that the English court had no jurisdiction to deal with anything but the assets locally situate in England, and it administered them by satisfying the English claims, and by handing over the surplus to the Scotch representatives. Where the court had administered personal estates, parts of which had been locally situated abroad, it had always been by consent, and there was no case in which it had done so against opposition. They also cited,

*Cook v. Gregson*, 23 L. T. Rep. N. S. 86; 2 Drew. 286.

*Dickinson*, Q.C. in reply.—The grant of letters of administration, in the case of *Preston v. Melville*, was limited to the personality in England, and the decree was limited accordingly; while in *Enohin v. Wylie* the question was whether the

English courts would construe a foreign will, and that case was no authority for limiting the decree for administration to the English assets in a case where general probate of a Scotch will had been granted by the English court.

HALL, V.C.—It appears to me that in this case the decree must be the ordinary decree, and not limited to the property in England. The only authority cited in favour of the proposition that the decree should be so limited is the case of *Preston v. Melville*; but there the grant of letters of administration was in terms limited to the personal estate in England—that is not so in the present case, the grant here being general. I cannot say that in the course of my experience I ever met with a decree so limited. The court is constantly dealing with estates, portions of which are situate out of this country, and I never saw a decree limited to assets in England. The court always, according to my experience, makes the ordinary decree. I say nothing as to what the court would have done in case there had been proceedings in Scotland, and anything in the nature of a decree had been made there. I see no reason why there should not in this case be the ordinary decree for administration. The decree must be so framed, and there must be an inquiry as to the outstanding personal estate in the usual form.

On appeal by the defendants,

*Graham Hastings*, Q.C. and *Macnaghten* for the appellants.

*Dickinson*, Q.C. and *Davenport* for the plaintiffs.

JAMES, L.J.—It appears to me that the decree of the Vice-Chancellor is entirely in accordance with the established practice of the court. Decrees are made constantly in these courts with respect to the assets of an Englishman domiciled abroad, or the assets of a foreigner domiciled abroad, if a person is found here who is accountable for them, or who is within the jurisdiction of the court. I am not aware it was ever laid down that there ought to be a limitation of the suit in that respect. You do not know what the domicile is. Very often there is an inquiry in the general administration suit what the domicile is. If the suit is to be limited in the way suggested, you ought first of all to have an inquiry as to the domicile before you institute a suit at all. No doubt it may be very expedient that in the course of the suit regard should be had to that which was done in Scotland; but, at present, no suit has been instituted in Scotland. It is not that the executors apprehend a suit, or anything of that kind, because one of the executors, who has as much right to be heard as any of the others, is himself the party instituting the proceedings here. If there are any persons in Scotland who desire to have the assets administered there for the purpose of dealing with the Scotch assets—with the assets on which the court can lay its hands there and apply them for the benefit of the persons who are in Scotland, and who desire the protection of the Scotch court—there will be no difficulty in doing it, and this court would of course adopt those proceedings according to the necessities and exigencies of the case. We cannot expect there will be any such suit. Two cases have been referred to which are illustrations of the principle I was suggesting. In *Preston v. Melville*, there was a Scotch administration of



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a general property, but there happened to be some property in England which alone was subject to an English probate, and one of the persons there, not one of the Scotch trustees, or the person who was legal personal representative in England, said: "I will not hand over that property bodily to the Scotch trustees. What they ask is to have it administered by them under the direction of the court. I am here. I desire, so far as it is necessary for the determination of all questions connected with the English property, that it should be settled here and the balance handed over." It was the same thing in the Russian case, *Enokin v. Wylie*. There happened to be property in England which was subject to an English probate, and it was ultimately given to the person who was the Russian executor; and in that suit the English people having claims upon the property, as they said, and having the assets here in the English funds, and subject to the control of the English court, asked the court to prevent the executor from removing that property until their rights were determined. That was decided in their favour, and it was decided upon the principles of law applicable to Russian domicile. All that was done there was to deal with the property subject to the law of this country. If it had been done in Scotland the court would have recognised the right to deal with it. It is not for us to anticipate that there will be any such proceedings in Scotland, and in the absence of that there seems to be no reason why the decree should not go exactly in the common form.

BAGGALLAY, L.J.—I am of the same opinion. My experience is exactly in accordance with that of the Vice-Chancellor, who says that he never saw a decree limited to assets in England under such circumstances as these, and that according to his experience the ordinary decree was the proper one.

BRAMWELL, L.J.—I concur.

Solicitors: *Freshfield and Williams; Campbell, Reeves, and Hooper.*

#### SITTINGS AT WESTMINSTER.

Nov. 22, 1878, and May 30, 1879.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

DREW v. NUNN. (a)

*Principal and agent—Sale of goods—Lunacy of principal—Revocation of agent's authority—Rights of third parties dealt with by agent.*

*The lunacy of a principal, if so great as to render him incapable of contracting for himself, puts an end to an authority to contract for him previously given to his agent.*

*Where a principal holds out an agent as having authority to contract for him, and afterwards becomes lunatic, he is liable on contracts made by the agent after the lunacy with a person to whom the authority has been so held out, and who had no notice of the lunacy.*

THE claim was for a sum of 99l. 4s. 4d., the price of boots and shoes supplied by the plaintiff to the defendant on the order of the defendant's wife.

The action was tried before Mellor, J. and a jury at Westminster, and the following facts were proved in evidence or admitted:—

The defendant with his wife and family came to live in London early in the year 1872.

From that time until Dec. 1873, the defendant at different times dealt with the plaintiff on credit. In Aug. 1872 defendant paid by cheque a bill then owing to the plaintiff for goods supplied on his wife's order.

In Nov. 1873, the defendant being in a weak state of health, authorised the agent of his property, which was chiefly in Ireland, to pay the whole of the defendant's income to his wife, and he also authorised and allowed her to draw cheques at discretion.

In Dec. 1873 the defendant became lunatic, and was placed in a private asylum, where he remained until April 1877.

Between April 3, 1876, and June 27, 1877, the defendant's wife ordered the goods from the plaintiff, the price of which was claimed in this action, and the plaintiff supplied the goods to her on credit. The plaintiff was ignorant when the goods were so supplied that the defendant had become lunatic, or that he had given his wife authority to receive his income. The defendant recovered his reason, and the plaintiff brought this action.

In June 1877 the defendant revoked the authority he had given to his wife to draw cheques, and he had before that time prohibited his agent from paying any income to her.

On these facts Mellor, J. refused to leave to the jury the question whether or not, when the goods were supplied, the income received by the wife was sufficient for the maintenance of herself and her family, and directed the jury to find for the plaintiff for the amount claimed.

The Court of Appeal, on the application of counsel for the defendant, made an order *nisi* for a new trial on the ground of misdirection.

*Willis, Q.C. (B. O. B. Lane with him)* now showed cause.—The judge was right in directing the verdict for the plaintiff on the facts. The first question is, was the authority given to Mrs. Nunn to pledge her husband's credit determined by his subsequent lunacy? It is submitted that it was not. Here there was an express authority given to the wife to bind her husband, so that the decision in *Jolly v. Rees* (15 C. B. N. S. 628; 33 L. J. 177, C. P.) has no application. Insanity differs from marriage or death. Contracts entered into with an insane person may be enforced against him where no advantage is taken of his incapacity, and where the consideration is wholly or in part executed. This is clearly so where the person who contracts with the lunatic is not aware of his incapacity:

*Molton v. Camroux*, 2 Ex. 487; and in error, 4 Ex. 17; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170.

It would seem also from *Brown v. Joddrell* (3 C. & P. 30) (see ruling of Lord Tenterden), *Dane v. Viscountess Kirlwall* (8 C. & P. 679), and *Niell v. Morley* (9 Ves. jun. 478) (see judgment by Sir William Grant at p. 481), that when no advantage is taken of the lunatic a contract may be enforced against him, even if the person seeking to enforce it knew of the lunacy. It is not necessary for the plaintiff to contend that a lunatic can appoint an agent; only that lunacy does not revoke an appointment made previously. In *Stead v. Thornton* (note to *Stephens v. Badcock*, 3 B. & Ad. 357) the decision turned upon the lunatic having been incompetent to appoint any agent. So also in *Tarback v. Bis-*

(c) Reported by W. APPELTON, Esq., Barrister-at-Law.

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pham (2 M. & W. 2) Parke, B. (at p. 8) says that a lunatic cannot appoint an agent to state an account. In *Reed v. Legard* (3 Ex. 636) the husband was held liable for goods supplied to his wife during his lunacy, but the goods were necessities, so that case is not in point. In *Davidson v. Wood* (32 L. J. 400, Ch.) a lunatic husband's estate was made liable for money borrowed by the wife in order to remove her husband to an asylum and to provide for her own maintenance in the neighbourhood, but those expenses again were "necessaries" and the wife's separate property was insufficient to meet them. It would be otherwise where the wife's allowance was sufficient:

*Richardson v. Dubois*, 21 L. T. Rep. N. S. 635; L. Rep. 5 Q. B. 51; 39 L. J. 69, Q. B.

In Story on Agency, 7th edit., sect. 481, the general rule of law is stated as to revocation of authority, but the author appears to be doubtful whether the agent's authority is revoked by the lunacy until that has been established by inquiry. See authorities referred to in sect. 481. See also the cases collected in the note to *Manby v. Scott* (2 Smith's Leading Cases, 7th edit. 479 et seq.). The second question is whether, if lunacy does revoke the agent's authority, a person is bound by the revocation to whom the agent has been previously held out as having authority, and who has no notice of the lunacy? Here the defendant's wife, before the lunacy, was expressly held out to plaintiff as having authority to do acts of a certain nature for her husband. It is submitted that the defendant's lunacy did not affect his liability on the contracts of his wife made with the plaintiff. All transactions with respect to the property of a lunatic would be stopped, if the authority of his agent, existing when the lunacy commenced, to act for him was wholly put an end to until a committee was appointed. It must be taken no doubt that the wife's authority was limited to the extent of the express authority given to her before the lunacy. Apart from any question of insanity it is clear that an express revocation of the agent's authority does not discharge the principal from liability unless that revocation is made known to the person dealt with by the agent.

*Horne Payne* for the defendant.—In order to support the last contention put forward for the plaintiff there should have been a finding of the jury that the defendant held out his wife to the plaintiff as having express authority to pledge his credit. No question having been left to the jury on this point, it is not open to the plaintiff. It is admitted that there was some evidence of holding out, because it was proved that in Aug. 1872 the defendant paid the plaintiff by cheque for some of the goods ordered by the defendant's wife. On the first point it is submitted that lunacy operates as an absolute revocation of the agent's authority. A lunatic's marriage is void if, when the ceremony took place, he was so insane as not to understand the nature of the act he was performing:

*Browning v. Reane*, 2 Phill. Ecc. Cas. 69; see also *Howard v. Digby*, 2 Cl. & Fin. 634.

The cases of

*Stead v. Thornton*, reported in note to *Stephens v. Badcock*, 3 B. & Ad. 357; and *Tartuck v. Bispham*, 2 M. & W. 2,

are distinct authorities to show that a lunatic is incapable of appointing an agent. So also in Story on Agency, 7th edit., sect. 6, in dealing with

the question as to who may delegate authority to agents it is said, "Idiots, lunatics, and persons not *ex jure* are wholly incapable." With the exception of the above there are no authorities on the matter. The inconvenience would be extreme if the agent's employment might continue after the lunacy of his principal. The contracts of lunatics are void or voidable according to whether or not they have been executed or partly executed. But if the lunacy does not revoke the agent's authority, that authority never can be revoked during the whole period of the lunacy, and will extend to the making of contracts after the principal has become insane. Lunacy is analogous to the cases of death or marriage, which clearly revoke the authority:

*Blades v. Free*, 9 B. & Cr. 167;

*Smout v. Ilbery*, 10 M. & W. 1.

*Cour. adv. vult.*

May 30. — The following judgments were delivered:

BRETT, L.J.—This appeal has stood over for a very long time, and principally on my account. It has stood over in order to enable me to make every effort to decide the question involved upon some satisfactory principle. But, speaking only for myself, I have found the doctrine applicable the most difficult and least to be satisfactorily explained doctrine I have ever met with in the English law. The case was tried before Mellor, J.; the action was to recover the price of boots and shoes supplied by the plaintiff to the wife of the defendant. The facts, which are beyond dispute in the case, are that the defendant when sane gave to his wife an absolute authority to act for him, and held out to the plaintiff that he had given his wife that authority. I think it must be taken as a fact, also, that afterwards the defendant became, not merely insane, but so insane that he could not have contracted with anyone on his own behalf, and so insane that if he had attempted to make a contract with anyone it would have been seen at once by the other person that he was too insane to do so. Under these circumstances, the wife ordered the goods from the plaintiff, who had no knowledge of the lunacy, and was supplied with them by him. The husband was confined for a time in a lunatic asylum, but afterwards recovered his reason. After his recovery the present action is brought against him, and he defends it on the ground that the mandate or authority which he gave to his wife was put an end to by his subsequent insanity, and therefore that he is not liable for the price of the goods, and the plaintiff cannot recover it from him. Mellor, J., left no question to the jury as to the extent or amount of the defendant's insanity, but directed them that the plaintiff was entitled to recover. It must be taken, therefore, I think, that insanity existed to the extent I have stated. Two questions arise on these facts: first, does the insanity of the principal put an end to the mandate or authority given to the agent? i.e., does it cause that mandate or authority to cease? One would have thought that question would have been found to have been decided on clear principles. But when authorities are looked into—and I have looked into Story on Agency, the Scottish and French authorities, Pothier and others—no satisfactory conclusion can be arrived at. If it is held that such insanity as existed here did not put an end to the agent's authority, then clearly the plaintiff is entitled to

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recover upon that ground. But, in my opinion, such insanity does put an end to the agent's authority. It is admitted that there are certain changes of status which do put an end to it. For instance, if a woman be the principal who appoints an agent, and she marries, her marriage puts an end to the authority previously given to that agent. The bankruptcy of a principal puts an end to it. His death puts an end to it. The reason why the authority is then put an end to is stated to be because the person who otherwise would be liable has become a different person from the giver of the authority. In marriage the husband, in bankruptcy the assignee, in death the heir or executor, would be substituted for the person who gave the authority. If the change of the person who gave the authority were the real ground upon which we had to proceed, then the lunacy of the principal would not put an end to the authority until that lunacy was established by a commission having been held, so that the committee would be liable instead of the lunatic. But I do not think that is a satisfactory principle upon which to base the rule. In bankruptcy the assignee, although he is a different person, is bound to carry out some contracts made by the bankrupt. In the case of death the executors are the representatives of the dead person for many purposes. I therefore think the true ground is that the agent, being a person appointed when the principal could act for himself to act for him, when the principal, according to law, cannot act for himself, the person who represents him ceases to be able to act for him. If that is so, where there is lunacy like that in the present case—lunacy so great that the person who suffers from it has no contracting mind, and cannot contract or do any legal act for himself for want of mind—then, as the principal at law is incapable of doing the act for himself, his agent cannot do it for him. Such lunacy therefore puts an end to the authority of the agent, and if any agent acts for his principal after such lunacy is brought to his knowledge, that agent would be doing a wrongful act both to the principal and the person with whom he dealt, and he would be liable to any person with whom he so acted for the principal. If therefore this lady, the defendant's wife, who must be taken to have known of her husband's lunacy, had acted with anybody to whom her previous authority had not been held out, I should say she would be acting as her husband's agent wrongfully, although being a married woman it would be difficult to make her liable. I should say the contract would be void as against the supposed principal, and the agent in such a case would himself be liable for misleading an innocent person. But then comes the question, who is liable where the authority of the agent has been held out to a person dealt with who had no notice of the principal's lunacy? An agent may be held out as having authority in one of two ways. Where some instrument such as a power of attorney asserts that he has the authority, then the fact of the power of attorney having been previously given is an assertion that the person holding it may act for the principal, and if the agent is acted with within that authority the principal is bound. The other way in which an agent may be held out as having authority is where something has been done as in the present case, where the principal whilst sane has held out that his agent had authority to act for him in

particular cases, and then the principal having become insane, and the agent knowing of the lunacy, nevertheless acts with a third person as though the authority continued. What is the consequence? It seems to me that a person who deals with the agent without knowledge of the principal's lunacy has a right so to deal, and that the lunatic is bound by having held out the authority of the agent. It is difficult to state what are the grounds upon which this principle rests. It is sometimes said that the right depends on contract. I cannot see it. It is also put on the ground of estoppel. It is somewhat difficult to see how in strictness there can be an estoppel. It is also said that the right depends upon representations made by the principal upon which a person with no notice to the contrary is entitled to act. There is an elaborate note in *Story on Agency* by the editors of the 7th edition in which they say the principle is to be defended on the ground of public policy. It is said by others to be in aid of rendering effectual business transactions. To my mind the better way of stating the ground is, that it is because of a representation, made by the principal when he was sane and could make it, to an innocent party upon which the latter has a right to act until he knows of the lunacy. Supposing there is no lunacy, but a principal holds out a person to be his agent and then of his own accord withdraws the agency. As between the principal and the agent the right to bind the principal has ceased, and then the agent does a wrongful act by acting with a third person as though the authority continued; nevertheless if the agent has been held out as having authority to the third person, and the latter acts with the agent before he has received any notice of the authority having ceased, the principal is still bound upon the ground that he made representations upon which the third person had a right to act, and cannot retract from the consequences of those representations. It is true that if the principal becomes lunatic he cannot himself give notice to the third person of the agency having ceased, and he may be an innocent sufferer from the wrongful act of the agent. But so is the other; and it is a principle of law that where it is a question which of two innocent parties shall suffer, that one must suffer who caused the state of things upon which the other has acted. Therefore, in my opinion, although the lunatic recovers his reason, he cannot, after his recovery, any more than if he had never been a lunatic, say that an innocent person who acted on representations made before lunacy had not a right to do so. A difficulty, no doubt, arises in stating a general principle applicable to such cases as these; but, for my own part, although it is not necessary to decide the question to-day, I should think that the same rule would apply in the case of the principal's death as of his lunacy; and that, if representations made by a person during life were acted upon after his death by an innocent party without any knowledge of the death, the principal's executors would be bound. On these grounds, therefore, although the authority was put an end to by the defendant's lunacy, and the agent had no authority to deal with the plaintiff, I nevertheless think that the plaintiff can recover, because representations were made by the plaintiff whilst sane to the defendant, upon which the plaintiff was entitled to act until he had notice

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of the lunacy, and no such notice was given to him.

BRAMWELL, L.J.—I am of the same opinion. I desire to add a few words to what has been said by Brett, L.J., in whose judgment I entirely agree. The defendant in this case must be taken to have told the plaintiff, or represented to him that the defendant's wife was his agent to contract debts with the plaintiff in the way of his trade, and that the plaintiff might continue to deal with her on the responsibility of the defendant. That is the effect of what has been found in this case. It is quite clear when such an authority as this is given that it continues until it is revoked, and notice of the revocation is given to the person who has been told that he may deal with the agent. That is the general rule, but then it is said that it does not apply where the revocation is not intentional but arises by reason of the principal's insanity. Why? It may be a hardship on the person who gives the authority, but it is much harder on the person who acts on that authority without notice of the revocation. Insanity is not a privilege so as to give the person who suffers from it a benefit at the expense of the other; it is a disability which no doubt ought not to be allowed to affect the insane person more than is necessary. I therefore think that there is no reason why a case like this should be taken out of the general rule to which I have referred, and indeed it would be most alarming if it were. The person who had been told that he was the agent might continue so to act most innocently—with the utmost *bona fides*; he might not know of the lunacy, or, if he did know, might think the best thing for the lunatic was to continue the agency: yet in all these cases, if the argument for the plaintiff was rightly founded, he would be liable to pay over again for the goods to the principal, or to make good any mischief which had happened to the person with whom the agent had acted. With respect to what the reason of the rule is, I do not like to lay it down with much peremptoriness. It seems to me like the case of a guarantee where a person says, "Supply goods to A. B., and I will pay for them until I revoke the authority." It seems to me that the thing is in the nature either of an agreement between the parties, or of a licence to the person supplying the goods. The agreement or licence continue in force until revocation. Lord Justice Brett's judgment has proceeded on the ground that the defendant was in such a state of insanity that the insanity itself was a revocation. Now I am not prepared to say every case of insanity would be sufficient to revoke the authority. I should think the insanity must be something approaching dementia in order to do so. If the defendant for instance had known that his wife was pledging his credit, I do not think that because he was insane he would have ceased to be liable. Where a man has no mind at all, of course he is incapable of contracting; he is like a dead man, he has no contracting intelligence. If that was the case here, I think the judgment of the court below may be well supported on the ground relied on by Brett, L.J., and should be affirmed.

BRETT, L.J.—Cotton, L.J. agrees with the conclusion to which we have come. He does not wish to pledge himself to any opinion as to whether or not the authority was in fact put an end to in this

case, or whether or not it can be put an end to in like cases until there has been a commission of lunacy. As to the holding out of authority he thinks that there is a contract between the person making the representation of authority, and the person to whom it is made; that that contract exists until notice of revocation, and that the principal is bound by the acts of the agent until such notice has been given. He wishes his judgment to be put on the ground that in this case the former contract had not been put an end to, and that the defendant is therefore bound. I wish for myself to add that if there was any question as to the extent of the defendant's insanity it should have been left to the jury. In argument, however, it was admitted that in fact the defendant was in such a state of lunacy that he could not contract himself. Mere weakness of mind would not bring the case within the rule I have laid down.

Order discharged.

Solicitor for plaintiff, A. E. Copp.

Solicitor for defendant, Blake.

May 7 and 13.

(Before BRAMWELL, BAGGALLAY, and THRENGER, L.JJ.)

HIORT AND ANOTHER v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY. (a)

*Bailor and bailee—Trove and conversion—Wrongful delivery of goods by warehouseman—Liability—Measure of damages—Nominal damages.*

*Plaintiffs sent goods to defendants to be warehoused, and delivered to plaintiffs' order only. Defendants delivered the goods to the order of G., who was plaintiffs' agent, for some purposes, but not authorised by them to give delivery orders. A few days afterwards plaintiffs sent defendants orders for the delivery of the goods to certain purchasers who indorsed the orders over to G. Plaintiffs having been unable to obtain payment for the goods from the purchasers sued defendants for the full value of them.*

*Held (1) (affirming the decision of the Exchequer Division), that plaintiffs were not entitled to recover the full value; (2) (reversing the decision of the Exchequer Division, Baggallay, L.J. dissenting), that plaintiffs were entitled to nominal damages for a conversion of the goods by defendants.*

APPEAL from a judgment of the Exchequer Division on a special case.

The facts (so far as they are material to the questions discussed in the Court of Appeal) stated in the case were shortly as follows:—

The plaintiffs were grain merchants at Hull, and were in the habit of employing George Grimmett at Birmingham, as their agent and broker, to sell grain for them in the Birmingham district. The grain was sent from time to time to the defendants' station at Birmingham, and they had express instructions to deliver it only to the plaintiffs' order.

The course of business was for Grimmett to take samples from the grain at the station for the purpose of effecting sales, and, when a sale was effected, to communicate to the plaintiffs the buyer's name, and the quantity, quality, and price of the grain sold, and the plaintiffs would then forward an invoice, with a delivery order on the

defendants to the purchaser, who would obtain delivery of the grain from the defendants.

In June 1873 the plaintiffs discovered that on various occasions between Jan. 1872 and June 1873 Grimmett had fraudulently obtained grain from the defendants, who had delivered it to him without receiving the plaintiffs' order. He was in the habit of making sales to persons in his own employ, and pretending that sales had been effected with persons who did not exist. One of his methods was to present to the defendants orders signed ostensibly by purchasers, and indorsed by them for delivery to himself.

On the 19th Nov. 1872 fifty quarters of oats, and on the 22nd Nov. 1872 ten quarters of oats, of the value together of 79l. 3s. 1d., were delivered by the defendants on Grimmett's orders in favour of John Sheldon as to the fifty quarters, and in favour of W. J. Reeve as to the ten quarters.

On the 24th Nov. the defendants received the plaintiffs' delivery order for the above parcels of oats in favour of George Tarpley, the order being then indorsed over by Tarpley to Grimmett. Tarpley was debited in the plaintiffs' books with the sum of 79l. 3s. 1d., but has never paid it. There were several other cases in which the defendants had pre-delivered goods in a similar manner on the order of Grimmett, and subsequently received orders from the plaintiffs in favour of the persons to whom the goods had been delivered, which orders were then indorsed over to Grimmett. The value of the goods so pre-delivered for which the plaintiffs have never received payment amounted in the whole to 230l. 5s. 4d.

The plaintiffs sought to recover this sum with interest.

The Exchequer Division on these facts gave judgment for the defendants, holding that the plaintiffs were neither entitled to receive substantial nor nominal damages.

The plaintiffs appealed.

The case in the court below is reported, and the special case fully set out, 38 L. T. Rep. N. S. 424.

*Gully, Q.C.* and *H. Sutton* for the plaintiffs.—There was a conversion of the goods here by the defendants in pre-delivering them to Grimmett's order. The fact of the subsequent order of the plaintiffs arriving makes no difference: a conversion cannot be purged. If this was an action for conversion under the old procedure, there could be no defence to it. The defendants could not plead that we were not possessed of the goods at the time of the conversion, for we were. Through not acting according to their instructions, the defendants enabled Grimmett to carry out a series of frauds. They cannot now say "from what has happened since we mis-delivered the goods, the same loss would probably have taken place as if we had not mis-delivered them. If there was a conversion we are entitled to recover the whole value of the goods." [BRAMWELL, L.J.—You contracted to sell the goods to Tarpley; the defendants have done that which entitled you to maintain an action for goods sold and delivered to Tarpley. Is not that in the nature of a re-delivery of the goods entitling you to nominal damages only?] It is submitted that the rule as to re-delivery of goods in actions of trover does not apply. In such cases the onus is on the defendant to show some act of his which

has diminished the plaintiff's loss. It is not enough for him merely to say "you can recover the price from A.B." At any rate we are entitled to nominal damages for the conversion which deprived us of the property in the goods for several days. They referred to

*Isaac v. Belcher*, 7 Dow. 516; 5 M. & W. 139;

*Keen v. Priest*, 4 H. & N. 226; 28 L. J. 157, Ex.;

*Edmondson v. Nuttall*, 17 C. B. N. S. 280; 34 L. J.

102, C. P.;

*Johnson v. The Lancashire and Yorkshire Railway Company*, 38 L. T. Rep. N. S. 448; L. Rep. 3 C. P. Div. 490;

*Johnson v. The Credit Lyonnais*, 37 L. T. Rep. N. S. 657; L. Rep. 3 C. P. Div. 32; 47 L. J. 241, C. P.

*Dugdale and Russell Griffiths* for the defendants.

—This is a pre-delivery, not a mis-delivery of goods, and the plaintiffs are not entitled even to nominal damages. The defendants have done what they were bound to do. They have delivered the goods to the order of the plaintiffs. The property has passed from the plaintiffs to Tarpley and from Tarpley to Grimmett. The plaintiffs have debited Tarpley in their books with the price of the goods. A debt in respect of the goods has therefore arisen between Tarpley and the plaintiffs, and Tarpley would be estopped, as between himself and the plaintiffs' from denying that the property had passed to him. If having got a remedy against the purchaser for the price, they may now claim the full value of the goods from the defendants for a conversion, they might have obtained the value of the goods twice over. [THESEMER, L.J.—I take it that at law the verdict in an action of trover was supposed to pass the property in the goods to the defendant; that would be impossible here.] That was the case when the judgment was satisfied by the plaintiff having obtained the price of the goods.

*Gully, Q.C.* replied.

*Curr. adv. vult.*

The Court gave judgment on the 13th May as follows:

BRAMWELL, L.J.—Substantially I am of opinion that this judgment should be affirmed, and that our judgment should be for the defendants. The only misgiving I have had is whether the plaintiff is not entitled to recover nominal damages, and if so whether a judgment, which would be nominally for the plaintiffs, would not have carried costs in the court below. But to my mind no such consequences would have attached to giving the plaintiffs a farthing damages. Being of this opinion it is not necessary to labour the question of whether there ought to have been nominal damages, which is one of absolute indifference. But I may as well say why, to my mind, it is that the plaintiffs are entitled to nominal damages. Before the Judicature Act it strikes me that the plaintiffs would have shown that there was what is called a "conversion" of the goods by the defendants. The Judicature Act has not altered the law with respect to conversion; as it was before so it still is. If there would have been a conversion before the Judicature Act there was one in the present case. It is true that one of the forms of the Judicature Act—the form in the appendix to the rule—the form in lieu of the old count in trover is, that the plaintiff has been deprived of the goods; but, though the form may have been altered, the law in substance remains the same. So that we must consider whether this would have

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been a conversion before the Judicature Act. I may repeat what I have said in several cases before that I never completely understood with precision or could exhaustively say what conversion was. No doubt, when the article is actually destroyed and consumed for the benefit of the converter, that would be a conversion both at law and in the ordinary sense of the term. But conversion has grown to be something utterly unlike conversion, and it has got to signify a thing which does not exist in nature, which it is impossible exhaustively to define or describe. I could refer to several judgments in which I have been concerned where this view has been expressed. There is *Burroughes v. Bayne* (5 H. & N. 300), *Pilot v. Wilkinson* (2 H. & C. at page 81), in which these matters were fully discussed. But I think that what the defendants did here would have been a conversion before the Judicature Act, and is so still. It seems to have been held that, if a man disposed of goods (and at law he did that if he undertook delivery of property without the owner's authority to somebody not entitled to receive it), he might be charged with converting them to his own use. There was a conversion where carriers misdelivered goods; why not therefore where the misdelivery was by a warehouseman? If there was a misdelivery, and nothing else done in this case, it would certainly be a conversion; that I take to be the law, but I should be very glad to know that I was wrong in so stating it, because I believe that the action of trover and conversion has caused gross and grievous injustice. A person, who has not been injured the least in the world, whose goods remain *in specie*—in such a condition that he could if he pleased maintain an action of detinue against the persons who hold them—has been at liberty to go against some unfortunate person who had actually handed the goods from one to another, and get the whole value of the goods on the ground that there was a conversion of the goods to the defendant's own use. However, I cannot but think there was a technical conversion here, and technically also a cause of action, as it strikes me, against the defendants for breach of their duty as warehousemen in delivering the goods without authority. To my mind, therefore, the plaintiff is entitled to nominal damages, and to nominal damages only. He is entitled to nominal damages because I take the law to be this: you could not purge yourself of a conversion, and I suppose cannot now. If guilty of it you must pay some damages. But a return of the goods might be shown in order to mitigate the damages. This was the case not only where the plaintiff voluntarily took back the goods, but also where he was compelled to take them back against his will. It was the practice for a defendant sued in an action of trover or conversion to apply to the court for leave to bring the things into court for the owner to take, and in that case he went on at his peril for such damages as he had actually sustained. If he did not get substantial damages he was made to pay the costs of the action which accrued after the time the chattel was returned. It was clear therefore that a return of the goods reduced the damages to damages granted only because there had been a technical wrong to the plaintiff. Apply that rule here; the goods have been delivered to Grimmatt's order, and afterwards the plaintiffs gave an order in favour of Tarpley, and he orders the goods to

be delivered to Grimmatt, who lodges the order. Grimmatt then could not ask the defendants to deliver the goods to him, because they had already delivered them to his nominee. If he had claimed them he would have been met, and successfully met, with this, "you have had the goods, you cannot require them again." The plaintiffs could have brought their action for the price of goods sold and delivered to Tarpley, and he would have had no defence to the action, because if he said, "I never got the goods after the sale," the answer would be, "You or your nominee got them beforehand, which is equivalent to your getting them now." As was pointed out, if the plaintiffs' contention is right, the plaintiff can say in this action against the company, "The goods are mine, and you converted them to your own use," and in an action against Tarpley, "The goods are not ours, but the price is because we have sold and delivered them to you." Suppose upon Grimmatt lodging their order, which was indorsed over to him by Tarpley, the defendants had said, "Then you had no authority to give the previous order for the delivery of the goods?" and he had admitted that he had no authority, and had procured a redelivery of the goods to them, that in my opinion would have been equivalent to what has really taken place. But I do not think the question of liability depends upon the fact that at the time of action brought the property in the goods was not in the plaintiff. It is enough for him to show, in order to make out a technical cause of action, that at the time of the wrongful conversion the property was in him. It seems to me plain that the plaintiffs either cannot maintain their action at all, or can recover only nominal damages. I think, therefore, that they ought to pay the costs of this appeal.

BAGGALLAY, L.J.—I will very shortly state my view of the facts of the case before I proceed to consider the law applicable to them. There were several parcels of wheat which were delivered to the custody of the defendants to be delivered by them to the order of the plaintiffs, and to their order only. The defendants' instructions were express not to part with the grain except on the plaintiffs' order. In stating what occurred it will be necessary only to deal with the first case mentioned in par. 11 of the special case. On the 19th and 22nd Nov. the company delivered out the grain to the order of Grimmatt, who was the plaintiffs' agent for some purposes, but not for the purpose of giving delivery orders for grain in the defendants' warehouse. On the 24th an order given by the plaintiffs on which the defendants were bound to act was received by them; the order was in favour of Tarpley, and indorsed over by him to Grimmatt. The company, therefore, had done in effect by anticipation on the 19th and 22nd that which they were bound to do on the 24th; they had delivered the goods to the plaintiffs' order. In my opinion, therefore, no substantial damages can be recovered against them. As to nominal damages, I speak with very great hesitation. But I think it is a case in which there should be substantial damages or no damages at all. Possibly there might have been a claim for damages in respect of the interval between the 19th and 22nd and the 25th. But no claim whatever has been made in this action for such damages. The claim was for the full value of the grain, 230*l.* odd. As

I said before, I should feel great hesitation in dissenting on the question of nominal damages if I stood alone on it; but the matter appears to have been under the consideration of Baron Cleasby when the case was before the Exchequer Division, and he was of opinion not only that there were no substantial damages, but that there was no case for damages, and fortifying myself with that authority I am bound to say I think the judgment of the court below was right, and that judgment ought to be entered for the defendants.

THE SINGER, L.J.—I have entertained some doubt as to whether this action is maintainable even for nominal damages. But upon consideration I think it is, and for this reason; stripping the case of all accidental circumstances which are not necessary to be considered in dealing with the law applicable to it, the matter appears to stand thus: The defendants being in possession as bailees of certain goods of the plaintiffs, were bound to keep those goods until they got the authority of the plaintiffs, the bailors to deliver them. Notwithstanding that duty they delivered the goods to persons who at the time had no authority to receive them, and without any order from the plaintiffs so to do; and although it is perfectly true that delivery was made in the expectation that subsequently a delivery order would be received from the plaintiffs, which delivery order in point of fact was in a few days received, it seems to me that the previous unauthorised act whether you call it mis-delivery or pre-delivery, whether it constitutes technically speaking a conversion, or whether it constitutes only a breach of the contract of bailment, or of the duties which flow from the bailment, was a wrongful act in respect of which a right of action vested at once in the plaintiffs, and that right of action, once vested, was not divested by the plaintiffs afterwards giving that delivery order under which the defendants might have done the act which they previously had done. I think there was sufficient damage in the eye of the law to enable the plaintiffs to maintain an action for this reason, that although the complete and final dominion of the goods was not taken from the plaintiffs, at all events they were for some days deprived of the property in the goods to which property they were entitled by their contract with the defendants; and that the law presumes a legal damage in respect of that act. The question assumes a very different aspect when we come to consider what is the damage the plaintiffs have sustained. The appellants have been driven really to contend in this case, and indeed they cannot help contending, that where a bailee, being told by a person who has had dealings between the bailee and the bailor in whom the bailee may put trust, that a delivery order will be coming forward in the course of a day or two, is asked for the convenience of all parties to deliver the goods to the person in whose favour the order will be, if he does deliver them, although afterwards the order does come forward as was anticipated the bailors are entitled to recover the full value of the goods. Now the mere statement of that proposition seems to me to show that it cannot be maintained. And there is more than one answer to it. In the first place if it is said that this unauthorised act constituted a breach of the contract of bailment, or a breach of the duties which flow from the bailment, then it follows that the bailors can only recover the

damages which have flowed from the unauthorised act, which constitutes that breach of duty or breach of contract. And here it is obvious, and cannot be disputed, that no damages have really flowed from the act of the defendants. If they had not delivered those goods at the respective dates at which they were delivered, they would have been bound by virtue of the delivery order issued subsequently by the plaintiffs to have delivered those goods exactly in the same way in which, and to the same persons to whom they were delivered. The damage has not been sustained by the delivery, but in consequence of the plaintiffs selling their goods and authorising the delivery of their goods to persons who, although liable, and treated as liable by the plaintiffs down to the present time for the price of their goods, have made default in payment of that price. Now it is said that there is some magic in the term "conversion," and that the case may be put in this way. The unauthorised delivery constituted a "conversion;" the plaintiffs have never received their goods or the price of them; consequently the damage which they are entitled to receive in respect of that conversion is the full value of the goods. That argument appeared to me more specious than sound. In the first place, although no doubt, the action of trover and conversion has been surrounded by technicalities which have in some cases worked injustice, I think of late the tendency of the courts has been to treat this action in what I may term a more common sense way than it had been previously treated. Just as in other actions of tort, it has been held that persons to whom the wrong has been done can only recover the damages flowing from the wrong, so in actions of trover it has been the tendency of the courts to hold the same. I will only refer in support of my view to the cases of *Brierley v. Kendall* (17 Q. B. 937; 21 L. J. 161, Q. B.) and *Chinnery v. Vial* (5 H. & N. 288; 29 L. J. 180, Ex.) where it was held that the person whose goods have been technically speaking converted was yet not entitled to recover the full value of those goods. But if the technicalities surrounding the action of trover are relied on, then the plaintiffs here are met with one of the technical rules, or I might also say a substantial rule, which surrounds the action of trover. It is this: if a plaintiff, who sues in an action of trover, and claims to recover, does recover the full value of the goods, it follows from the verdict in his favour that the property he previously claimed, and in respect of which he is paid the full value, is, upon satisfaction of the judgment, transferred to the defendants. No doubt there are cases in which the defendants, although bound to pay the full value of the goods, may, owing to the way in which they have disposed of the goods, be made to retain the goods. But that is not the case *quoad* the person suing them. He is assumed, if he is to recover the full value of the goods, to be in a position to convey or transfer to the defendants the full dominion and property in those goods so far as regards any act of his own. If that be so how stands the matter here? There was an act of conversion which gave a right of action, and subsequent to that act of conversion a transfer, and a valid transfer of the property in the goods from the person who afterwards elects to bring an action of trover to some other person, who was entitled to hold the goods, and who on the other hand was bound to pay the price of the goods



CHAN. DIV.]

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to the plaintiffs. Then they clearly had no dominion over these goods, and no property in them which they were able to transfer to the defendants upon the verdict being satisfied, except the property which they possessed between the time of the act of unauthorised delivery and the time when they did authorise the delivery—in other words, when they transferred the property to the third person. Therefore it appears to me to follow, from the ordinary rules touching the action of trover, that they had no right to recover any damages but damages for the deprivation of what I may call the control of the goods for that period which I have mentioned. But, inasmuch as it is admitted that during that period they really sustained no damage in the matter, it follows that they can only recover a verdict in the action for nominal damages. That being so, and inasmuch as the parties really have stated the special case, and have come down to the hearing upon that special case, for the purpose of trying the substantial question as to which of the parties shall bear the consequences of Grimmer's frauds, and inasmuch as it is held now that the plaintiffs themselves must bear the consequences of those frauds, it seems to me to follow that they ought also to bear the costs of the action in which they have substantially failed.

*Appeal allowed, and order appealed from varied to the extent of entering judgment for the plaintiffs for one shilling.*

Solicitors for the plaintiffs, *Chester, Urquhart, Mayhew, and Holden*, for *Arnold and Son*, Birmingham.

Solicitor for the defendants, *R. F. Roberts*.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

*Friday, May 9.*

(Before *Fry, J.*)

*CHAPMAN v. MASON. (a)*

*Practice—Order LI., r. 2 a—Action brought against executor while administration action pending—Transfer to Chancery Division.*

*A judge of the Chancery Division in whose court an administration action is pending can order the transfer to himself of such actions only, brought in other divisions against the executor of the person whose estate is being administered, as are brought against him quâ executor.*

THIS was a motion on behalf of the plaintiff, *J. T. Chapman*, sole executor of the will of *W. Chapman*, that an action, commenced by *J. Hardy, R. H. Johnstone, and Charles Parker* (trading as bankers under the firm of *Hardy and Co.*), in the Common Pleas Division, against *J. T. Chapman*, as defendant, wherein the plaintiffs claimed £110*l.* 1*s.* balance of an account between the plaintiff and defendants between Aug. 1877 and Jan. 1879, might be transferred to the Chancery Division in which the action of *Chapman v. Mason* was now pending for the administration of the estate of *Wm. Chapman*, deceased.

The writ in the administration action was issued in Jan. 1879; and on the 7th Feb. 1879 the usual administration decree was made.

(a) Reported by *FRANK EVANS, Esq. Barrister-at-Law.*

The plaintiff, *J. T. Chapman*, by his affidavit in support of the motion, stated that his brother, *W. Chapman*, died in July 1877, and by his will appointed the plaintiff his sole executor; that *Hardy and Co.* had been the bankers of *W. Chapman*, and at his death he was indebted to *Hardy and Co.* in a sum of 3111*l.* 8*s.*, which was reduced by a cheque paid into the bank the day after his death to 3055*l.* 8*s.*; that after the death of *W. Chapman*, the plaintiff, before he was able to obtain probate, was desirous of having banking facilities at once, and he thereupon applied to *Hardy and Co.* in his character of executor to his brother, and that they opened an account with him as such executor, which account was entered as "*W. Chapman, executor, J. T. Chapman, in account with Hardy, Johnstone, and Parker*;" that such account was opened by the plaintiff solely in his character as executor to his brother, without any intention of making himself personally liable for the balance of 3055*l.* 8*s.* due from his brother; that the sum shown by the pass-book to have been paid by the deponent into the said account between Aug. 1877 and Jan. 1879 amounted in the aggregate to 5713*l.* 15*s.* 7*d.*, while the sums drawn out of such account between those dates amounted to 4591*l.* 19*s.*, being an excess of payments in over drawings out of 1121*l.* 16*s.* 7*d.*, and that all the cheques drawn by the deponent were drawn "on account of *Wm. Chapman's executor, J. T. Chapman.*" Messrs. *Hardy and Co.* had in respect of that account considered the whole of such excess to be applicable to the reduction of the balance of 3055*l.* 8*s.* carried over from the account of *W. Chapman*, and had applied it accordingly, and the action brought by them in the Common Pleas Division against deponent was to recover from him personally the balance as made out by them by the banking account so opened with the deponent as *W. Chapman's executor*.

Messrs. *Hardy and Co.*, by their affidavit in answer to these statements, said that the plaintiff in opening the before-mentioned account did not at any time request any special arrangement that payments to be made by him should be carried to the credit of any account separate from his account as executor of his brother, *W. Chapman*; that the account was opened in the usual and ordinary way of business upon the understanding that the balance due from *W. Chapman* would be paid out of his estate, and that balance was accordingly debited against the account opened with the plaintiff as such executor; that, in the September following the opening of such account, the plaintiff paid into the said banking account a sum of 3100*l.* arising from the sale of his brother's farming stock, whereby the original amount due from *W. Chapman* was discharged; but that the said *J. T. Chapman* had continued to draw upon the bank for various large sums of money for which it was submitted he was personally liable, and it was for the amount due in respect of such drawings that the action in the Common Pleas Division had been brought.

*Onslow* for the plaintiff.—This motion is made under Order LI., r. 2 a. A similar order to that now asked for was made by *Bacon, V.C.* in *Re Timms* (38 L. T. Rep. N. S. 679). [*Fry, J.*—In that case the action was brought against the defendant as executor, though it was for a *deceitavit*. If I am an executor, and the estate of my testator is being administered in an action in the

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Chancery Division, and a running-down action is brought against me in the Common Pleas Division, can I ask for that to be transferred to the Chancery Division? The plaintiff is an executor, and is entitled to the protection of the court. [FRY, J.—Either he owes the money, or he does not owe it. If he owes it, he owes it personally. If he does not owe it, he has a good defence, of which he may avail himself in the action in the Common Pleas Division. I do not say that the action cannot be transferred, but I cannot do it. It must be done by order of the Common Pleas Division, with the consent of the President of the Chancery Division under Order LI., r. 2.] The case is within the express words of the rule, and the order asked for is a convenient one to be made.

*Langworthy for Hardy and Co.*

FRY, J.—Order LI., r. 2 a, provides that “when an order has been made by any judge of the Chancery Division for the . . . administration of the assets of any testator . . . the judge in whose court such . . . administration shall be pending, shall have power . . . to order the transfer to such judge of any action pending in any other division brought . . . against the executor of the testator . . . whose assets are being so administered.” In the present instance, it appears that Messrs. Hardy and Co. have brought an action against a person, who is an executor, for the amount of a certain banking account, as a personal action. It is said to be an action against an executor, and so it is in one sense. But, in order to be within the rule which I have read, it must be an action brought against an executor *quod* executor; and this action is brought against him in respect of a personal liability. The application must be refused with costs, which must be paid by the executor personally.

Solicitors: W. B. A. Kime; G. F. Moresby-White.

Tuesday, June 10.

(Before FRY, J.)

POWELL v. WILLIAMS. (a)

*Practice*—Trial of issues of fact before judge and jury—Reasons for order—Order XXXVI., rr. 3, 26, 29 a.

*Notice of motion by a defendant, given within four days after a plaintiff has given notice of trial, for a direction that issues of fact may be tried before a judge and jury, is a sufficient notice within Order XXXVI., r. 3, that a defendant wishes to have the issues so tried.*

*A notice of such a desire ought not to state the particular issues to be tried, but, generally, that the defendant desires to have the issues of fact tried before a judge and jury.*

*Where a defendant gave notice of motion for a direction that certain specified issues should be tried before a judge and jury:*

*Held, that the notice of motion was an expression of desire that particular issues should be tried, and, though not the proper or necessary form of giving notice required by rule 3, satisfied the requirements of the rule and went beyond it, and that an order must be made, referring it to chambers to settle proper issues of fact, and*

*directing those issues to be tried before a judge and jury at the particular assizes.*

The action was brought for an injunction to restrain a nuisance caused by working a quarry in the county of Radnor.

Notice of trial before Malins, V.C. had been given by the plaintiff, and a notice of motion had been given by the defendant for a direction that the following issues of fact might be tried at Presteign, in the county of Radnor: Whether the defendant had carried on his work in such a manner as to cause a nuisance to the plaintiff; whether the nuisance, if any, existed in the same degree twenty years ago, or had been materially increased during the last twenty years; what, if any, damage had been occasioned to the plaintiff.

The motion was now made in the terms of the notice of motion.

*Higgins, Q.C. and Chapman Barber, for the defendant.*—The witnesses reside at or near Radnor, and the expense of having the issues tried there will be less than if the witnesses were brought up to London. *Prima facie* the defendant has a right to a trial by jury. In *Ruston v. Tobin* (40 L. T. Rep. N. S. 111; L. Rep. 10 Ch. Div. 563) Malins, V.C. said: “Many cases have already occurred before me in which, if either of the parties had desired a jury, I should very willingly have acceded to their suggestion.” And he mentions several of such cases, one of which is precisely the same as the present case. It is immaterial to the defendant whether the whole action, or only issues, are sent for trial. The issues asked to be directed to be tried are taken from those directed by Bacon, V.C. in *West v. White* (36 L. T. Rep. N. S. 95; L. Rep. 4 Ch. Div. 631). [FRY, J.—The objection to sending particular issues to be tried is, that other questions of fact often come into dispute.] The reason for granting this order is sufficient. In *West v. White*, Bacon, V.C. says: “The reason is that the defendant desires . . . the trial by jury.” They also referred to

Order XXXVI., rr. 3, 26, 29 a;  
*Bordier v. Burrell*, L. Rep. 5 Ch. Div. 512;  
*Wood and Ivory v. Hamblet*, L. Rep. 6 Ch. Div. 113;  
*Swindell v. Birmingham Syndicate*, 35 L. T. Rep. N. S. 111; L. Rep. 3 Ch. Div. 127.

*Glasse, Q.C. and Cracknall for the plaintiff.*—The application is improper both in substance and in form. The notice of motion is not the notice contemplated by rule 3. Separate notice of the defendant's desire should have been given before the notice of motion. [FRY, J.—It may be that something more is required, but it is plain that the notice must show an intention to have a trial by jury.] The form of the issues is not correct. There will scarcely be accommodation for all the witnesses at Presteign. They cited

*Mirehouse v. Barnett*, 47 L. J. 689, Ch.

*Higgins replied.*

FRY, J.—I think the proper order to make in this case will be to refer it to chambers to settle proper issues of fact in this action, and to direct those issues of fact to be tried before a judge and jury at the assizes at Hereford. The application now made by the defendant is under Order XXXVI., r. 3, which, having provided that the plaintiff may give notice of trial of an action and specify the mode of trial, provides that the defendant may, upon giving notice within four days

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from the time of the service of the notice of trial, or within such extended time as a court or judge may allow, to the effect that he desires to have the issues of fact tried before a judge and jury, be entitled to have the same so tried." The words no doubt are permissive as regards the defendant, but it appears to me they are obligatory on the court, subject only to the discretion given to the court by rule 26 of the same order, which provides that the trial of issues without a jury may be directed "if it shall be desirable" in matters which "previously to the passing of the Act could, without any consent of parties, be tried without a jury." No doubt the questions of fact in this action could, before the passing of the Act, have been, without the consent of parties, tried without a jury in the Court of Chancery; and therefore, if I saw that there were grounds on which it appeared to me to be desirable that the trial should not take place before a jury, I could so direct. But having attended to what has been stated before me in this matter, and the previous decisions of other judges, I do not find anything which makes it desirable that the trial should be without a jury. I think, therefore, the defendant is entitled, under Order XXXVI., r. 3, to have the issues of fact tried before a judge and jury, and I therefore direct them to be so tried accordingly. Then this objection has been urged, that the defendant has not been correct in point of form, because, although he, within the time extended for giving notice, has given his notice of motion, he did not give simple notice out of court to the plaintiff, and instead of requiring generally that the issues of fact in the action should be tried before a judge and jury, he has required that the specific issues shall be tried before a judge and jury. I think that the notice of motion is an expression of a desire on the part of the defendant that particular issues should be tried, and therefore, although I do not think that it is the proper or necessary form of giving notice as required by rule 3, I think it satisfies the requirements of that rule and goes beyond it. In the next place, it seems to me that the defendant has been in error as to the issues of fact which he has required to be tried, because, as it has been very properly admitted, those specified in the notice of motion are not the proper or best issues of fact to be tried; and in the next place, I think that what the defendant ought to have required is generally that issues of fact should be tried. Upon those points of form it appears to me that the defendant has been wrong. Therefore, although I make this order, I shall make it without giving the defendant any costs of this motion. I do not give the plaintiff any costs of the motion, because he has resisted it *in toto*. If it had been met by a consent on the plaintiff's part to give the defendant that which he is strictly entitled to, I should have given the plaintiff the costs of this motion. The plaintiff not having done that, I simply make the order without costs on either side. The reasons, signified upon the order, will be, in the first place, that the *locus in quo* is more accessible from Herefordshire than from London; that a large number of witnesses reside in places which are more accessible to Hereford than to London; and that it has not been made to appear to the court desirable to direct a trial without a jury of the issues of fact.

Solicitors for the plaintiff, *Watkins, Baker, Baylis, and Baker.*  
Solicitors for the defendants, *Merediths, Roberts, and Mills.*

## QUEEN'S BENCH DIVISION.

Tuesday, May 13.

(Before COCKBURN, C.J. and MELLOR, J.)

THE PRISON COMMISSIONERS v. THE MAYOR, &amp;C., OF LIVERPOOL (a)

*Reformatory school—Liability to provide proper clothing for juvenile offenders—Prison authorities—Reformatory Schools Act 1866 (29 & 30 Vict. c. 117), s. 23—Prison Acts (28 & 29 Vict. c. 126; 40 & 41 Vict. c. 21, s. 4).*

*T. M., a juvenile offender, was sentenced by the stipendiary magistrate of L. to a short term of imprisonment, and a further period of five years in a reformatory school. Previously to his entering the school the Prison Commissioners of England had provided the said T. M. with clothing proper and suitable for such school. Under the Prison Act of 1865 the mayor, aldermen, and burgesses of L. were the prison authorities for the prison of the borough of L., and under the Reformatory and Industrial Schools Act of 1866 they still are the authorities for the reformatory and industrial schools of the borough. By the Prison Act of 1877 the borough prison of L. was transferred from the old prison authorities and vested in one of Her Majesty's principal Secretaries of State. The question was whether the providing of clothing for juveniles sentenced to a period of years in a reformatory or industrial school after a term of imprisonment was a prison or reformatory school expense, and whether the Prison Commissioners, or the mayor, aldermen, and burgesses of L., as the authorities having the management of the reformatory schools, were liable for the expense of such clothing.*

*Held, that the Prison Commissioners were liable, and that the mayor, aldermen, and burgesses of L. should not be burdened with the expenses of matters over which they had no control.*

THIS was a case stated by consent, under Order XXXIV. r. 1. :—

1. Down to the commencement of Prison Act, 1877, the mayor, aldermen, and burgesses of the borough of Liverpool acting by the council were the prison authority of the borough of Liverpool, and of the borough prison of that borough, and as such authority they, down to the commencement of the said Prison Act 1877, were liable to defray, and they defrayed, the expenses mentioned in sect. 23 of the Reformatory Schools Act 1866, in the case of youthful offenders sentenced under sect. 14 of the last-mentioned Act, to be sent to and detained in a certified reformatory school, after imprisonment in the borough prison of the said borough.

2. On the 28th March 1877 Thomas Mulloch was convicted by the police magistrate of the borough of Liverpool, of an offence punishable with imprisonment, and was sentenced to be imprisoned for more than ten days in the above-mentioned prison, and to be sent at the expiration of his period of imprisonment to the Reformatory school ship *Akbar*, and to be there detained

(a) Reported by A. H. FRYER, Esq., Barrister-at-Law.

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for a period of five years. The said ship *Akbar* was a certified reformatory school.

3. The said Thomas Mulloch was imprisoned in the said prison, in accordance with the said sentence, and was at the time in that behalf directed by the sentence removed by the plaintiffs to the said reformatory school, and was there received and detained under the said sentence.

4. Under the Prison Act 1877 the said prison became vested in one of Her Majesty's principal Secretaries of State, and during the whole period of the imprisonment of the said Thomas Mulloch in the said prison, the general superintendence of the said prison was and it still is vested in the plaintiffs under the said Prison Act 1877.

5. At the time of the removal of the said Thomas Mulloch from the said prison to the said reformatory school, the said Thomas Mulloch was possessed of proper clothing necessary for his decent conveyance from the prison to the school.

6. Previously to and for the purpose of the admission of the said Thomas Mulloch into the said reformatory school, he was also provided by the plaintiffs with certain other clothing at a cost of 30s. Such other clothing was proper clothing for the said Thomas Mulloch requisite for his admission to the said school, and unless he had been provided with such last-mentioned clothing he would not have been admitted by the managers of the said school.

7. A question having arisen between the plaintiffs and the defendants with respect to the liability to pay for such last-mentioned clothing, and in order to obtain the admission of the said Thomas Mulloch into the said reformatory school, it was arranged between the plaintiffs and the defendants that the plaintiffs should repay the cost thereof in the event of the court being of opinion that the defendants were liable for the cost of such clothing.

8. The question is, whether, having regard to the provisions of the Prisons Acts 1865 and 1877 and the Reformatory Schools Act 1866, the defendants were liable for the expense of proper clothing requisite for the admission of the said Thomas Mulloch to the said school.

*Poland* (the Attorney-General with him), for the plaintiffs, maintained that the providing the proper clothing before entering a reformatory school was a school expense, and that the defendants were liable for it. The mayor and corporation of Liverpool were, under 28 & 29 Vict. c. 126, the prison authorities for the borough of Liverpool, and by 29 & 30 Vict. c. 117, s. 3, are still the authorities having the control and management of the reformatory and industrial schools of the borough. The plaintiffs concede that by 40 & 41 Vict. c. 21, s. 3, the prison of the borough of Liverpool became vested in the Home Secretary, who has appointed the plaintiffs to assist him in carrying out the provisions of the Act; but the mayor and corporation have still the control and management of the reformatory schools, for sects. 4 and 52 of the Act of 1877 must be read together. The clothing requisite for admission into the school does not come under the 4th section, which deals with the defraying of expenses connected with prisoners. [COCKBURN, C.J.—Up to the time that the juvenile offender is started for the school he is a prisoner, and all expenses connected with him are prison expenses.] The question here is who is to pay for the boy's suit in the school. During

the term of imprisonment the prison authorities are clearly bound to support the prisoner, but by 29 & 30 Vict. c. 117, s. 23, the prison authorities had to provide the uniform suits of the children in the reformatory, and as the Act of 1877 does not affect the jurisdiction of the defendants in reference to their borough reformatory schools, they are liable to defray such expenses. The Legislature undoubtedly intended that the borough authorities should retain their old powers of raising rates for the support of their reformatory and industrial schools.

*B. S. Wright* (*Herschell*, Q.C. with him), for the defendants, was not called upon. (But see ss. 23 and 30 of 29 & 30 Vict. c. 117, and ss. 52 and 57 of 40 & 41 Vict. c. 21.)

COCKBURN, C.J.—The Legislature clearly intended by the Prisons Act of 1877 to relieve the local rates, and to throw burdens like these on imperial taxation. By the same Act the powers and jurisdiction of the old prison authorities with reference to reformatory and industrial schools are kept alive, but not their duties and obligations, and we must read sect. 57 with sect. 4. This providing of suitable clothes is a prison expense, and the plaintiffs are liable to defray it. The Government have taken away the control and management of prisons and prisoners from the old prison authorities, and they must not be saddled with the expenses of matters over which they have no control.

MULLOR, J.—I am of the same opinion.

*Judgment for the defendants.*

Solicitors for the plaintiffs, *Hare and Fell*.

Solicitors for the defendants, *Venn and Son*, for *Rayner*, Liverpool.

Thursday, May 8.

(Before COCKBURN, C.J. and LOPES, J.)

REG. v. THE JUSTICES OF WILTSHIRE. (a)

Poor rate—Objection to valuation list—Time for appealing—Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39), s. 1—25 & 26 Vict. c. 103.

Where a valuation list has been objected to before the assessment committee, and subsequently a rate has been made based upon such list, it is not a condition precedent to an appeal that the list should again be objected to before the committee after the making of the rate.

A supplemental valuation list for the parish of S. was deposited by the respondents on the 13th April 1878. The appellant on the 11th May gave to the assessment committee notice of objection to the amount at which they were rated in the said list. On the 22nd May, at a meeting held to consider the objection, the assessment committee refused to reduce the amount, and approved and signed the valuation list. On the 23rd May a poor rate was made, and on the 28th May demanded, the appellants being assessed to the same on the amount entered in the supplemental list. The next meeting of the assessment committee was held on the 12th June, and the next Quarter Sessions on the 2nd July.

The appellants again gave notice of objection to the list on the 31st July, which objection was overruled on the 4th Sept. The appellants then gave notice of appeal for the Michaelmas Sessions held in October, but the Court of

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*Quarter Sessions declined to enter and respite the appeal.*

*Held, that the decision of the Court of Quarter Sessions was right, as the appellants having been before the assessment committee and taken exception to the list, and having failed to obtain relief, were in a position to have appealed at the July Sessions.*

THIS was an application for a *mandamus* to compel the justices to enter continuances and hear the appeal.

It appeared that an application was made by the appellants, the Great Western Railway Company, to the Court of Quarter Sessions for the county of Wilts, held on the 16th Oct. 1878, to enter and respite an appeal against a poor rate made by the respondents, the assessment committee of the Highworth and Swindon Union.

The following were the facts as stated for the opinion of the court:—

1. The respondents, on the 13th April 1878, deposited a supplemental valuation list of certain rateable hereditaments in the parish of Stratton St. Margaret, in which list the property in the occupation of the appellants in the said parish was entered as a rateable value of 6703*l*. The said parish of Stratton St. Margaret is included in the Highworth and Swindon Union.

2. The appellants, on the 11th May 1878, gave to the assessment committee for the Highworth and Swindon Union (hereinafter called "the assessment committee") notice of objection to the amount at which their said property was valued in the said valuation list.

3. On the 15th and 22nd May 1878 the assessment committee held meetings for hearing the objections of the appellants, and on the latter day refused to reduce the amount at which the said property of the appellants was valued as aforesaid, and duly approved and signed the said supplemental valuation list.

4. The respondents, on the 23rd May 1878, made a poor rate of ninepence in the pound for the relief of the poor of the said parish, and assessed the appellants to the same according to the rateable value of their property appearing in the said valuation list.

5. The rate mentioned in the last paragraph was duly published on the 26th May 1878, and demand made upon the appellants for payment thereof on the 28th May 1878.

6. The next meeting of the assessment committee after the making and publication of the said rate was held on the 12th June 1878, and the next quarter sessions for the county of Wilts, hereinafter called "the July sessions," were held on Tuesday, the 2nd July 1878; so that, if it was necessary again to give the assessment committee notice of objection, the appellants could not have given the proper notices in order to appeal to the sessions held on the 2nd July. The appellants subsequently to the 12th June attended two meetings of the assessment committee by their agent after the publication and demand of the rate aforesaid, but made no further objection to the said valuation list until the 31st July 1878, when the appellants gave notice of objection against the said valuation list to the assessment committee, who on the 4th Sept. 1878, at a meeting for hearing amongst others the said objections of the appellants, refused to grant any relief to the appellants.

8. The appellants, on the 17th Sept. 1878, gave notice to the respondents and to the assessment committee of their intention to appeal against the said poor rate to the next quarter sessions to be holden in and for the county of Wilts, and in pursuance of such notice application was made at the Wilts quarter sessions held on the 16th Oct. 1878, to enter and respite the appeal.

9. It was objected on the part of the respondents that the Court of Quarter Sessions had no jurisdiction to entertain the application to enter and respite the said appeal on the following grounds: (1) That the appellants ought to have appealed to the next quarter sessions, i.e., the next practicable sessions after the allowance and publication of the poor rate, pursuant to 17 Geo. 2, c. 38. s. 4, for there was ample time between the 28th May 1878 (the day the rate was demanded) and 2nd July 1878 (the day of holding the July quarter sessions) for the appellants to have given the twenty-one days' notice to the assessment committee as required by sect. 1 of the 27 & 28 Vict. c. 39, of their intention to appeal at the next quarter sessions. (2) That the appellants having objected to the valuation list on the 15th and 22nd May 1878 before the assessment committee, and failed to obtain relief, had done all the Legislature intended should be done by the proviso contained in the 1st section of the 27 & 28 Vict. c. 39, and that it was not necessary for the appellants to go through the same process of objecting again after the first poor rate based upon such valuation list had been allowed, but, if still aggrieved, they should forthwith have given the twenty-one days' notice of intention to appeal to the July quarter sessions, which was the next sessions after the failure to obtain relief, and that having failed to go to such sessions they had lost the right of appeal at the following October quarter sessions. (3) That if it was necessary for the appellants to renew their objection to the assessment committee to the valuation list after a poor rate based upon such list had been allowed and published, such objection should have been preferred at the meeting of the assessment committee next after demand of the rate on the 28th May 1878 had been made, and not deferred until the 31st July 1878, after two meetings of the committee had been in the meantime holden.

10. The appellants contend: (1) That notwithstanding their having objected to the said valuation list as aforesaid before any rate was made upon the basis of it, they had no right of appeal against the said poor rate until they had given to the assessment committee notice of objection against the valuation list in force in the said parish at the time of the making of the said rate, and had failed to obtain relief in the matter, and that the fact of the appellants having stated their objection to the said valuation list to the assessment committee before the approval of the said list by the assessment committee did not relieve the appellants from the necessity of objecting to the said list after the making of a rate on the basis of it as a condition precedent to an appeal against the said rate. (2) That as, the said rate was published on the 26th May 1878, and the next meeting of the assessment committee was held on the 12th June 1878, it was impracticable for the appellants, if their contention in the last paragraph is correct, to appeal to the July sessions, because a decision of the assessment committee

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could not be obtained in time to enable the appellants to give the requisite twenty-one days' notice of appeal prior to such quarter sessions. (3). That as it was impracticable to appeal to the July sessions, the appellants were not obliged immediately to object against the said valuation list, but that their notice of objection given on the 21st July 1878 as aforesaid was sufficient, and that it was not until the assessment committee on the 4th Sept. 1878 refused to grant relief as aforesaid, the appellants became entitled to appeal to the sessions held on the 16th Oct. 1878.

11. The question for the opinion of the court is: Whether the Court of Quarter Sessions were right in deciding that they had no jurisdiction to enter and respite the appeal against the said poor rate. If the court shall be of opinion that the decision of the Court of Quarter Sessions was wrong, then the appeal is to be entered and respited as asked for.

By 27 & 28 Vict. c. 39, s. 1:

Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act 1862 applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union, provided that no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, &c.

*R. E. Webster, Q.C. (Lopes with him), for the appellants, contended that, before notice of appeal could be given, the appellants must have made objection to the list subsequent to the making of the rate based upon that list. He cited*

*Reg. v. Great Western Railway Company, L. Rep. 4 Q. B. 323; 20 L. T. Rep. 481;*

*Reg. v. The Justices of Derbyshire, 25 L. T. Rep. 43;*

*Reg. v. The Guardians of Biggleswade Union, 21 L. T. Rep. 494.*

*Charles, Q.C. and Ravenhill, for the respondents, showed cause in the first instance, and contended that it was sufficient if objection were made to the list prior to the appeal, and that being so, the justices rightly decided that they had no jurisdiction to respite this appeal, which might have been made at the July sessions.*

*COCKBURN, C.J.*—I am of opinion that this rule moved for by Mr. Webster must be refused. The case all turns, no doubt, upon the modification introduced by the 1st section of the 27 & 28 Vict. c. 39, of the preceding Act of the 25 & 26 Vict. c. 103. Under the first of those two Acts of Parliament a party could appeal against a rate founded upon a valuation list approved by the assessment committee, without having taken an objection before the assessment committee to his assessment or the assessment of other people upon that valuation list. The new Act comes in and says that no one shall appeal against a rate who shall not have given notice to the assessment committee, and who shall not have taken objection to the valuation list before he appeals against the rate. That is, no doubt, to a certain extent, a salutary provision, for this reason: the purpose

of the valuation list and the legislative opportunity given to take exception to that list was a means of preventing the expense, sometimes very considerable expense, of going to quarter sessions to appeal against a rate and to get relief. By the alteration of the valuation list it could be obtained cheaply and readily without occasion to resort to the more expensive process of going before the quarter sessions on appeal. On the other hand, it being left open to a party to appeal without having recourse to the more summary and less expensive mode of obtaining relief, the Legislature interposed and said, "You shall not appeal against a rate until or unless"—for that is the way I read the statute—"you have been before the assessment committee, and have sought there the relief which you may obtain in this cheaper and easier mode; unless you are defeated there, you shall not be permitted to have recourse to the more expensive process of appealing against a rate of taking it to the quarter sessions. Mr. Webster's contention is, that, although the party deeming himself aggrieved and desirous of appealing has in the first instance gone before the assessment committee, and there sought the relief which it was the object of all this legislation to make him seek in that easier form, instead of going to quarter sessions to appeal; that, although he has been once before the rate, as soon as the rate is made upon the valuation lists with reference to which his objection has been already heard and determined, he must go again, and go through the very same discussion, in order to be entitled to appeal against the rate. Now that in itself would be a legislative absurdity of so striking a character, that one cannot suppose the Legislature could have intended anything so nonsensical. It desires that a man shall go before the assessment committee, and makes it a condition of his being entitled to appeal to quarter sessions, but never could have intended that, having done before the rate was made that which the statute desired he should do, he shall be obliged to go through it over again in order to be entitled to bring his appeal to quarter sessions. I should struggle to the utmost against a conclusion involving really so preposterous an absurdity as that. But, says Mr. Webster, the court is bound by its former decision in the *Great Western* case, where it was held that, although the valuation list is by the Act of Parliament permanent, and need not be renewed in the shape of a fresh valuation list, and therefore rate after rate may be made in succession on the same valuation list, this court held no doubt that between each successive rate, if a man intend to appeal against a later rate, he must challenge the valuation list, although the Act of Parliament intended to make it permanent, and that that is conclusive in the present case. I own that the present discussion has somewhat shaken my confidence in the correctness of that decision; but it is by no means necessary to overrule it on the present occasion, because the two cases appear to me to be plainly distinguishable. A man may not have appealed against the first rate, he may have relied upon the opportunity of a fresh valuation list being made to which he could make exception, circumstances may have induced him to desist from presenting an appeal against the first rate; but when he finds the valuation list is kept in a state of permanency, and he feels that

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he has been aggrieved by the first rate upon him, he may well say, when the second rate comes, "I will appeal against a rate founded on that valuation list." Then he does not satisfy the exigency of the Act of Parliament, which says, "You shall not appeal unless you have objected to the valuation list," unless he object to the list as the list upon which the second rate has been founded. That decision, as far as it goes, is, or at all events may be, what the Legislature might well be thought to have had in its contemplation, and what I think is essential to the working out of this legislation, that though the valuation list is by the terms of the Act to be permanent until a new one is made, yet, in order that there may not be any appeal without objection being taken to the list, which might be cured in that simple and summary manner instead of appeal to quarter sessions being resorted to, it is necessary to appeal for the purpose of each successive rate against the valuation list to which exception not only may be taken, but must be taken. I think, looking at it in that point of view, the former decision of the Court of Queen's Bench remains intact, and we may give effect to this legislation by saying, at all events, where a second rate is not in question, where you are dealing with the first rate made after the valuation list has been approved, that the party who has been before the assessment committee and has there taken his exception and has failed to obtain relief, is then in condition at once to appeal to the next practicable quarter sessions. It is admitted that the next practicable quarter sessions is the one to which the appeal should be made, and that between the time when this valuation list was finally approved by the committee and the 2nd of July, the necessary period would have elapsed, and therefore the quarter sessions and the one to which the appeal should have been made.

LOPES, J.—I have nothing to add.

*Rule discharged with costs.*

Solicitor for the appellants, *R. B. Nelson.*

Solicitors for the respondents, *Bradford and Foote, Swindon.*

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*Tuesday, May 13.*

(Before Sir R. PHILLIMORE.)

THE ANDERS KNAPE. (a)

APPEAL FROM INFERIOR COURT.

*Salvage—Pilotage.*

*A person, whether a pilot or not, who takes charge of a vessel in distress, with the consent of her master, is entitled to salvage reward, in the absence of an express contract to the contrary.*

*Semble, it is immaterial whether, under such circumstances as would entitle a person to salvage reward in any case, the person claiming salvage does or does not hold himself out rightly or wrongly as being a pilot, so long as he performs the service.*

The Frederick (1 W. Rob. 16) approved.

This was an appeal in an action of salvage from the decision of the City of London Court.

(a) Reported by J. P. ASPINALL and F. W. BAIKES, Esqs., Barristers-at-Law.

The facts were, that the *Anders Knape*, a Swedish screw steamer, whilst on a voyage from Sweden to Cadiz, got ashore on the night of the 13th Feb. 1879, on the Long Sand; she got off without assistance the next morning, but with her rudder damaged, and anchored in eleven fathoms water.

The plaintiffs were the master and others belonging to the fishing smack *Faith*, and on the morning of the 14th they heard guns fired, and proceeded in consequence to the Long Sand, and soon after noon they fell in with the *Anders Knape*.

The master of the *Faith* went on board and took charge of the ship to bring her into Harwich. The contention for the plaintiffs was, that the master of the smack was not a pilot, and did not engage as such, and that the *Anders Knape* being in distress both by reason of the damaged condition of the rudder, and also from the ignorance of the locality, that the services rendered her were salvage services. The defendants contended that, at the time the plaintiffs came on board, the *Anders Knape* had a signal for a pilot flying, and that the smack exhibited a flag which led those on board the *Anders Knape* to suppose that she was a pilot boat, and that the person who ultimately turned out to be master of the *Faith* was engaged, in consequence of his own proceedings, as a pilot and for the purpose of piloting the ship into Harwich, and that therefore there was nothing to convert the service into a salvage service.

The flag which was produced by the master of the smack was red and white in two horizontal stripes, the upper one being white, and with a narrow border of blue. The regulation as to the flags to be carried by pilot boats and pilots is contained in the Merchant Shipping Act 1854 as follows:

#### *Characteristics of Pilot Boats.*

346. Every pilot boat or ship shall be distinguished by the following characteristics; (that is to say,) (1.) . . . . (2.) . . . . (3.) When afloat, a flag at the mast-head or on a sprit or staff, or in some other equally conspicuous situation; such flag to be of large dimensions compared with the size of the boat or ship carrying the same, and to be of two colours, the upper horizontal half white, and the lower horizontal half red:

And it shall be the duty of the master of such boat or ship to attend to the following particulars: First, that the boat or ship possesses all the above characteristics; secondly, that the aforesaid flag is kept clean and distinct, so as to be easily discerned at a proper distance; and lastly, that the names and numbers before mentioned are not at any time concealed; and if default is made in any of the above particulars he shall incur a penalty not exceeding 20l. for each default.

*Qualified Pilot to display Flag, though not in Pilot Boat.*

347. Whenever any qualified pilot is carried off in a boat or ship not in the pilotage service he shall exhibit a flag of the above description, in order to show that such boat or ship has a qualified pilot on board; and if he fails to do so, without reasonable cause, he shall incur a penalty not exceeding 50l.

*Penalty on ordinary boat displaying Pilot-flag.*

348. If any boat or ship, not having a licensed pilot on board, displays a flag of the above-mentioned description, there shall be incurred for every such offence a penalty not exceeding 50l., to be recovered from the owner or from the master of such boat or ship.

There was great conflict of evidence as to the conversation which took place between the master of the *Faith* and the captain of the *Anders Knape*, and as to whether the damage to the rudder of the *Anders Knape* was of such a nature as to



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materially interfere with her steering, and, if so, whether the master of the *Faith* was aware of the fact when he took charge.

*Bucknell* for the plaintiffs.

*Myburgh* for the defendants.

Mr. Commissioner KERR, in delivering judgment, said that, on the facts, he was quite satisfied that it was pilotage and nothing else. The two flags are conclusive—one flag flying for a pilot, and another flag which is practically a pilot flag; one showing that a ship wanted a pilot, and the other flying a flag which must be taken for a pilot flag. The services were offered and accepted solely as those of a pilot. I think there ought to be some mode of preventing the use of a flag like that: it is a pilot flag, with two blue borders above and below. That is enough. It is to all intents and purposes a pilot flag, and the captain of the *Anders Knape* treated it as such. The suit is dismissed with costs.

From this decision the plaintiffs appealed, and the appeal came on for hearing in the Admiralty Division on May 13, 1879.

*Clarkson* for the appellants.—This is a salvage service. It was rendered in a place out of any pilotage district, and therefore it is immaterial whether the flag was similar to a pilot flag or not. That the ship was in need of assistance is obvious from the fact that she did not proceed on her voyage direct, but was brought into a port of refuge.

*Myburgh* for respondents.—The plaintiff held himself out as a pilot, and contracted to pilot the *Anders Knape* from the place where he boarded her into Harwich for pilotage reward, and therefore he cannot recover salvage.

Sir R. PHILLIMORE.—This is a case about which I admit I was exceedingly doubtful in the course of the argument. I have been referred to the case of *The Frederick* (1 W. Rob. 16), cited in *The Æolus* (L. Rep. 4 Ad. & Ecc. 31; 28 L. T. Rep. N. S. 41), where Dr. Lushington says: "It has been urged in the argument for the owners that pilots are not to convert their duties into salvage services. This may be a correct position under ordinary circumstances; at the same time it is to be observed that it is a settled doctrine of this Court, that no pilot is bound to go on board a vessel in distress to render pilot service for mere pilotage reward. If a pilot, being told he would receive pilotage only, refused to take charge of a vessel in that condition, he would be subjected to no censure; and if he did take charge of her, would be entitled to salvage remuneration." Now, the facts of this case are these: This foreign vessel had been on the sand, and had sustained some damage to her rudder. She was therefore in a condition in which salvage services might be rendered to her. The plaintiff in this case—the master of the *Faith*—says that he went on board this vessel, and was told by the captain that the rudder was broken, and that the ship had been aground. A considerable quantity of evidence is produced as to whether he contracted as a salvor, or whether he contracted as a pilot. It has been well put by Mr. Myburgh that in this case it might be contended that he contracted to act as a pilot. But his own evidence is distinctly the other way. He says he told the captain that he was a fisherman, and that he told him he could conduct his ship into Harwich, that is to say, if

he wished it; that he could help him to go into a port of refuge, where he could get the damage done to his vessel repaired. Supposing nothing had been said, supposing the master of the *Faith* had gone on board the *Anders Knape* without saying anything at all, and the captain had said, "I want to go to Harwich," and the master of the *Faith* had proceeded to put the vessel in a right direction, could it be doubted that he had performed a salvage service, looking to the state of the ship, and the fact that he had been asked to take her to a place where she could be repaired? I am of opinion that the facts of the case are brought within the judgment of Dr. Lushington in the case to which I have referred (*The Frederick*, 1 W. Rob. 16). I think that that was a case in which he would be "subject to no censure if he refused to take charge of the vessel, and if he did take charge of her he would be entitled to salvage remuneration," unless he had expressly contracted. I think that there was a salvage service, although I admit that the distinction is a nice one. I think that the judge of the court below was misled by the word pilotage; but, upon the whole, I am of opinion that a salvage service was rendered, and that the salvage remuneration should be awarded, and I shall award 30*l.* with the usual costs. There will be leave to appeal.

Solicitors for appellants, *Lowless and Co.*

Solicitors for respondents, *Stokes, Saunders, and Stokes.*

## CROWN CASES RESERVED.

Saturday, June 21.

(Before Lord COLERIDGE, C.J., KELLY, C.B., DENMAN and FIELD, JJ., POLLOCK and HUDDLESTON, BB., MANISTY, LINDLEY, HAWKINS, and LOPES, JJ.)

REG. v. OWEN HUGHES. (a)

*Perjury—Petty sessions—Jurisdiction of justices—Illegal arrest—Want of information in writing or on oath.*

*H.*, a police constable, obtained an illegal warrant against *S.* for assaulting him and obstructing him in the discharge of his duty. *H.* arrested *S.* thereon, and took him before the magistrates in petty sessions, who convicted and sentenced *S.* to six months' imprisonment with hard labour.

No objection was taken by *S.* to the proceedings, and he called a witness to show he was not guilty.

*H.* was afterwards indicted for perjury committed by him at the hearing of the case at petty sessions, and convicted by the jury, subject to the opinion of this court as to the jurisdiction of the justices in petty sessions, because there was no written information nor oath to support the warrant.

Held (Kelly, C.B. dissentiente), that the justices had jurisdiction to hear and determine the case against *S.*, notwithstanding he was brought before them on an illegal warrant, and there was no written information.

CASE reserved for the opinion of this court by Bramwell, L.J.

Owen Hughes was convicted before me at the last Anglesea Assizes (July 1878) of perjury.

He swore falsely and corruptly on the hearing

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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of a charge against John Stanley at petty sessions for an assault on him, Owen Hughes, and for obstructing him, being a police constable, in the discharge of his duty.

But it was objected that the defendant Owen Hughes should be acquitted on the ground that the proceedings were informal and without jurisdiction in the magistrates who heard the case.

Hughes went to the office of the clerk to the justices, saw there a clerk of the clerk, and told him he wanted a warrant against John Stanley for assaulting him and obstructing him in the discharge of his duty. The clerk gave him a form of a warrant to that effect, which Hughes took to a magistrate, who signed it.

There was no written information nor oath by Hughes or any other person to found or justify the issuing of the warrant.

Stanley, however, was arrested on the warrant by Hughes, and brought before the magistrates. The case was gone into of assault and obstruction. No objection was taken by Stanley, who defended himself, and called a witness to show he was not guilty.

I overruled the objection, and, as I have said, the defendant Hughes was convicted.

I have now to ask the Court for the Consideration of Crown Cases Reserved whether, because there was no written information nor oath, I ought to have directed an acquittal. If I ought, the conviction should be quashed, otherwise not.

The defendant was discharged on bail, to appear at the next Assizes for Anglesea.

G. BRAMWELL.

Bramwell, L.J. stated further to the court that there was no evidence at the trial before him that the warrant was produced before the magistrates; that no one then thought it necessary to inquire into such a matter; and that the case at the trial was conducted on the footing, that the case before the magistrates was conducted in the same way as it would have been if the warrant had been issued on a written information duly sworn to.

The case was argued twice, first on Nov. 23, 30, and Dec. 6, 1878, before Kelly, C.B., Mellor, Denman, and Field, JJ., and Pollock, B., and the Court, after taking time to consider its judgment, directed the case to be re-argued before a full court, and it was re-argued accordingly before the above-named ten judges on March 8 and 15, 1879.

C. Bowen for the prisoner.—The conviction cannot be sustained. It was essential that there should have been a written information to sustain the warrant for the arrest of Stanley. Without an information there is no charge, and without a charge there is no issue between the prisoner and the Crown. The necessity for the information appears from Paley on Convictions, 64 (5th edit.). The information or charge was the basis of the whole proceeding, and without that being laid upon oath, there was no legal trial or hearing before the magistrates in petty sessions, any more than there could be a criminal trial before a judge at the assizes without an indictment; all the proceedings were *coram non judice*. The only statute under which the sentence on Stanley could have been imposed is the 34 & 35 Vict. c. 112 (Prevention of Crime Act), s. 12, which enables justices to inflict a term of imprisonment not exceeding six months with hard labour for assaults

on constables in the execution of their duty. Assuming the justices to have proceeded under that statute, sect. 17 enacts "that any offence against that Act may be prosecuted before a court of summary jurisdiction, in England in manner directed by the 11 & 12 Vict. c. 43, and any Act amending the same." Sect. 1 of the 11 & 12 Vict. c. 43 enacts that in all cases where an information shall be laid or complaint made the justices may issue a summons requiring the person summoned to appear to answer to the said information or complaint provided also that no objection shall be taken or allowed to any information, complaint, or summons for any defect therein in substance or form, or for any variance between such information, complaint, or summons, and the evidence produced at the hearing of such information or complaint. Then sect. 2 enables justices, if they think fit, upon oath or affirmation substantiating the matter of such information or complaint, to issue their warrant to arrest the party charged or complained against if he does not appear to the summons. Sects. 4, 7, 8, 9 also show that it was intended by the Act that the information should be in writing. Sect. 10 enacts that every information for any offence punishable upon summary conviction, unless some particular Act of Parliament shall otherwise require, may be made or laid without any oath or affirmation being made of the truth thereof, except where the justices shall issue their warrant in the first instance (as here was the case), and in every such case the matter of such information shall be substantiated upon oath before any such warrant shall be issued. The language in sect. 10 is imperative and not directory merely. To give them jurisdiction the justices in petty sessions should have followed the course prescribed in 11 & 12 Vict. c. 43, and, not having done so, the proceedings were *coram non judice*, and perjury could not be committed by a person giving evidence under such circumstances. In *Caudle v. Seymour* (1 Q. B. 889) it was held that a justice's warrant was bad which did not show any information on oath on which the warrant was issued; and, further, that a deposition on oath taken by the justice's clerk, the justice not being present, nor at any time seeing, examining, or hearing the deponent, was irregular, and no justification for the proceedings founded upon it. If it be said that this is procedure, and does not affect the jurisdiction of the magistrate, that may be met by the observation of Coleridge, J. in *Caudle v. Seymour*: "It is true that a magistrate here has jurisdiction over the offence in the abstract, but to give him jurisdiction in any particular case it must be shown that there was a proper charge upon oath in that case. A man has no right because he is a magistrate to order another to be taken for an offence over which he has jurisdiction without a charge regularly made." So in the present case it is conceded that the justices had jurisdiction in the abstract over the offence, but it is contended that they had no jurisdiction in the charge against Stanley for want of a written information on oath. The cases of *Reg. v. Pearce* (9 Cox C. C. 258; 22 L. J. 75, M. C.) and *Reg. v. Millard* (6 Cox C. C. 150; 22 L. J. 108, M. C.) were then referred to. In *Reg. v. Carr* (10 Cox C. C. 564) it was held that it should be proved distinctly, on the trial of an indictment for perjury, what the charge was on the hearing of which the false evidence was given. In that case

Kelly, C.B. said: "This is an indictment for perjury, on the trial of which offence it is necessary to prove, first, that perjury was committed—that is, that the party charged has deposed on oath to something that is untrue; and, secondly, that that evidence is material to the issue before the tribunal where the inquiry takes place. In this case the perjury arises on the hearing of a charge against Lambe before certain magistrates, and the jurisdiction on their parts to entertain it is the point in question. We must see whether the case distinctly shows that the charge was made to and in the presence and hearing of the accused in order to ascertain whether what was sworn was material to the issue. The charge must be collected from the statement in the case, and looking at that, it appears that Lambe was in some way or other made personally to appear before the magistrates, when certain evidence on some charge or other was given. We find, first, that a summons seems to have been made out, but whether that was ever served, or left the magistrates' office, or was delivered to the police officer, or, if so, whether he ever showed it to the accused, does not appear. It is further stated that Lambe appeared before the magistrates, and evidence was heard which there is reason to believe was in relation to a charge of selling beer without a licence; but whatever may have been the charge, we look in vain for any charge distinctly stated, whether written or oral, on which the defendant gave evidence, and in relation to which such evidence is said to have amounted to perjury. Perjury is assigned in the indictment by alleging that the prisoner swore falsely on the hearing of the charge. To sustain that, the charge should distinctly be proved, and I nowhere find any statement—I do not mean on which we may not speculate as to the charge—but any such statement as distinctly shows the charge against Lambe. Two documents are set out, neither of which appears to have been shown or made known to Lambe. How do we know that the charge was not keeping open his house for the sale of beer at unlawful hours? I do not say that we are to infer that, but how can we say that Lambe may not have been before the magistrates without any summons or information, or any real charge having been made known to him? Under these circumstances, and without reference to the authorities cited, I think the conviction should be quashed." The case of *Reg. v. Scotton* (59 B. 493; 13 L. J. 58, M. C.) also supports the defendant's conclusion, though that was not an indictment for perjury. The case of *Turner v. The Postmaster-General* (5 B. & S. 756; 34 L. J. 10, M. C.), which will be cited on the other side, depended on a particular statute. It has been said that a person by appearing waives an irregularity in the process by which he is summoned before the court, but it is contended that there can be no waiver in a criminal case of any matter which goes to the root of the jurisdiction of the justices. The information in writing was essential to the jurisdiction of the justices, and the want of that could not be waived. What charge was there when Stanley was brought before the magistrates? [DENMAN, J.—May not the magistrates have said to the constable when Stanley was brought before them, "What do you charge this man with?" and may not the constable have replied, "I charge him with assaulting me in the execution of my duty." That would not do,

if a written information, as is contended, is necessary. There was no proof that the defendant was sworn in any judicial proceeding. If Stanley was brought before the bench for an offence under the 24 & 25 Vict. c. 100, he could not be convicted under the 34 & 35 Vict. c. 112:

*Martin v. Pridgeon*, 1 E. & E. 778; 28 L. J. 179, M. C.

The information is not mere process, but procedure, and goes to the root of jurisdiction. "The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion of the inquiry," per Lord Denman, C.J. in *Reg. v. Bolton* (1 Q. B. 74). In *Reg. v. Brickhall* (33 L. J. 156, M. C.) a person was summoned under the 5 & 6 Will. 4, c. 76, s. 81, for assaulting a constable in the execution of his duty, but convicted under the 24 & 25 Vict. c. 100, s. 42, of a common assault, and Crompton, J. held that the conviction was made without jurisdiction. In the present case the false oath was not taken on the charge of which the prisoner was convicted. Sect. 4 of 11 & 12 Vict. c. 43, was evidently framed on the assumption that the information was to be in writing, and there could not be a waiver of the oath required to substantiate the information where a warrant is issued by magistrates in the first instance under sect. 10. The case of *Blake v. Beech* (L. Rep. 1 Ex. Div. 320) is a decision in the defendant's favour. Most of the decisions where it has been said that the want of a summons or information was waived are civil cases.

*Poland* for the prosecution.—The conviction was right. The justices who heard the case had jurisdiction, and the false swearing of the defendant at such hearing amounted to perjury. The question is whether the hearing was *coram non judice*. The warrant was improperly issued, and Stanley was illegally arrested and brought before the justices, but he was before them, and his case was to be dealt with by them in some way. No question arises now as to the illegality of the arrest, or of the conviction of Stanley; the only question is whether all that took place at the hearing was *coram non judice*. [KELLY, C.B.—What do you say the charge before the justices was, and in what form was it made?] It is sufficient to say that a charge was made orally, and that upon the hearing of that charge the defendant swore falsely and corruptly. Whatever was the form of the charge against Stanley before the justices, he had an opportunity of defending himself against it. A man may be charged in the first instance with a particular offence, and on the hearing it may appear that the man has committed a second offence. In such cases the justices exercise their discretion, it may be to commit summarily or send the case for trial, or to dismiss the first charge and convict for the second offence. Surely the magistrates have jurisdiction over the entire matter in such cases. In the present case the constable at the time of the commission of the assault might have arrested Stanley and taken him before the justices, and the charge then would have been oral. The warrant in this case was not the charge—it was merely the authority of the justices to arrest Stanley, and when Stanley was before the magistrates the charge was then made. [MELLOR, J.—Was Stanley in custody for the offence or any other offence legally?] Are the justices to enter upon a preliminary inquiry

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whether a person before them charged with a breach of the peace is legally brought before them? [KELLY, C.B.—Then what prevents a man not legally in custody from walking away? MELLON, J.—The Judges of the Superior Courts have power over all kinds of offences, yet the courts never exercise the jurisdiction without inquiring into the legality of the proceedings. What more power has a justice of the peace?] The jurisdiction of a justice of the peace arises on a breach of the peace, and it arises when a person is brought before him charged with a breach of the peace, and that person has the opportunity of defending himself against the charge. There is no law that requires the charge to be made in writing. A man when brought before a justice on a charge is to be dealt with according to law, if the charge is one over which the justice has jurisdiction. The Vagrant Act (5 Geo. 4, c. 33, s. 6) authorises any person to apprehend a vagrant, and forthwith take him before a justice of the peace, to be dealt with according to the provisions of the Act. That is an instance where there is no preliminary formal charge, and the justice must necessarily inquire whether the person apprehended was found offending as a vagrant, and false swearing upon the inquiry would amount to perjury. In *Reg. v. Millard* (Deans. C. C. 166; 6 Cox C. C. 155) Wightman, J. ruled, on an objection on the trial of an indictment for perjury, "that the magistrates had jurisdiction to hear a charge under the Malicious Trespass Act (7 & 8 Geo. 4, c. 30, s. 24), although the information was not on oath, and that the omission to lay the information on oath was an error in procedure only," and Jervis, C.J. said that Wightman, J. was right in saying that the information on oath was a matter of procedure only. Jervis, C.J. also said: "If a party charged appear before a magistrate, his jurisdiction is founded to hear and determine the case, but if he does not appear the proceedings must be under the 30th section of the 7 & 8 Geo. 4, c. 30, and there must be an information on oath in order to justify an *ex parte* proceeding." In *Turner v. The Postmaster-General* (5 B. & S. 756; 34 L. J. 10, M. C.) the passage from p. 54 of Paley on Convictions was relied on, yet it was held that the want of an information and a summons was cured by the appearance of the appellants before the justices, and that they had waived the objection that they were not legally in custody on the charge, and therefore that the justices had jurisdiction to commit. A man may waive anything in the nature of procedure.

*Blake v. Beech*, L. Rep. 1 Ex. Div. 320; 45 L. J. 111, M. C.;

*Reg. v. Berry*, Ball C. C. 46; 8 Cox C. C. 151;

*Reg. v. Hurrell*, 3 Fos. & Fin. 171,

were then cited.

*Bowen* in reply.—It is conceded that there may be a waiver of process, but not of procedure. Process is merely to bring a man before a justice, but where the procedure is dictated by statute, as in this case, by sect. 17 of 34 & 35 Vict. c. 112, the mode prescribed is a condition precedent to the jurisdiction which must arise at the commencement of the hearing. See note to *Cripps v. Durdan* (1 Sm. Lead. Cas. 735). In *Res v. Fearshire* (1 Leach C. C. 202) Lord Mansfield said that it was the indispensable duty of the magistrate to take all charges in writing of whatsoever nature, kind, or complexity they might be. In this case an information was required in writing, and the

absence of it rendered the inquiry at petty sessions one *coram non iudice*.

*Cur. adv. vult.*

June 21.—LOPES, J.—The facts of this case and the Acts of Parliament and authorities which bear upon it have been fully gone into by the judgments of the other members of the court which I have read. I agree in substance with the judgments which will be delivered, but do not desire to commit myself to any opinions which have been expressed collateral to the question before us. I think the warrant in this case was mere process for the purpose of bringing the party complained of before the justices, and had nothing whatever to do with the jurisdiction of the justices. I am of opinion that whether Stanley was summoned, brought by warrant, came voluntarily, or was brought by force, or under an illegal warrant, is immaterial. Being before the justices, however brought there, the justices, if they had jurisdiction in respect of time and place over the offence, were competent to entertain the charge, and being so competent a false oath wilfully taken in respect of something material would be perjury.

HAWKINS, J.—I am of opinion that the conviction was right, and ought to be affirmed. In arriving at this opinion, I have assumed as a fact, from the case as stated, that Stanley was arrested and brought before the justices upon an illegal warrant as ever was issued—a warrant signed by a magistrate not only without any written information or oath to justify it, but without any information at all. It follows that the magistrate who issued the warrant, and the defendant who with knowledge of the illegality executed it, were liable to an action for false imprisonment. If authority were wanting for this, I need but refer to *Caulle v. Seymour* (1 Q. B. 889), and *Morgan v. Hughes* (2 T. R. 231), per Ashhurst, J. Wrongful, however, as were the proceedings by which Stanley was brought into the presence of the magistrates, to answer a charge which up to that moment had never been legally preferred against him, yet before those magistrates, and in his presence, a charge was made over which, if duly made, they had jurisdiction. Upon that charge it was that the hearing proceeded, and in support of that charge it was that the defendant was sworn, and in giving his evidence swore corruptly and falsely. The case expressly finds that the alleged perjury was committed "on the hearing of a charge against John Stanley at petty sessions for an assault on him, Owen Hughes, and for obstructing him, being a police constable, in the discharge of his duty." Comparing this finding with the language of the 24 & 25 Vict. c. 100, s. 38, which enacts that "whosoever shall assault, resist, or wilfully obstruct any police officer in the due execution of his duty shall be guilty of a misdemeanour," I come without hesitation to the conclusion that the charge was that of the indictable offence created by that statute; and I do not think a doubt could have been suggested as to this, had we not been informed, in the course of the argument, that the justices in the result dealt summarily with the case, and convicted Stanley under sect. 12 of 34 & 35 Vict. c. 112 of an assault upon Hughes, being a constable, in the execution of his duty, and sentenced him to six months' imprisonment with hard labour. The case does not find in what form the charge was

made, whether in writing or otherwise. In my opinion, writing was unnecessary; but even were it so, I would, in the absence of evidence to the contrary, assume it to have been properly made, as did Crompton, J. in *Turner v. The Postmaster-General* (34 L. J. 12, M. C.). Now, a charge having been made before them of an indictable offence, committed within their jurisdiction by a person then bodily present, it seems to me the justices were bound to take cognizance of it. The 17th section of 11 & 12 Vict. c. 42, expressly recognises the legality of depositions of witnesses taken in cases in which persons charged with indictable offences are "brought" before justices "with or without warrant." Had the justices proceeded upon the defendant's deposition to commit Stanley for trial, instead of convicting him summarily, it is difficult to see what possible objection could have been made to the legality of their proceedings. They did not, however, think fit to adopt that course. They took, it is true, the evidence on oath of the defendant upon the charge for the indictable misdemeanour created by 24 & 25 Vict. c. 100, but, having done so, they proceeded to convict summarily under a different statute (34 & 35 Vict. c. 112) without, as I collect, any new information or charge of the latter offence; in short, they convicted him of an offence with which he had never been legally charged. In this I am of opinion they were wrong; and upon this ground I am strongly inclined to think the conviction may be quashed. *Martin v. Pridgeon* (1 Ell. & Ell. 778; 28 L. J. 179, M. C.) and *Reg. v. Brickhall* (33 L. J. 156, M. C.), more particularly referred to hereafter, are strong authorities in favour of this view. It does not, however, seem to me to be necessary to decide that point, for in the case before us we have only to determine whether the justices, at the moment when they swore the defendant in support of the charge which was made, had jurisdiction to hear that charge. Whether they afterwards pronounced a legal or an illegal judgment is immaterial to the present inquiry. Assuming, however, contrary to the view I have taken, that the charge upon which the defendant was sworn was an offence punishable upon summary conviction under 34 & 35 Vict. c. 112, and that verbal information of that offence was made before the magistrate who without written information or oath illegally issued the warrant under which Stanley was brought before the petty sessions, I should still be of opinion that the justices, in hearing that charge, and taking evidence in support of it, were acting within their jurisdiction. There is a marked distinction between the jurisdiction to take cognizance of an offence and the jurisdiction to issue a particular process to compel the accused to answer it. The former may exist; the latter may be wanting. To found jurisdiction to take cognizance of an offence, notwithstanding the dictum of Lord Mansfield in *Res v. Fearshire* (1 Leach C. C. 202), it has been constantly held that a written information is not necessary, per Grose, J. in *Res v. Thompson* (2 T. R. 23), per Parke, B. in *Reg. v. Millard* (6 Cox C. C. 150; 22 L. J. 108, M. C.), per Erie, C.J. in *Reg. v. Shaw* (10 Cox C. C. 66; 34 L. J. 173, M. C.), and per Crompton, J. in *Turner v. The Postmaster-General*. See also old forms of conviction, in which the information is set out thus: "A. B. giveth me to understand and be informed," &c.

The information, which is in the nature of an indictment, of necessity precedes the process; and it is only after the information is laid that the question as to the particular form and nature of the process can properly arise. Process is not essential to the jurisdiction of the justices to hear and adjudicate. It is but the proceeding adopted to compel the appearance of the accused to answer the information already duly laid, without which no hearing in the nature of a trial could take place, unless under special statutory enactment. If a mere summons is required, no writing or oath is necessary—a bare verbal information is sufficient. If a warrant is required, then, and for that purpose only, an oath substantiating the information is requisite, not only by the provisions in Jervis's Act, so often referred to, but by the common law, of which it was always a doctrine that a warrant which deprives a man of liberty ought not to issue without oath of the truth of the information: (see *Res v. Heber*, Barnardiston, 101.) To justify a warrant, I am also of opinion that a written information is necessary. In the case of indictable offences it is expressly made so by sect. 8 of 11 & 12 Vict. c. 42. The illegality of the warrant and of the arrest did not, however, affect the jurisdiction of the justices to hear the charge, whether that hearing proceeded upon a valid verbal information, followed by an illegal process, or upon an information for the first time laid in the presence of Stanley, upon which he was then and there instantly charged. The dictum of Holt, C.J. (1 Lord Raymond 509) is an express authority recognising the legality of a conviction upon an information *instantly*. Stanley might, it is true, had he known of the illegality of his arrest, have demanded his release from it, and prayed for an adjournment to a future day, to enable him to prepare his defence. This, I think, it would have been the duty of the magistrates to grant: (see per Crompton, J. in *Turner v. The Postmaster-General* (34 L. J. 13, M. C.), and per Blackburn, J. in *Reg. v. Shaw* (Ib. 173, 4). A refusal to do this, however, would not have destroyed their jurisdiction, though it might possibly have afforded good ground for setting aside the conviction on the ground that they had not allowed the accused sufficient opportunity to answer the charge. Another course might have been pursued, viz., to commence to hear, and if necessary adjourn the further hearing to a future day, a power expressly given by 11 & 12 Vict. c. 43, s. 16. It so happens, however, in the case before us that neither the magistrates nor Stanley were aware of the illegality of the warrant; and so the hearing proceeded without objection, and as if all things were in order. To use the language of the case, "the case was gone into of assault and obstruction," Stanley "defended himself and called a witness to show he was not guilty," and in the result was convicted as I have above mentioned. Possibly that conviction may be open to the objection that the justices had no jurisdiction to convict of the offence created by statute 34 & 35 Vict. c. 112, when the only charge made against him was of the misdemeanour created by 24 & 25 Vict. c. 100, on the authority of *Reg. v. Brickhall*, or upon the ground that under the circumstances Stanley had not such opportunity of answering and time to answer as he was in common justice entitled to: (see *Blake v. Beech*, 1 Ex. Div. 320.) The case of *Reg. v. Gillyard* (12 Q. B. 527) is a

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strong authority to show that the Queen's Bench have jurisdiction to quash a conviction upon other grounds than want of jurisdiction in the magistrates, e.g., on the ground of fraud, conspiracy, and perjury in obtaining it. If the contention on the part of the defendant be correct, then Stanley, even though he had suffered the whole imprisonment to which he was sentenced would be liable to be tried again, and could not plead *autrefois convict*; and if he had been acquitted would have been in no condition to plead *autrefois acquit*—two very startling consequences. A flood of authorities might be cited in support of the proposition that no process at all is necessary when the accused being bodily before the justices the charge is made in his presence, and he appears and answers to it. In 2 Hawk. P. C. 281 it is said "it seemeth plain from the nature of the thing that there can be no need of process where the defendant is present in court, but only where he is absent." In *Ren v. Stone* (1 East, 649) Lord Kenyon said: "Justice requires that a party should be duly summoned and fully heard before he is condemned; but if he be stated to be present at the time of the proceeding, and to have heard all the witnesses, and not to have asked for any further time to bring forward his defence, if he had any, this at all times has been deemed sufficient." *Reg. v. Shaw* (34 L. J. 169, M. C.; L. & C. 579; 10 Cox C. C. 66) is to the same effect, and appears to me to be decisive of the present case. The defendant in that case was convicted of perjury, committed upon the hearing of a charge punishable on summary conviction against one Kilshaw, a beershop keeper, under 18 & 19 Vict. c. 118. The proceedings, not being prescribed by that Act, were regulated, as are proceedings for the offence of which Stanley was convicted, by Jervis's Act (11 & 12 Vict. c. 43). At the trial no proof was given of any written information warranting a summons; indeed, the evidence showed that the summons was filled up by the magistrate's clerk, handed to a superintendent of police, who took it to a magistrate, who read and signed it without making any inquiry, or requiring any statement of fact—very like the circumstances of the present case. It was proved, however, that Kilshaw appeared before the justices, that the charge was then made against him, that he answered it, and that the defendant committed perjury in evidence which he gave on his behalf. It was objected that the justices had no jurisdiction to hear the charge against Kilshaw, because there was no information to justify the issuing of a summons. Erle, C.J. said: "In my opinion, if a party is before a magistrate, and he is then charged with the commission of an offence within the jurisdiction of that magistrate, the latter has jurisdiction to proceed with that charge without any information or summons having been previously issued, unless the statute creating the offence imposes the necessity of taking some such step." See also per Blackburn, J.: "I think when a man appears before justices, and a charge is then made against him, if he has not been summoned, he has a good ground for asking for an adjournment; if he waives that, and answers the charge, a conviction would be perfectly good against him, and the witnesses, if they swore falsely, would be liable to indictment for perjury." To the same effect are *Reg. v. Millard* (*ubi sup.*); *Reg. v. Berry* (8 Cox C. C. 151; 28 L. J. 86, M. C.); *Reg. v. Sim-*

*mons* (Ib. 183; 8 Cox C. C. 190); *Reg. v. Smith* (1 L. Rep. C. C. R. 110; 11 Cox C. C. 10); *Reg. v. Fletcher* (Ib. 320; 12 Cox C. C. 77); *Turner v. Postmaster-General* (5 B. & S. 756; s. c. 34 L. J. 10, M. C.) in which latter case the defendants were in custody upon a charge of felony, which could not be sustained, but before the magistrates were charged with and convicted of a different offence, for which they could not be legally arrested without warrant or information on oath. The court upheld the conviction. I do not look upon *Blake v. Beech* (1 Ex. Div. 320) as deciding that the magistrates in the case then before them had no jurisdiction, but only that the conviction ought to be quashed for irregularity under the peculiar circumstances of that case. *Reg. v. Pearce* (3 B. & S. 531; s. c. 32 L. J. 75, M. C.) only decides that perjury cannot be committed by a witness who is sworn in a non-existing cause, which is undeniable. That case would have been a strong authority for the defendant if no charge had been made against Stanley before the defendant was sworn. *Reg. v. Scott* (5 Q. B. 493; s. c. 13 L. J. 58, M. C.; and 1 New Sess. Cas. 27) was the strongest authority cited in favour of the defendant. That case, however, turned upon the peculiar language of the 6 & 7 Will. 4, c. 65, s. 9, "provided that before any proceedings shall be had or taken upon such information the charge shall be deposed to on oath," &c. It does not become necessary therefore to consider how far that case has been affected by more recent decisions. In the course of the argument there was some discussion as to whether the warrant was produced before the justices. In my opinion, whether it was or not is immaterial; had it been so, it would have proved nothing, for it could not in any sense be treated as the information. It was the act and process of the magistrate alone, not the information of the informer, and the recital of an information in it would be no evidence that there was such an information in fact: (see *Stevens v. Clark*, 1 Car. & M. 509, Cresswell, J.) I have carefully considered the provisions of Jervis's Act (11 & 12 Vict. cc. 42 and 43), but I find in them nothing at all militating against the view I have expressed. The sections of those statutes to which our attention was called which regulate the formalities to be observed when a charge is made against an absent person whose presence it is desired to procure do not seem to me to have any bearing upon a case like the present where the charge is made in the presence of the accused, who is then and there called upon to answer it, as he lawfully may be, according to the dictum of Holt, C.J., to which I have referred. In such a case it is, in my opinion, altogether immaterial, so far as the jurisdiction of the justices to hear that charge is concerned, whether the accused was before them voluntarily or otherwise, or on legal or illegal process. I have already pointed out that Stanley may have good grounds for asking that his conviction may be quashed, irrespective of the invalid objection raised by the defendant. But this conviction, in my opinion, ought to be affirmed.

POLLOCK, B. and LINDLEY, J. concurred in the judgment delivered by Hawkins, J.

MANISTY, J.—I am of opinion that this conviction should be affirmed. The case finds that Hughes swore falsely and corruptly in the hearing of a charge against Stanley at petty sessions for

an assault on him (Hughes) and for obstructing him, being a police-constable, in the execution of his duty; and the question is whether the justices had jurisdiction to hear that charge, Stanley having been brought before them by means of a warrant signed by a magistrate, but which warrant had been issued without any information in writing or on oath. By virtue of the provisions in several statutes, which it is unnecessary for me to repeat, justices of the peace assembled in petty sessions have jurisdiction to hear a charge of an assault upon a constable in the execution of his duty, but it is only by the Prevention of Crimes Act 1871 (34 & 35 Vict. c. 112) that they can summarily convict and punish for that offence. The charge made against Stanley might have been lawfully made and heard without any previous summons or warrant. Hughes might have apprehended Stanley in the act of committing the alleged assault; a magistrate seeing the alleged assault committed might have then and there ordered Stanley into custody; or Stanley, knowing or believing that he would be apprehended if he did not appear, might have appeared voluntarily before the justices to answer the charge, in any of which cases I cannot doubt but that the justices not only might, but must have heard the case and disposed of it somehow. It would be very strange, to say the least of it, if the law be that, notwithstanding the justices would have had jurisdiction to hear the charge if there had not been a warrant, they had no such jurisdiction in consequence of there being a warrant unsupported by sworn information. Nothing short of a clear statutory enactment would justify such a conclusion. That there is no such statutory enactment, I think, is clear. But it is said there are decisions which govern the case. The decision most relied upon on behalf of the prisoner Hughes is *Reg. v. Scotton* (5 Q. B. 493), but it will be seen by examining that case that the very ground upon which it was decided is wanting in the present case. The indictment was for perjury on the hearing before justices of an information laid under 1 & 2 Will. 4, c. 32, sects. 40 & 41, and the court held that the justices had no jurisdiction to hear it, because by sect. 9 of 6 & 7 Will. 4, c. 65, it was expressly made a condition precedent to any further step beyond the information that the matter of the information should be deposed to by oath of the informer or some other credible witness, and no such deposition had been made. Whether that case was rightly decided may, I think, admit of considerable doubt, having regard to the qualified language of the proviso at the end of sect. 9; but, assuming the right construction to have been put upon it, there is no such enactment in the present case, or anything like it. I think it unnecessary to review all the cases which were cited in the course of the argument, partly because I do not think that any of them are conclusive either way, but mainly because I found my judgment upon this, that the provisions contained in the 17th section of the 34 & 35 Vict. c. 112 (which incorporates the 11 & 12 Vict. c. 43), relative to process or proceedings for the purpose of bringing accused persons before justices, are, in my opinion, directory only, and do not in any way affect the jurisdiction of justices to hear charges made against persons who are before them, and who are accused of offences over which the justices have jurisdiction. The proviso at the end of sect. 1 of 11 & 12 Vict. c. 43, strongly sup-

ports this view. We are not told by the learned judge who has stated this case how the justices dealt with Stanley; but we are informed by counsel at the Bar that they convicted him summarily, and sentenced him to imprisonment. In my opinion it is immaterial for the present purpose how the justices disposed of the charge, the only question before us being whether the justices had jurisdiction to hear it, and to receive evidence upon oath in support of it. I think they had, and that the question put to us should be answered in the affirmative.

FIELD, J.—I also am of opinion that this conviction should be affirmed. I have nothing to add to the judgments already delivered, but only desire to say, as I differed from my brothers Cleasby and Grove in *Blake v. Bosch*, that I have carefully reconsidered my judgment in that case, and am unable to alter the view I then entertained.

HUDDLESTON, B.—The question in this case is, whether a conviction for perjury committed by the prisoner Hughes before justices should be quashed, because there was no information on oath for the warrant upon which Stanley, the party charged, was brought before the justices. The charge against Stanley before the justices was for obstructing Hughes, a police constable, in the discharge of his duty. It is not stated in the case under what statute the charge was made against Stanley; it might, therefore, have been under 34 & 35 Vict. c. 112, s. 12, by which he might be convicted summarily; or it might have been under 24 & 25 Vict. c. 100, s. 38, by which he might have been sent for trial to the assizes or sessions. If the charge be for an offence under the former Act, it may by sect. 17 be prosecuted in manner directed by Jervis's Act, 11 & 12 Vic. c. 43. Sect. 1 of that Act provides that, "where an information shall be laid that any person has committed any offence for which he is liable by law on summary conviction, the justice may issue his summons." This is the process by which the person to be charged is called on to appear. By sect. 2, "if being served the party does not appear a warrant may issue, or a warrant may issue in the first instance if the justice shall think fit," but in both these cases the matter of the information must be substantiated to the satisfaction of the justice by oath or affirmation; and if the summons is not obeyed the justice may proceed *ex parte* on proof of due service. By sect. 10 it is declared (that is declaratory of the common law) and enacted that the complaint in case of an order, and the information in case of a summary conviction, shall be made or laid without any oath or affirmation except where warrants are issued in the first instance to apprehend, and then the matter of the information must be substantiated by the oath or affirmation of the informant. Sect. 13 deals with the appearance or default of the party charged, and provides that the case may be heard in his absence on due proof of the service of the summons, or a warrant for his apprehension issued and committal; and for the dismissal of complaint or information if the complainant or informant does not appear by himself, counsel, or attorney; for the adjournment of the hearing, and concludes thus, "but if both parties appear, either personally or by their respective counsel or attorneys, before the justice or justices



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who are to hear and determine such complaint or information, then the said justice or justices shall proceed to hear and determine the same." The object of all these provisions is to bring the party accused before the justices, to enforce his presence, and to enable them to deal with him in his absence; but when he is before them, the justices are required, and shall proceed to hear and determine. The information on oath is not necessary to give the justices jurisdiction to try, though it is necessary to give them jurisdiction to issue a warrant to apprehend. The jurisdiction to try arises on the appearance of the party charged. Sect. 14 shows what is to take place at the hearing, "where such defendant shall be present at such hearing the substance of the information shall be stated to him." The word "stated" is important as pointing out that no summons, information, or other document, is to be read or shewn to him. An information is nothing more than what the word imports; namely, the statement by which the magistrate is informed of the offence for which the summons or warrant is required, and it need not be in writing unless the statute requires it. The magistrate to whom it is made is not necessarily, and very often never is, one of the magistrates by whom the case is subsequently heard. In practice an information is never produced before the justices. If in writing, it remains with the magistrate granting the summons or warrant, as the warrant remains in the custody of the constable. The clerk to the justices, or the police officer present, states the substance of the information, that is, the nature of the charge; sometimes where there is a charge sheet, as in the metropolitan districts, reading from it—otherwise not. The charge sheet is merely the statement drawn up by the inspector at the station of the charge preferred before him. He states, in fact, the substance of the charge or information, and the prisoner is called on to plead. He may admit the truth and plead guilty, or he may not admit the truth and desire to be tried for it, or he may apply to adjourn or object to the jurisdiction. But if he make no objection (and here it is found that Stanley made no objection) the case must proceed. Principle and authority seem to show that objections and defects in the form of procuring the appearance of a party charged will be gone by appearance. The principle is that a party charged should have an opportunity of knowing the charge against him, and be fully heard before being condemned. If he have the opportunity, the method by which he is brought before the justice cannot take away the jurisdiction to hear and determine when he is before them. The arrest of Stanley was no doubt illegal, there had been no information or oath to justify the warrant, and it might be that if the objection had been taken the magistrates might have entertained it, but they could then and there have issued their summons for Stanley's apprehension at once, on a verbal information which would be good (*Reg. v. Fuller*, 1 *Ld. Raym.* 610), and have proceeded to hear and determine, though if the defendant objected they ought to adjourn, so that he might know the charge and be prepared to meet it. *Reg. v. Stone* (1 *East*, 649), was a conviction under the game laws, and the objection that there had been no summons was abandoned on argument, and Lord Kenyon at p. 649, and Mr. Justice Le Blanc

at p. 654, point out that "justice requires that a party should be duly summoned and fully heard before he is condemned; but if he be present at the time of the proceeding, and heard the charge of all the witnesses, and not have asked for any further time to bring forward his defence, if he had any, this at all times has been deemed sufficient." This was a case in which the objection was made to the conviction that it did not appear on the face of it that the defendant was duly summoned, but the principle is the same. In *B. v. Shaw* (L. & C. 579, 10 *Cox C. C.* 66), where there was no information of any kind, Erle, C. J. points out that where the parties are before a magistrate who has jurisdiction in respect of time and place (as the magistrates had here), no summons or information is necessary to complete his jurisdiction, unless the obligation is imposed by the statute which constitutes the offence, and certainly that is not imposed by the 11 & 12 *Vict. c. 43*. Blackburn, J., in that case, says no information was required. It is material to know what the charge is (and here the case finds Stanley was charged with obstructing the police constable in the discharge of his duty). Sometimes a summons or other writing may be required, but no antecedent information is necessary. In the absence of one, the party to be tried may, if he please, ask for an adjournment, but if he does not do so the adjudication is good; and Montague Smith, J., says, no information or summons is necessary where the party appears voluntarily, (and I do not think it makes any difference if he be there compulsory.) It is to be observed that this decision was in 1865, long after Jervis's Act came into operation. Indeed Jervis's Act (11 & 12 *Vict. c. 43*) is referred to by the prisoner's counsel. Mr. Bowen's argument in this case for the necessity of an information is entirely based on Jervis's Act (11 & 12 *Vict. c. 43*.) This case is, therefore, a distinct authority that the absence of such an information is not fatal to the jurisdiction of the justices. In *Turner v. Postmaster-General* (5 *B. & S.* 756) it was held that though there was no information on oath (the 62nd section of 24 & 25 *Vict. c. 97*, the statute on which the defendant was convicted, requiring one) that after appearance and no objection made, no objection to the jurisdiction of the justices to convict could be taken, that any defect in bringing the party before the justices was cured by appearance and the merits of the case being gone into, and that the justices had jurisdiction. *Blake v. Beach* (1 *Ex. Div.* 330) is to the same effect. I wish to say that I subscribe to every word in my brother Field's judgment in that case. The judgments of Cleasby, B. and Grove J. are based on the ground that the objection to the want of an information was distinctly taken before the magistrates. *B. v. Berry* (*ubi sup.*), *R. v. Fletcher* (*ubi sup.*), *Reg. v. Fuller* (13 *Lord Raym. Rep.* 320) support the same principle, though they were sought to be distinguished in argument by suggesting that the inquiry on which the perjury arose was of a quasi civil nature. The decision in *R. v. Scotton* (5 *Q. B.* 493) was on the ground that by the words of the statute 6 & 7 *Will. 4, c. 65, s. 9* it was a condition precedent to any further steps that the matter of the information should be deposed to on the oath of the informer, or some other credible witness. I think, therefore, that Stanley being before the justices and no adjournment asked for, and being

charged with an offence punishable by summary conviction, though there had been no information on oath for the warrant, that false swearing in a material point would be perjury. The passages quoted in the argument from Paley on Convictions and Smith's Leading Cases have reference to the statement of the information in the old form of conviction, where, of course, it became necessary to show in that part of the conviction all the ingredients to give jurisdiction. The form of conviction in Jervis's Act omits the information, but if the offence with which Stanley was charged was one under 24 & 25 Vict. c. 100, s. 38, for which he might be committed for trial at the assizes or quarter sessions, I entertain no doubt that there need not have been an information on oath or warrant to give the justices jurisdiction to hear and commit or discharge. The practice of justices with regard to indictable offences is regulated by Jervis's Act. Chap. 42, sect. 8 provides that where a warrant is to be issued there must be an information in writing on oath, but not where a summons only is issued. There is no section pointing out what is to be done at the hearing, as in Jervis's Act 11 & 12 Vict. c. 43. But sect. 17, which applies to the examination of witnesses provides, "that where any person shall appear, or be brought before any justice, charged with any indictable offence, whether such person appear voluntarily upon summons or have been apprehended with or without warrant, or be in custody for the same, or any other offence, depositions shall be taken and the oath administered before the witness is examined." The justice here, therefore, has expressly jurisdiction to administer the oath to the witness when the party charged is before him, whether he appear or be brought there, and whether there be or be not a warrant; and, therefore, having jurisdiction to administer an oath, false swearing on a material point would be perjury. But apart from either statute, I do not think it can be doubted that a police constable would be justified in taking into custody without summons or warrant any person who was assaulting and obstructing him in the execution of his duty, and subsequently charging him with that offence. Upon such a charge being made (although it was entirely false) the magistrate before whom it is made must inquire into its truth, and to do so must have jurisdiction to administer an oath. False swearing in that inquiry on a material point would be perjury. In any view, therefore, I am of opinion that the conviction must be affirmed.

DENMAN, J.—I conceive the true meaning and effect of the case submitted to us by the learned Lord Justice to be as follows: John Stanley was improperly arrested by the defendant, Owen Hughes, a constable, who had obtained a form of warrant from the clerk to the clerk of the justices which was filled up by the clerk or by Hughes in the usual form, as for a charge of assaulting and obstructing Hughes in the execution of his duty. This warrant was improperly signed by the magistrate without requiring any information either in writing or upon oath. The magistrates at petty sessions finding Stanley before them, and having been verbally informed, either by Hughes, or their own clerk, that Hughes charged Stanley with assaulting him and obstructing him in the execution of his duty, and without inquiring how Stanley had been brought there, administered an oath to Hughes, and took evidence in the course of which Hughes committed perjury, if perjury,

in law, would be committed in such a case; the only point raised for our consideration being that the absence of a written information or of an information upon oath was fatal to a conviction for perjury. No question was raised at the petty sessions as to the existence of an information or as to the existence or legality of the warrant or arrest. These objections were first suggested upon the trial of Hughes for perjury. Stanley made no objection to the charge being heard, and called a witness in his own behalf. He was in fact, as was admitted upon the argument though not stated in the case, convicted and sentenced to six months' imprisonment with hard labour, a sentence which could only have been passed upon summary conviction under the powers of the 34 & 35 Vict. c. 112, s. 12. The case has been twice most ably and elaborately argued, and for some time I doubted whether the conviction could be sustained, but upon full consideration I am satisfied that it ought to stand. The main argument for the defendant was based upon the ground that the offence of which he was convicted was one under statute 34 & 35 Vict. c. 112, s. 12, and that by virtue of sect. 17 of that Act, coupled with the provisions of the 11 & 12 Vict. c. 43, thereby incorporated, the whole proceeding was void, and without jurisdiction for want of an information upon oath. I am of opinion, however, that we ought not to have regard to the conviction in considering whether perjury was committed, but to look to the moment at which the false evidence was given, and consider whether, at that moment, the magistrates had jurisdiction to hear that evidence judicially. And I think that they had jurisdiction to hear that evidence judicially, if, at the trial at which it was given, it was evidence which in any possible event they might have acted upon judicially in a matter within their jurisdiction whether the result of their acting upon it might have been to convict, or to acquit, or to adjourn, or to send for trial, or to take bail, or to do any other judicial act within their competency. At the moment at which the false evidence in question was given, it appears to me that there was nothing to compel the magistrates to inquire into the mode in which Stanley had been brought before them. If, as I suppose (and here I am putting the case as favourably as it can be put for the defendant) nothing more happened than that the magistrate inquired "What is the charge against that man?" and Hughes said in answer, "I charge him with assaulting me, and obstructing me in the execution of my duty." I apprehend that the magistrates would at once have had jurisdiction to put Hughes upon his oath, and inquire into several matters, upon any one of which the perjury might have been committed wholly without reference to what they might in the result feel themselves bound to do or not to do. For example, they might have inquired into the name and number of Hughes, and whether he were really a member of the police, and actually on duty at the time of the alleged assault; whether Stanley was really the person who had assaulted him or not, how he was dressed, whether he were alone, or with others, &c., and indeed even if the jurisdiction of the magistrates to convict depended upon whether he had arrested Stanley in the act, or brought him up upon a legal warrant afterwards obtained, this very question might have been a legitimate subject of inquiry. Considering that

this was a case in which Hughes complained of an assault upon himself, it need not have occurred to the magistrates in the first instance that any warrant at all would have been necessary, for there is nothing in any of the statutes to repeal the common law which would have enabled Hughes if the charge were a true one, to bring Stanley at once before the magistrates, without any warrant at all. The charge actually made as stated in the case, according to my understanding of it, is much more nearly in accordance with the provisions of 24 & 25 Vict. c. 100 s. 38, than with those of 34 & 35 Vict. c. 112, s. 12. It included a breach of the peace; and I can see no reason why the magistrates, at all events, in the absence of any objection on the ground of the illegality of the arrest, or the want of an information, should not have administered an oath, and inquired into the charge; at all events, until any doubt arose as to their jurisdiction to deal with it finally by conviction. It was contended, that even under 11 & 12 Vict. c. 42, relating to indictable offences, the right of the magistrates to inquire would not be well founded in the absence of an information in writing or upon oath; but I am of opinion that there is nothing in that Act to destroy the jurisdiction of the magistrates to inquire into a charge of an indictable offence, where the person charged is actually in custody before them. The first section of that Act shows that the provisions relating to warrants and informations are not intended to apply in such a case, but are merely provisions for the purpose of bringing people not already in custody before the justices; but it is not necessary to consider further the question whether the conviction was good or bad, and I express no opinion upon it. Their jurisdiction to convict appears to me to be a totally different question from the question whether they had jurisdiction to take evidence in such a case. I cannot hold that the magistrates who tried and convicted Stanley (even if the conviction be one that cannot be supported) had no jurisdiction to administer an oath to Hughes, or that any evidence he gave relevant to a verbal charge of assault and obstruction was *coram non judice*. The case of *Reg. v. Scotton* (5 Q. B. 493) which at first seemed to me to be in favour of the defendant's contention, is, I think, clearly distinguishable on the ground that there the court thought that the only possible foundation of the magistrates' jurisdiction was an information, whereas in the present case there was nothing to prevent the magistrates proceeding to inquire into a charge which in at least one other lawful manner might have been brought before them without any information at all, and either adjudicated upon by them or sent for trial. In the view I take of this case it is necessary to discuss more fully the contention of the defendant's learned counsel as to the applicability of Jervis's Acts to the case upon the supposition that because the conviction was one under 34 & 35 Vict. c. 112, no evidence given upon the hearing could be the subject of an indictment for perjury in the absence of an information on oath or in writing. In my view all that was necessary to give the magistrates jurisdiction to hear evidence was that there should be before them a person charged with an offence within their general jurisdiction under such circumstances as to call upon them to take evidence before they could decide whether they should exercise or

abstain from exercising some legal power which they possessed. For the reasons above given, I think such was the case here, and that the evidence falsely and corruptly given upon oath, and which must be taken to have been held by the learned Lord Justice to have been relevant and material to the subject matter of inquiry before the justices cannot be said to have been *coram non judice*. The indictment on being referred to, appears to have contained an allegation that the perjury was committed upon the hearing of a "complaint or information," and this is no doubt language which would at first sight lead me to expect that proof would have been given of a charge made otherwise than in the way in which it appears to me that the case states the charge in this case to have been made. But I do not think that the words "complaint or information" are inconsistent with a verbal charge made under the circumstances suggested above. The statute 14 & 15 Vict. c. 100, s. 20, which is applicable to the case provides that "In every indictment for perjury it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom the oath was taken, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding either in law or equity, and without setting forth the commission or authority of the court or person before whom such offence was committed." All that is necessary since that statute is that the indictment should show that there was a proceeding pending before the court, over which the court had jurisdiction, and I think this does sufficiently appear in the present case, and that it is not necessary to tie down the meaning of the words to any particular form of information or complaint. For these reasons I am of opinion that the conviction ought to be affirmed.

LORD COLERIDGE, C.J.—I am desired to say that the Lord Chief Baron dissents from the judgment of the majority of the court. I had myself prepared a judgment, but after having had the advantage of reading the judgment of my brother Hawkins, I should only be expressing, were I to read it, in less forcible language the conclusions at which he has arrived. Without binding myself to every single expression, I concur in the results, and the train of reasoning in his judgment. And this being the view of the majority of the judges who heard the case, the conviction will be affirmed.

*Conviction affirmed.*

## House of Lords.

April 4 and May 20.

(Before the LORD CHANCELLOR (O Cairns), LORDS HATHERLEY, SELBORNE, and GORDON.)

TENNENT v. THE CITY OF GLASGOW BANK AND LIQUIDATORS. (a)

ON APPEAL FROM THE FIRST DIVISION OF THE COURT OF SESSION IN SCOTLAND.

*Joint-stock company—Fraud of directors—Rescission of contract—Winding-up.*

*T. was a shareholder in a joint-stock company. The company having become insolvent, T., after the stoppage of the company, and before the resolu-*

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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tion to wind it up had been passed, brought an action to set aside the transfer of the shares to him on the ground that he had been induced to purchase them by the fraud of the directors. Held (affirming the decision of the court below), that the contract could not be rescinded after the company had stopped payment.

THIS was an appeal from a judgment of the First Division of the Court of Session in Scotland.

The City of Glasgow Bank was established in 1839, and in 1862 it was incorporated under the 25 & 26 Vict. c. 89, with unlimited liability.

On the 2d Oct. 1878 the bank stopped payment, and a resolution to wind-up voluntarily was passed on Oct. 22nd. On investigation of its affairs the bank was found to be hopelessly insolvent.

It appeared that in 1872 and 1873 the appellant purchased actually from the bank, though nominally from third parties, 6000l. of its stock, which he held and received the dividends upon down to the date of the insolvency. The stoppage having occurred on the 2nd Oct. 1878, the appellant on the 21st, the day before the resolution for the winding-up was passed, raised an action of reduction in the Court of Session to set aside the transfer of the shares to him on the ground that he had been induced to purchase them through the fraud of the company. After the commencement of the winding-up, finding that his name had been placed on the list of contributories in respect of the stock which he held, he presented a petition to the Court of Session praying that his name might be removed from that list. That petition was rejected by the court below, on the ground that, although the appellant would have been entitled to relief had he come forward in time, yet, the rights of innocent third parties having intervened, his option to avoid the contract on the ground of fraud was barred; and, further, that it was too late to attempt to rescind the contract after the stoppage of the bank.

From this decision the present appeal was brought.

*Southgate, Q.C., Macnaghten, and Whiteway* appeared for the appellant, and urged that, as the appellant had been induced to become a member of the company by fraud, he was entitled to be relieved from the contract of membership and its consequences, he having repudiated his shares as soon as he discovered the fraud, and having commenced legal proceedings before the resolution to wind-up, which is the time when the rights of the creditors of the company intervene. Before the date of the winding-up the question is only between the member and the company. They cited

*Oakes v. Turquand*, L. Rep. 2 H. of L. Cas. 325; 16 L. T. Rep. N. S. 808;

*Reese River Silver Mining Company v. Smith*, L. Rep. 4 H. of L. Cas. 64;

*Weston's case*, L. Rep. 4 Ch. 20; 19 L. T. Rep. N. S. 337;

*Stone v. City and County Bank*, 3 C. P. Div. 282; 37 L. T. Rep. N. S. 195; 38 L. T. Rep. N. S. 9;

*Henderson v. Lacom*, L. Rep. 5 Eq. 240; 17 L. T. Rep. N. S. 527.

*Kay, Q.C., Benjamin, Q.C., Davey, Q.C., and Kinnear* (of the Scotch Bar), for the respondents, maintained that the appellant could not be allowed to avoid his contract when he took no steps to do so till after the company was known to be insolvent. The contract was only voidable, not void; and the delay which had occurred, and the inter-

ention of the rights of third parties, made it impossible to restore matters to their former condition. *Henderson v. The Royal British Bank* (7 E. & B. 356) is in point, and shows that the rights of creditors date from the stoppage, not from the winding-up. *Oakes v. Turquand* does not support the appellant's contention, and in the *Reese River Company v. Smith* the company was a going concern when the bill was filed. They also referred to

*Webb v. Whiffin*, L. Rep. 5 H. of L. Cas. 711;

*Re Whitehouse*, 9 Ch. Div. 595; 39 L. T. Rep. N. S. 415;

*Western Bank of Scotland v. Addis*, L. Rep. 1, H. of L. Cas. 84, 145;

*Daniell v. The Royal British Bank*, 1 H. & N. 681;

*Dossett v. Harding*, 1 C. B. N. S. 524.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 20.—Their Lordships gave judgment as follows:

The LORD CHANCELLOR (Cairns), after stating the facts, continued as follows:—In this case it may be assumed that whatever difficulties arising from lapse of time and other circumstances may, as between the appellant and the bank, be in the way of his succeeding in the action of reduction he has instituted he would have been entitled, had the bank been a going concern, to have succeeded in this action. The question is, whether he can succeed in rescinding his contract after the bank has stopped payment. The Lord President stated that the law upon this subject was contained in three propositions: first, a contract induced by fraud is not void, but only voidable at the option of the party defrauded; secondly, this did not mean that the contract was void till ratified, but it meant that the contract was valid till rescinded; thirdly, the option to void the contract was barred where innocent third parties had, in reliance on the fraudulent contract, acquired rights which would be defeated by its rescission. Upon the first of these propositions there can be no dispute. Nor as to the third proposition. The only question is as to the precise wording, and the extent and mode of its application. The case of *Oakes v. Turquand* decided that it was too late, after a winding-up commenced, to rescind a contract for shares on the ground of fraud. Whether it can or cannot be so rescinded up to that time must depend on the particular circumstances of the case. In the case of a joint-stock company, the shares are in their nature and creation transferable without the consent of creditors; and a shareholder, so long as the bank is a going concern, can get rid of his shares and rid of his liability to creditors either immediately, or after a certain interval. The assumption is, that while the company is a going concern, no creditors have any specific right to retain the individual liability of any particular shareholder. It is on the same or a similar principle that, so long as the company is a going concern, a shareholder who has been induced to take up shares by the fraud of the company has a right to throw back his shares upon the company without reference to any claims of creditors. He would have a right to transfer his shares without reference to creditors. The company, as a going concern, is assumed to be solvent and able to meet its engagements, and to have a surplus, and, the company being solvent, its duty to pay the repudiating shareholder what is due to him, and to take the shares off his

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hands, is an affair of the company and not of its creditors. But if the company has become insolvent and has stopped payment, then, even irrespective of winding-up, a wholly different state of things appears to arise. The assumption of new liabilities under such circumstances is an affair not of the company, but of its creditors. The repudiation of shares, which, while the company was solvent, would not, or need not, have inflicted any injury upon creditors, must of necessity inflict a serious injury on creditors. I should therefore be disposed in any case to hesitate before admitting that after a company had become insolvent and stopped payment, whether a winding-up had commenced or not, a rescission of a contract to take shares could be permitted as against creditors. But in this case the facts are extremely peculiar, and it is not necessary to lay down any general rules extending beyond the particular facts of this case. The bank stopped payment on the 2nd Oct., and never resumed business, its stoppage being caused by its insolvency. It was admitted that the directors knew at the time of stoppage that the insolvency of the bank was irretrievable. The steps taken by the directors were taken by them as agents and representatives of the shareholders, and there was imposed on the shareholders whatever responsibility may fairly be inferred from the steps so taken. Now, at that time and till 21st Oct., the appellant was to all intents and purposes a shareholder, not having taken any steps to disaffirm this contract, and the directors during this time were acting as his agents. It was the action of the directors, taken in the interest of the shareholders, including the appellant, and taken under the authority of the 46th article of the deed of the company, which, by holding out to the body of creditors the prospect of a voluntary winding-up, stayed the hands of the creditors from proceeding to a compulsory winding-up; and it became impossible after the advertisement of 5th Oct., for the body of shareholders in the company, whose agents the directors were, to make any alteration in their status, whether by a transfer or by a repudiation of shares, which would affect the rights of creditors in the company. This consideration alone seems to be sufficient to dispose of the present appeal, and it must therefore be dismissed with costs.

Lords HATHERLEY, SELBORNE, and GORDON concurred.

*Judgment appealed from affirmed, and appeal dismissed with costs.*

Solicitor for the appellant, J. M'Diarmid.

Solicitors for the respondents, Martin and Leslie, for Davidson and Syme, Edinburgh.

Thursday, May 15.

(Before the LORD CHANCELLOR (Cairns), Lords HATHERLEY, O'HAGAN, BLACKBURN, and GORDON.)

MORTIMORE v. MORTIMORE. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.  
*Will—Construction—Next of kin—Time when class to be ascertained.*

*A testator left certain property equally among his four daughters for life, and to their issue after them, and, in default of issue, with remainders to*

*the surviving daughters for life, and their issue, and from and after the decease of his last surviving daughter, among the children of such daughter, "and if there be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the Statute for the Distribution of Intestates' Estates."*

*Held (affirming the judgment of the court below), that the case was governed by the decision in Bullock v. Downes (3 L. T. Rep. N. S. 194; 9 H. L. Cas. 1), and that the class of next of kin was to be ascertained at the date of the testator's death, not at the death of the last surviving daughter.*

THIS was an appeal from a judgment of the Court of Appeal (James, Baggallay, and Thesiger, L.JJ.), reported in 37 L. T. Rep. N. S. 520 and 7 Ch. Div. 322, under the name of *Mortimore v. Slater*, reversing a decision of Bacon, V.C., reported in 36 L. T. Rep. N. S. 947, where the facts are fully set out.

The question arose upon the construction of the will of one John Clarke, who died in May 1838, by which he left certain funds in trust for each of his four daughters for her life, and after her death for her issue, and in default of issue, for the survivors for life and their issue; the ultimate bequest, in the event, which happened, of the last surviving daughter dying without issue, being "to such person or persons as will then be entitled to receive the same as my next of kin under the Statute for the Distribution of Intestates' Estates."

The plaintiff, who was the executrix of the last surviving daughter, Frances Clarke, who died on the 8th March 1875, and was also legal personal representative of another of the daughters, claimed a declaration that, according to the true construction of the will, the persons who were entitled to the said funds on the death of Frances Clarke were the persons who were the testator's next of kin according to the statute at his death.

The defendant, who was administratrix of one Thomas Young, a grandson of the testator, who survived Frances Clarke, contended that the class of next of kin should be ascertained at the date of the death of the last surviving daughter.

Bacon, V.C. decided in favour of the defendant, but his decision was reversed, as above mentioned.

This appeal was then brought to the House of Lords.

Everitt (Southgate, Q.C. and Swanston, Q.C. with him) appeared for the appellant.—In addition to the authorities cited below he referred to

*Jones v. Colbeck*, 8 Ves. 38;

*Lee v. Massey*, 3 De G. F. & J. 113;

*Re Greenwood's Will*, 31 L. J. 119, Ch.

Kay, Q.C. and W. C. Renshaw, who appeared for the respondent, were not called upon to address the House.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Cairns).—My Lords, it appears to me that this case is absolutely indistinguishable from *Bullock v. Downes*, and I must say that you seldom find, in dealing with the construction of wills, two cases so completely alike. I think that you cannot adopt the decision which Bacon, V.C. arrived at without overruling, if your Lordships could do so, the judgment of this House in the case of *Bullock v. Downes*. I must add that, apart

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

from authority, if you were now considering the case for the first time on principle, you could come to no other decision. There is a gift to a class which is thus described, "Such person or persons as will then be entitled to receive the same as my next of kin under the statutes in force for the distribution of intestates' estates." These words necessarily refer to the death of the testator as the time for determining who are to be entitled as his next of kin. The only words referring to futurity are the words "will then," and I am willing to take them as referring to the death of the survivor. But what does that come to? That you are still to find out the persons who are entitled at the testator's death, and then ascertain who would be entitled at the later date to claim under that title. I move that the judgment of the court below be affirmed, and the appeal dismissed with costs.

Lords HATHERLEY, O'HAGAN, BLACKBURN, and GORDON concurred.

*Judgment appealed from affirmed, and appeal dismissed with costs.*

Solicitor for the appellant, J. Watson.

Solicitor for the respondent, C. Langley.

## Judicial Committee of the Privy Council.

May 15, 16, 17, and June 14.

(Present: The Right Hons. Sir JAMES COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and Sir ROBERT COLLIER.)

THE NATIONAL BANK OF AUSTRALASIA v. THE UNITED HAND-IN-HAND AND BAND OF HOPE COMPANY AND LAKELAND (consolidated appeals). (a)

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA.

*Mortgagor and mortgagee—Bill imputing fraud in dealing with mortgage securities—Rights of mortgagee—Interest—Costs.*

*A mortgagee who denies his character as such, and claims as owner, will not, if defeated, be allowed to claim the benefits attached to the character of a mortgagee.*

*The respondent company, as mortgagors, filed a bill against the appellants as mortgagees, in which they not only impeached the validity of the mortgage, but also impugned as fraudulent and void a series of transactions, the effect of which, if valid, would have been to destroy the respondents' right of redemption.*

*The appellants, by their answer, did not rely wholly on their title as unpaid mortgagees, but maintained the validity of the subsequent transactions, and claimed as absolute owners of the property.*

*The Court found that these transactions were void as against the mortgagors, but upheld the validity of the mortgage securities.*

*Held (affirming the judgment of the court below), that the rule by which, when a mortgagor unsuccessfully impeaches the validity of the mortgage securities, no decree should be made in the suit except one of dismissal, without prejudice to the plaintiffs' right to bring a regular suit for redemption, did not, under the circumstances, apply; and that the defendants could not claim the immunities of an ordinary mortgagee, but*

*were liable (1) to account for whatever was received from the property by those whom they put into possession without just title; (2) for the interest on the principal moneys for which they were held accountable; (3) for the costs of the suit.*

*The Incorporated Society v. Richards (1 Dr. & War. 258) approved and followed.*

These were consolidated appeals from judgments of the Supreme Court of Victoria (Stawell, C.J. and Fellowes, J.), affirming, with variations, two decrees of Molesworth, J., made in a suit brought by the respondent company against the appellant bank and the respondent Lakeland, impeaching the validity of certain mortgages given by the company to the bank, and of certain subsequent dealings with the property comprised in such mortgages.

*Southgate, Q.C. and Oozens-Hardy* appeared for the appellants.

*Joshua Williams, Q.C., Eddis, Q.C., J. D. Wood, and Shebbeare* for the respondents.

The facts, arguments, and authorities appear fully in the judgment of their LORDSHIPS, delivered on the 14th June, as follows:—The company which is the first of the respondents in this appeal, and which will throughout this judgment be designated as "the company," was incorporated on the 18th Oct. 1866, under the provisions of a colonial statute, The Mining Companies Limited Liability Act 1864, for the purpose of working certain mines at Ballarat. The National Bank of Australasia (the appellant), which will hereafter be spoken of as "the bank," had a branch at Ballarat, and were the bankers of the company. In 1873 the then directors of the company caused to be executed under its common seal two securities in favour of the bank. The first of these was an indenture bearing date the 22nd Feb. 1873, which, after reciting a resolution of the shareholders of the company empowering the directors to borrow money not exceeding 20,000*l.*, and an agreement between the directors, purporting to act in pursuance of the powers given to them by that resolution, and the bank for an advance of 10,000*l.*, and for having the repayment of that advance with all further sums in which the company might thereafter become indebted to the bank, with interest at the rate of 7 per cent. per annum, secured in manner thereafter appearing, and also by an assignment by way of mortgage of the leasehold property of the company bearing even date therewith, assigned, by way of mortgage, the plant and machinery thereby specified. This deed fixed no time for the repayment of the sums secured, but contained a power of sale, expressed in the fullest terms, which the bank was to be at liberty to exercise if the company should make default in payment after service upon it of a demand in writing under the hand of the manager or acting manager of the Ballarat branch of the bank. The second security, being the further security mentioned in the indenture of the 22nd Feb., was not executed until the 11th March in the same year. It was an instrument of mortgage of the leasehold estate therein described of which the company was the registered proprietor under the provisions of the Transfer of Land Statute, otherwise known as Act No. 301; and it was, with one variation that will be hereafter noticed, in the form prescribed for mortgages by that statute, and was duly registered on

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

the 16th April 1873. The property comprised therein will be henceforth called "the mine." In 1876 the company instituted against the bank and the respondent Lakeland, a purchaser from the bank of the mortgaged property, a suit of which the nature will hereafter be considered. On the 6th Dec. in that year Molesworth, J. made an interlocutory decree, which, amongst other things, directed an account to be taken against the bank as mortgagees in possession. The full bench of the Supreme Court of Victoria affirmed this, with some slight variations, by a decree dated the 3rd May 1877. Against this last decree the bank obtained leave to appeal on the 16th May in that year. That appeal is the first of those of which their Lordships have now to dispose. Pending it, the accounts directed by the decree were taken in the Master's office, and on the 9th Aug. 1878 an order on further directions was made by Molesworth, J., which on appeal was affirmed by the full court by its order of the 30th of the following month. The second appeal to Her Majesty is against this last order. The two appeals, though heard together, will be considered separately. The first and principal objection taken to the interlocutory decree is that, inasmuch as the company by its bill impeached the validity of the mortgage securities which the court affirmed, no decree ought to have been made in the suit except one of dismissal without prejudice to the plaintiff's right to bring a regular suit for redemption. In support of this contention the learned counsel for the bank relied upon the rule of courts of equity to this effect, which they insisted was established by the case of *Troughton v. Binkes* (6 Ves. 573), *Martinez v. Cooper* (2 Russ. 198), *Gordon v. Horsfall* (5 Moo. P. C. 393), *Inman v. Wearing* (3 De G. & Sm. 729), *Johnson v. Fesenmeyer* (25 Beav. 88), and *The Crenner Mining Company v. Williams* (35 Beav. 353). Their Lordships do not dispute the authority of these cases, but conceive that the present is distinguishable from them, and does not fall within the somewhat strict and technical rule affirmed and enforced in them. It will be found in all of them, if examined, that whilst on the one hand the plaintiff impeached the mortgage securities, the defendant on the other insisted on his rights as mortgagee and on nothing more; and that the relation of mortgagor and mortgagee having been established, the court held that the plaintiff could not be allowed to have a decree for redemption on a bill which disputed the existence of that relation, and contained no prayer for redemption. The rule is treated as a privilege incident to the character of mortgagee, which the defendant had throughout admitted and insisted on. But what is the present case? The bill, admitting the execution of the mortgages, insists that such execution was *ultra vires* the then directors, and prays that they may be declared void as against the company; and it also states, and impugns as fraudulent and void against the company, a series of transactions the effect of which, if valid, would be to destroy the company's right of redemption, and to convert the title of the bank from a mortgage into an absolute title. The twenty-eighth paragraph moreover contains a direct statement that the sums advanced by the bank upon the mortgages had been more than satisfied by the value of the gold obtained by them from the mine. And the bill prays, amongst other things, that all the impeached transactions

may be declared void as against the company; that possession of the mine, and of so much of the plant and machinery as remains in the possession or control of the defendants, may be restored to the company; and that an account may be taken of all gold, or the proceeds thereof, received by the bank, or which, but for their wilful default, might have been received from the mine, and of the proceeds of any machinery and plant sold by the defendants; and for payment of what may be found due on taking the account together with interest thereon, "the plaintiff offering and undertaking to pay or allow to the defendants all sums properly expended by them respectively in the working of the said mine, for the substantial benefit of the property, and also all other just credits; and that all proper and necessary accounts may be taken, and all necessary directions given." The bank by its answer, not relying wholly on its title as unpaid mortgagee, with all the privileges as well as liabilities incident thereto, maintained the validity of the transactions subsequent to the mortgages which were impeached by the bill; alleged that under the circumstances thereinbefore appearing it became absolutely entitled to the property comprised in the mortgages; submitted that it was not liable to account to the company, or to any other person, for its dealings therewith, or for the proceeds of the sale of any of the said property; and denied that the plaintiffs had any title to, or right, or interest in the property the subject of the suit, or the accounts thereby sought. From this statement of the somewhat loose and informal pleadings in the cause, it plainly appears that the issues raised between the company and the bank were not merely mortgage or no mortgage, but further, whether, by means of its acts subsequent to the impeached mortgage the bank had ceased to be mortgagees, and had become absolute owners. The court was bound to try all those issues. The dismissal of the suit might have been taken to affirm the title set up by the bank generally, or would at least have left its claim to more than a mere mortgage title, subject to redemption, open to future litigation. Again, if the company, as the court observed, failed to establish its right to have the mortgages set aside, but succeeded on all the other issues, the result was only to modify the relief prayed by the bill, and it was obviously necessary to direct the accounts ancillary to that modification in order to ascertain whether, as alleged by the bill, the bank's advances on the footing of the mortgages had been more than satisfied by their receipts, or whether there was still any balance due to them in respect of those advances. Their Lordships are therefore of opinion that the rule invoked does not apply to such a case as the present, and conceive that they are in some measure supported in that opinion by the cases of *Montgomery v. Calland* (14 Sim. 79) and *The Incorporated Society v. Richards* (1 Dr. & War. 258), which will be hereafter noticed with respect to the other questions raised at the hearing of these appeals. They prefer to rest their judgment on this point upon the distinction taken above, rather than upon the general principle upheld in *Parker v. McKenna* (31 L. T. Rep. N. S. 296, 739; L. Rep. 10 Ch. App. 96), *The London Chartered Bank v. Lempière* (29 L. T. Rep. N. S. 186; L. Rep. 4 P. C. 572), and *Hilliard v. Eiffe* (L. Rep. 7



H. of L. Cas. 39), because those decisions relate to what should be done on the failure of the plaintiff to prove allegations of fraud in general cases, whereas the rule invoked by the bank in this case is one based upon the relation of mortgagor and mortgagee. The principle, however, of these decisions, so far as it is applicable to this case, is in favour of the company. Assuming, then, that the bill ought not to have been dismissed on the ground suggested, their Lordships have to consider whether the questions determined in favour of the company were correctly so determined, and whether the decree based on such findings was incorrect either in substance or in form. Little, if anything, was urged at the bar by way of argument to show that the declarations of this decree touching the transactions subsequent to the execution of the mortgages were incorrect. The first of these transactions is the execution sale to Cuthbert in trust for the bank on the 6th Aug. 1874, which is the root of the title set up by the bank to an absolute interest in the mortgaged property. The facts proved as to this were the following. [Their Lordships went through the facts, and continued:] It is clear that by these collusive proceedings the bank could obtain no good title against the company, and that the Supreme Court of Victoria was right in so declaring. But it is equally clear that the effect of the proceedings, if valid, would have been to vest the interest of the old company, i.e., the equity of redemption, in the bank between the date of the execution sale and that of the subsequent transfer to the new company, and to make them absolute owners of the mortgaged premises during that period. Then came the proceedings of the 5th March 1875, under which the mortgaged premises were put up for sale, under the powers of sale contained in the indenture of assignment and instrument of mortgage, and knocked down to the Messrs. Davey. This transaction has also been declared by the decree to be void as against the company. A question has been raised whether it was an actual sale, or a mere buying in of the property put up for sale. In neither view can it have had any effect on the right of the company. On the second hypothesis it would necessarily leave the rights of all parties as they were; on the first, the sale would be impeachable by the company, on the ground that the Daveys were merely nominal purchasers on behalf of the bank, who, as mortgagees selling under their power of sale, could not sell to themselves. The last and most important transaction to be considered is the sale to Lakeland, both of the plant and machinery and of the mine, for one lump sum of 6000*l.*, under the memorandum of agreement of the 15th Sept. 1875. The question is reduced to that of the validity of the sale of the mine. Molesworth, J. being doubtless more familiar than we are here with the provisions of the Transfer of Lands Statute and their application, summarily disposed of this question by saying, "I do not think the bank effectually sold Lakeland the mining lease. It could only make title under 301, and did not." This point, however, having been raised at the bar with some distinctness, their Lordships will deal with it more in detail. It is not immaterial to consider in what character the bank was dealing with Lakeland in this transaction. On the face of the agreement of the 15th Sept. 1875, they do not

purport to be acting as mortgagees exercising a power of sale. According to their case, they were then the absolute owners of the mine. It is hardly necessary to observe that a sale of the mine by the bank in the character of absolute owners, which, as between them and the company, they did not possess, could not pass a good title against the company. If, however, Lakeland, to use Molesworth, J.'s expression, is "entitled to the benefit of all the muddled titles and powers which the bank had to convey to him," and the sale is to be treated as made by the bank in exercise of the power given by the instrument of mortgage, the transaction is impeachable upon other grounds. The company was the registered owner of the mine under the provisions of the Transfer of Land Statute; and the mortgage was made under and subject to the provisions of the 83rd and following sections of that Act, and was duly registered thereunder. The instrument itself is in the form set forth in the 12th schedule to the Act, except that it contains, as that form permits, a special covenant or agreement, which will be hereafter considered. Hence the only way in which the mortgagee could extinguish the rights of the mortgagor in the mine was by foreclosure, under the 31 Vict. No. 317 (of which there is no question here), or by a sale under the 84th, 85th, and 87th sections of the Transfer of Land Act. [Their Lordships, after discussing how far the provisions of these sections, as to the service of a notice of demand, were modified by a special clause contained in the instrument of mortgage, continued as follows:] From a case recently before their Lordships (*Campbell v. The Commercial Bank of Sydney*, 40 L. T. Rep. N. S. 137), which arose upon similar provisions in a New South Wales Act, it may be inferred that, upon an application to complete the title of the purchaser by registration under the 87th section an objection on the ground of the failure to serve a proper notice of demand might, and probably would, have been taken by the registrar. Again, it follows from both the 42nd and the 87th sections of the Act under consideration that, whether the transaction with Lakeland be regarded as a sale by absolute owners or as one by mortgagees under the statutory power, no interest in the mine could effectually pass to the purchaser until registration, and consequently that the agreement of the 15th Sept. 1875 was a mere agreement for sale which, whatever equities it created between the bank and Lakeland, left the prior equity of the company untouched. Their Lordships have now to deal with the particular objections taken to the form of the decree. In order to estimate the weight of these, it will be well to consider what was the general nature of the decree to be made in a suit so framed, and upon the facts so found. The suit was in the nature of an equitable ejectment, in which each party claimed an absolute interest in the property, for the profits of which the bill sought an account. The court, taking an intermediate view of the rights of the parties, found that the relation of mortgagor and mortgagee originally subsisted between the parties, and had never been effectively determined; that the transactions on which the bank relied as making their title absolute were void against the company; that consequently it was necessary to take an account of what, if anything, remained due upon the mortgage, and to ascertain whether, as alleged

by the company, the bank's charge had been satisfied when the bill was filed. To such a state of things, the observations of Lord St. Leonards, in the case of the *Incorporated Society v. Richards* (1 Dr. & War. 258), apply. When pressed to give the defendants the advantages of a mortgagee in an ordinary suit for redemption, he said, "This is a peculiar case, and cannot be treated as the ordinary case between mortgagee and mortgagor. Here you set up a title adverse to the owner; and when a creditor denies his character as such and claims as owner, I cannot allow him to fall back on his original character of creditor, as if he had never departed from it. I will never allow a party, who has put the owner at arm's length, to turn round, when defeated, and claim all the benefits attached to the character of a fair creditor." The particular objections to the form of the interlocutory decree will now be considered in detail. The first was that it charges the bank as mortgagees in possession from the 6th Aug. 1874, the date when Cuthbert took possession of the mine. The direction appears to their Lordships to be correct, because it is consistent with the facts established, and with the claim of the bank to an absolute title in the mine as against the company from the date of the sheriff's sale to Cuthbert. The second and third objections were that the decree erroneously treats the bank as chargeable with the value of the gold obtained, first by the new company, and secondly by Lakeland. Their Lordships are of opinion that the bank was properly so treated. As mortgagees in possession they were admittedly accountable, not only for their actual receipts, but for what, but for their wilful default, they might have received. And it appears to their Lordships that whatever was received by those whom it has been found the bank put into possession without just title, and in derogation of the company's rights, has correctly been held to fall within this category. Another objection taken to the decree was that, as varied by the full bench, it made the bank chargeable with interest on the principal moneys for which it was held accountable. And the learned counsel for the bank relied much upon the general rule affirmed in *Nelson v. Booth* (3 De G. & J. 119) to the effect that a mortgagee in possession is not chargeable with interest on his receipts if, when he took possession, an arrear of interest was due to him. This, however, as has been shown, is not an ordinary redemption suit, and the before-cited case of *The Incorporated Society v. Richards* is a clear authority that in an exceptional case like this the defendant cannot claim the immunities of an ordinary mortgagee. There Lord St. Leonards ordered the account to be taken with annual rests. Such a direction, though more usual, is in terms less favourable to the defendant than that contained in the decree under appeal, which amounts only to one that interest be allowed on both sides of the account. That it was competent to the court, in the circumstances, to give such a direction, their Lordships entertain no doubt. Another objection taken was that the interlocutory decree, instead of directing, as in an ordinary redemption suit, the taxation of the bank's costs, and the addition of the certified amount of them to the amount due for principal and interest on the mortgage, reserved the consideration of them until after the taking of the account. It is sufficient on this to

say that in a suit of this character such a reservation was, in their Lordships' judgment, within the discretion of the court, and consistent with usual practice. An objection on which their Lordships have felt greater difficulty is that taken to the direction in the decree, as finally drawn up, that the bank should be charged with "what, but for its wilful negligence and default, would have been the clear proceeds of the sale of the said plant and machinery." The bill, which is loosely drawn, made no special case as to the sale of the plant and machinery at an undervalue, otherwise than by alleging that the sum of 6000*l.* was considerably less than the value of the mine and property sold to Lakeland, as the bank well knew, and that a larger sum had been, previously to the sale to Lakeland, offered for the said property; and, as to the plant and machinery, prayed only for an account "of the proceeds of any machinery or plant sold by the defendants, or either of them," saying nothing about negligence or wilful default. [Their Lordships discussed the evidence on this point and the judgments of the courts below upon it, and continued as follows:] Upon the whole their Lordships have come to the conclusion that the full court, as well as Molesworth, J., had sufficient grounds for holding that the plant might have been sold for less than could have been obtained for it, regard being had to the allegation in the bill, to the evidence in the cause, and to the conduct of the bank in selling for one sum that which they had a right to sell with that which they had no right to sell. They are therefore of opinion that the appeal against the interlocutory decree wholly fails. Little need be said on the second appeal. If the interlocutory decree is right, no question can be raised as to the accounts taken under it, inasmuch as the bank filed no exception to the Master's report. The only question that remained was, what was to be done as to the costs of the suit. Now, not only had the bank set up, and failed to prove, a title to an absolute interest in the property, not only had it sought to destroy the right of its mortgagor by a series of very questionable transactions, but it had been found to have been overpaid, in its character of mortgagee, when the bill was filed. These circumstances were amply sufficient to deprive it of the ordinary right of a mortgagee to the costs of suit, and to bring the question by whom the costs were to be borne within the discretion of the court. Their Lordships can see no ground for interfering, contrary to the ordinary practice of this tribunal, with that discretion, and must therefore humbly advise Her Majesty to affirm the decree of the 3rd May 1877, and the decretal order of the 30th Sept. 1878, and to dismiss these appeals with costs.

Solicitors for the appellants, *Wadson and Malleson*.

Solicitors for the respondents, *Thomas Randall; Brundett, Randall, and Govett*.

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SHERWEN v. SELKIRK.

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## Supreme Court of Judicature.

## COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

June 20 and 21.

(Before JAMES, BAGGALLAY, and THESIGER, L.JJ.)

SHERWEN v. SELKIRK. (a)

*Practice—Administration since Judicature Act 1873—Proof for secured debt—Judicature Act 1873, ss. 2, 25 (sub-sects. 1, 7)—Judicature Act 1874, ss. 1, 2—Judicature Act 1875, ss. 2, 10.*

*Sub-sect. 1 of sect. 25 of the Judicature Act 1873 did not take effect on the passing of that Act, and was therefore postponed by the suspending Act of 1874.*

*Consequently, the rules of administration in bankruptcy as to the respective rights of secured and unsecured creditors do not apply in the administration by the court of the assets of a person who died between the date of the passing of the Judicature Act 1873 (5th Aug. 1873) and the 1st Nov. 1875, the date when the Judicature Acts came into operation.*

*Decision of Malins, V.C. reversed.*

*Hilton v. Jones (38 L. T. Rep. N. S. 808; L. Rep. 9 Ch. Div. 620) overruled.*

THIS was an appeal from a decision of Malins, V.C.

The suit was one for the administration of the estate of one W. Selkirk, who died intestate in April 1874.

The usual administration decree was made on the 16th Jan. 1875, and on the hearing of the cause on further consideration, the question was raised by the Whitehaven Bank, who were secured creditors of the intestate, whether the rule introduced by the Judicature Act 1873, s. 25, sub-sect. 1, which provides that "in the administration by the court of the assets of any person who may die after the passing of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors . . . as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt," was applicable to their proof.

Sub-sect. 1 of sect. 25 of the Judicature Act 1873 was repealed and re-enacted, with certain extensions, by the 10th section of the Judicature Act 1875, which came into operation on the 1st Nov. 1875.

In the present case the intestate died, and the administration decree was made, between the passing of the Act of 1873, and the coming into operation of the Act of 1875.

The Whitehaven Bank claimed to prove for the whole of their debt without deducting the value of their security; but the Vice-Chancellor, following his own decision in *Hilton v. Jones* (38 L. T. Rep. N. S. 808; L. Rep. 9 Ch. Div. 620), held that s. 25, sub-sect. 1 of the Judicature Act 1873 was not postponed by the Judicature Act 1874, but applied to the present case, and that the bank must deduct the value of their security, and could only prove for the balance.

From this decision the Whitehaven Bank appealed.

*J. Pearson, Q.C., Cozens-Hardy, and Whitworth;* for the appellants.—The Act of 1873 was postponed by the suspending Act of 1874, which by its second section provides that the Act of 1873 except any provision thereof directed to take effect on the passing of the said Act should commence and come into operation on the 1st Nov. 1875. Sect. 25, sub-sect. 1 was not one of the provisions directed to take effect on the passing of the Act of 1873. The recital which precedes the sub-sections of sect. 25 shows that the sub-sections were not intended to come into operation until the transfer of the jurisdiction of the several courts to the High Court of Justice was effected. That transfer was postponed by the Act of 1874. The "court" referred to in the 1st sub-section is the High Court of Justice, which did not come into existence till the 1st Nov. 1875. Therefore there could be no administration by that court until that date, and the rule introduced by sect. 25, sub-sect. 1 cannot apply to the present case. They referred to

*Re Joseph Suche and Co.,* 33 L. T. Rep. N. S. 774; L. Rep. 1 Ch. Div. 48.

*Higgins, Q.C. and T. A. Roberts* for the respondents.—We say that sect. 25, sub-sect. 1, took effect on the passing of the Act of 1873. It plainly provides that the rule in bankruptcy shall prevail in the administration by the court of the assets of any person who may die after the passing of the Act. It is one of the provisions not suspended by the Act of 1874. The expression "the court" does not apply to the High Court of Justice only, as is clear from sect. 91 of the Act of 1873, which provides that "the several rules of law enacted and declared by this Act shall be in force and receive effect in all courts whatsoever in England, so far as the matters to which such rules relate shall be respectively cognisable by such courts." They referred at great length to various sections of the Acts of 1873, 1874, and 1875.

*Locock Webb, Q.C., Joliffe, and Howard,* for other respondents.

No reply.

*JAMES, L.J.*—This case really seems to me to be beyond all reasonable doubt, were it not for the expression of opinion given by Malins, V.C. in the case of *Hilton v. Jones*, which I observe was brought up on appeal, but the appeal was not heard upon that point, because the facts rendered it unnecessary, as is mentioned in the note to *Hilton v. Jones* (L. Rep. 9 Ch. Div. 622.) The ground upon which Malins, V.C. put it in that case was some sort of equitable construction of the Act. The Vice-Chancellor said in his judgment: "The suspending Act of 1874, in postponing the operation of the Act of 1873, excepted any provision directed to take effect upon the passing of the Act, and I must hold that this 25th section, being a provision substantially directed to take effect upon the passing of the Act, was not suspended by the Act of 1874." Now I am bound to say that I really do not understand what is meant by a provision being "substantially directed" to take effect. It is either directed to take effect, or it is not directed to take effect upon the passing of the Act. What the section says is, that certain rules shall be applied with respect to persons dying after the

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passing of the Act; that is to say, those words "dying after the passing of the Act," are a description of the persons as to whom, when the Act begins, it is to be applied, but it has nothing to do with the taking effect. The section says that the court—which I for my part have no doubt meant the court intended to be thereby constituted, that is to say the High Court of Justice—was, in the administration of estates to have regard, and to give effect to a certain rule, but not to do it except with regard to persons who died after the passing of the Act. Until the court came into existence it could not do anything, and the thing which was directed to be done by the court could not take effect until the court came into existence. And therefore it is impossible in my view, upon any principle to say that that thing was directed substantially, or in any way whatever, to take effect upon the passing of the Act. The 1st sub-section of the 25th section of the Act of 1873 was one of the clauses which was suspended by the Act of 1874, until the Act of 1875 came into operation, and then, before it came into effect at all, was repealed by a new section, which in terms says it is to be applied to the estates of persons dying after the passing of the Act. It is not necessary to go further into the very long series of observations which were addressed to us upon the different parts of the Act of Parliament. The thing seems too plain.

BAGGALLAY, L.J.—I am of the same opinion. The question we have to consider is whether the rule of law declared in the 1st sub-section of the 25th section of the Judicature Act of 1873 is to be observed in the administration of the estate of one William Selkirk, who died in April 1874 after the passing of that Act, and in respect of whose estate an administration order was made in the month of December of the same year. [His Lordship read the sub-section, and continued:] The first and the most important question is what is meant by the expression "in the administration by the court;" in other words, what court is meant by the words "the court." There is no interpretation clause, and we must therefore look to the context. Now, turning to the context, we first of all find that the title of the Act is "An Act for the Constitution of a Supreme Court." Then the preamble states that "it is expedient to constitute a Supreme Court," and the enacting portion of the Act is divided into several parts. The first is as to the "Constitution and Judges of the Supreme Court;" the second as to "Jurisdiction and law;" the third as to "Sittings and distribution of business;" the fourth as to "Trial and procedure," and so on through eight or ten parts, but all having reference to the jurisdiction and the mode in which business is to be conducted in the Supreme Court which it was the object of the Act to establish; and I may notice that the 3rd section provides how the Supreme Court is to be constituted by the union or amalgamation of a large number of existing courts, and the 4th section provides that "the said Supreme Court shall consist of two permanent divisions, one of which, under the name of Her Majesty's High Court of Justice, shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior courts as is hereinafter mentioned, and the other of which, under the name of Her Majesty's Court of Appeal, shall have and exercise appellate jurisdiction," &c. When

we come to part 2, in which sect. 25 occurs, we find that from the 16th to the 23rd sections inclusive, they all have reference to the jurisdiction which is one of the subject-matters mentioned in the heading of the part; and the 24th and 25th have reference to the rules of law or rules of practice thenceforth to be observed. The 24th section is introduced in these words: "In every civil cause or matter commenced in the High Court of Justice, law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively according to the rules following." Then you have a variety of rules for the purpose of doing away with the anomaly which at that time existed between the mode of practice in the different courts which were amalgamated for the purpose of forming the Supreme Court. The 25th section is introduced with these words: "And whereas it is expedient to take occasion of the union of the several courts whose jurisdiction is hereby transferred to the said High Court of Justice to amend and declare the law to be hereafter administered in England as to the matters next hereinafter mentioned." Then it proceeds to enact under eleven different heads the law which is thenceforth to be observed with regard to those subject-matters. I may mention in general terms that, as regards nine out of those eleven heads, the rules previously observed and the law previously acted upon in the courts of equity are to prevail in all others; but in the first, with which we have at present to deal, the law which previously prevailed in bankruptcy is to prevail over the law which was previously observed in Chancery, and I think in the ninth, as regards damages where there had been a collision and both vessels were in fault, the Admiralty rule is to prevail over the rule previously observed at common law. There you have the rules of law which are to be observed in the court which is constituted by the Act of Parliament, whether it is the whole of the Supreme Court, or the two divisions in which the court is to act. Practically the business is commenced and assumed to commence in the High Court of Justice; the Court of Appeal is a court in which matters disposed of in the High Court of Justice may be reheard and that which is thought right may be done. I can come to no other conclusion, having regard to the frame of the Act and the context, than that where reference is made in the 1st sub-section of sect. 25 to "administration by the court," it can mean no other court than the court which is constituted and created by the Act. When you have once arrived at that conclusion, it really seems to me that you have substantially disposed of the question with which we have now to deal, because the 2nd section of the Act of 1873 provides that "this Act, except any provision thereof which is declared to take effect on the passing of this Act, shall commence and come into operation on the 2nd day of Nov. 1874." A short Act was passed in 1874, and that time was thereby extended to the 1st Nov. 1875. There is no declaration whatever that this particular 25th section, or any sub-section of it, is to take effect on the passing of the Act. No doubt it does provide that when an administration takes place by the court, whenever that system of administration may commence, it shall have reference to the estates of persons who die after the passing of the Act. There is nothing further to indicate an intention.

and certainly nothing declaring or directing that that sub-section of the Act is to come into operation earlier than when there shall be an administration by the court constituted by the Act. If that be so, the operation of this sub-section of the Act is postponed until the 1st Nov. 1875. If it had not been so postponed, no doubt in the case of an administration by the court, if it had been constituted at an earlier period, the rule would have applied; but the constitution of the court does not take place, or the provisions of its constitution do not come into effect, until the 1st Nov. 1875, and that very day on which it comes into operation the Act of 1875 also comes into operation and substitutes another provision for that contained in sect. 25, sub-sect. 1.

**THESIGER, L.J.**—I am entirely of the same opinion. I must say that, when the different sections of the Act of 1873 are compared, the matter is really free from all doubt whatever. The 2nd section provides that "this Act, except any provision thereof which is declared to take effect on the passing of this Act, shall commence and come into operation on the 2nd Nov. 1874," that period being extended by a subsequent Act of 1874 until the 1st Nov. 1875, when also the Act of 1875 came into operation. The provision in question in this case is contained under a preamble which is the commencement of sect. 25; but before I call attention to that section, and the preamble commencing it, I should like to point out that where the draftsman of this Act intends to make it clear that a provision shall take effect on the passing of the Act he is able to do it, as one would expect he would do it, in clear and intelligible terms, because at the close of sect. 60 it is said: "This section shall come into operation immediately upon the passing of this Act." Again, at the close of the 68th section: "This section shall come into operation immediately on the passing of this Act." There are, therefore, two sections in which the declaration which is referred to in the 2nd section of the Act is made in clear and precise and intelligible terms. Now, turning to sect. 25, let us see whether the preamble throws any light upon the intention of the Legislature as regards the sub-section. It is: "And whereas it is expedient to take occasion of the union of the several courts whose jurisdiction is hereby transferred to the said High Court of Justice to amend and declare the law to be hereafter administered in England as to the matters next hereinafter mentioned." Now, what is the occasion? The occasion is not the passing of the Act by which the courts are to be united, but the occasion is the union of the courts. Therefore, pausing at this point, nothing can be clearer from the preamble than this, that the amendment of the law was to be an amendment which was to be administered by the new court, and which was to take effect when the new court amalgamating the old ones came into operation. Let us for a moment turn away from sub-sect. 1. There are eleven sub-sections under this preamble to which I have referred; nine of those sub-sections do not mention, even incidentally, the passing of this Act, and therefore it must be admitted that as regards those sub-sections the period at which the alteration in the law or practice is made is the period when the Act comes into operation. And more than that, when we look at sect. 91, which is to apply to all courts in

the kingdom the rules of law which are comprised in the eleven sub-sections of sect. 25, it is clear that the several rules of law enacted in that section are only to come into operation as regards those courts, although no alteration is to be made in those courts at the time when the Act comes into operation. The words are: "The several rules of law enacted and declared by this Act shall be in force and receive effect in all courts whatsoever in England so far as the matters to which such rules relate shall be respectively cognisable by such courts." There is clearly, neither directly nor indirectly, any direction in that section that any time but that of the Act coming into operation shall be the time when the rules of law in sect. 25 are to come into operation in courts of justice. Then we come to the consideration of sub-sect. 1 with the strongest ground for believing that the intention of the Legislature, as expressed in the Act itself, was that these rules of law should only come into operation when the existence of the court, the existence of which was to be the occasion of this change, was a fact. Even if that were not so, the words of sub-sect. 1 are so clear that I cannot conceive how there can be any doubt upon the construction: "In the administration of the assets of any person"—Now, stopping there, can there be any doubt as to the time when so far the section would come into operation? Clearly no doubt whatever. Then how does it go on? "The assets of any person who may die after the passing of this Act." How is that in any way to affect the time when the section is to come into operation? It is nothing more or less than a description of the person whose estate is to be administered, the administration to take effect and to operate at the time when this Act comes into operation. Therefore it appears to me that, however you were to read the words "the court," whether you were to read them as meaning an existing court, or the new court, equally the time when the sub-section would operate would be the time of the commencement of the Act. At the same time I think the matter is made more clear and is more pointed by the fact that in the words "in the administration by the court," the word "court" clearly refers not to the existing court, but to the High Court of Justice constituted by the Act. For these reasons it appears to me that the appeal should be allowed.

**JAMES, L.J.**—The appeal will be allowed with costs, both here and in the court below. All parties will have their costs out of the estate, both here and in the court below. I may mention that the court has decided substantially the same thing upon sub-sect. 7.

*Appeal allowed.*

Solicitors for the appellant, *Johnston and Harrison.*

Solicitors for the respondents, *Helder, Roberts, and Co.*

*April 28 and 29.*

(Before **JAMES, BRETT, and COTTON, L.JJ.**)

**WEST CUMBERLAND IRON AND STEEL COMPANY v. KENYON. (a)**

*Mine—Water—Use of property—Water discharged from neighbouring mine—Negligence—Ordinary course of working—Damages—Injunction.*

*In an action by mineowners to restrain the defen-*

(a) Reported by **E. S. ROGGE, Esq., Barrister-at-Law.**

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dants, who were neighbouring mineowners, from allowing water to flow through a bore-hole which they had made in a shaft which they had recently sunk, into the plaintiffs' workings, and for damages, the plaintiffs alleged that the defendants had made the bore-hole for the sole purpose of getting rid of the water, and not in the ordinary and proper course of working. The water in question did not flow directly from the bore-hole into the plaintiffs' workings, but into some old unused workings of the defendants, and thence found its way by natural percolation into the plaintiffs' mines. The defendants alleged that, if they had not made the bore-hole, the water would nevertheless have found its way by natural percolation into the plaintiffs' mines, and on this ground they contended that they were not liable for any damage which might have been done to the plaintiffs.

*Held* (reversing the decision of Fry, J.), that, although the plaintiffs had proved that the defendants had used their land otherwise than in the natural and ordinary manner necessary for its enjoyment and occupation, they had failed to show that they had sustained any damage by the acts of the defendants, or that any additional burden had been cast upon them, and therefore the plaintiffs had no good ground of action.

The mere fact of temporarily intercepting the water did not amount to an appropriation of or give the defendants command over, the water as a thing which they could control, in the sense of being ever afterwards prevented from restoring it to its former flow from their own to their neighbours' land and to the condition in which it was before their operations.

Everyone is entitled to deal with water on his own land so long as, when dealt with, he does not cause it to go on his neighbour's land in such a way as to affect such land in any other manner than it had been previously affected, and impose an additional burden.

THIS was an appeal by the defendants from a decision of Fry, J. under the following circumstances:—

The plaintiffs and the defendants were proprietors of adjoining collieries. An action was entered in Jan. 1876 to restrain the defendants from permitting water to flow through a certain bore-hole in their mine directly or indirectly into the plaintiffs' workings, and for damages. The plaintiffs were the lessors of a colliery in the parish of Workington, in Cumberland. In June 1875 the defendants, Henry Kenyon and John Campbell, became lessees from the trustees of John Harris, of a small coalfield in the adjoining parish of Brigham. Both collieries were situate close to the river Derwent. The defendants' was altogether to the south of that river, and to the east of the plaintiffs'. The greater part of the plaintiffs' colliery was also to the south of the river, but a portion of it was on the north side. The same seams of coal were found in the plaintiffs' colliery and in the defendants' coalfield, but there was a fault, running in a direction approximately from north-west to south-east, which crossed that part of the plaintiffs' collieries which lay to the south of the Derwent. There were three seams of coal existing in both collieries, named respectively the Ten Quarters Seam, the Ratler Band, and the Main Seam, the Ten Quarters' Seam being the

nearest to the surface. The colliery of the plaintiffs was in the dip of the defendants; but on the north-east side of the fault the coal measures were from forty to sixty feet lower than on the south-west side. The plaintiffs were working the Main Seam, which was the lowest of the seams, by means of a pit called the Lowther Pit, south of the Derwent, south-west of the fault, and about half a mile to the west of the boundary between the two collieries. On the north side of the Derwent the fault had been pierced by a driftway to the west of the plaintiffs' colliery, and connected therewith and through this a communication existed between the plaintiffs' working on the north side of the Derwent and the Lowther Pit. In the defendants' coalfield the Ten Quarters Seam lay about 126 feet below the surface of the ground, and the Ratler Band about thirty feet below the Ten Quarters Seam. The Main Seam of the defendants' coalfield had been worked out to the boundary thereof many years before the defendants became lessees. The old workings had been effected by means of three shafts, called Hardy Gate Shaft, Old Banks Shaft, and Limefitts Shaft. Limefitts Shaft was near the western boundary of the defendants' coalfield, and nearly due east of the plaintiffs' Lowther Pit, and about half a mile distant from it. Old Banks Shaft and Hardy Gate Shaft were situate in that order to the south-east, and on the rise of Limefitts Shaft. There was in most places a barrier between the plaintiffs' and the defendants' working where they adjoined of thirty-five yards in thickness on each side, but at one point just under the Derwent there was no barrier on the defendants' side. Hardy Gate Shaft and Old Banks Shaft had been disused for many years when the defendants became lessees, but at that time Limefitts Shaft was used by the trustees of John Harris for pumping the water out of an adjacent coal mine called Millbanks (not comprised in the defendants' lease). In June 1875 the trustees of John Harris, having ceased to work the Millbanks mine, drew the pumps from Limefitts Shaft. The water then gradually rose in the old workings of the Main Seam until it reached the height of fifteen fathoms in Limefitts Pit. The water forced its way through such barrier as was left under the river Derwent, and got into the old workings belonging to the plaintiffs to the north of the Derwent, and there rose to such a height that it passed along the driftway through the fault, and into the plaintiffs' main workings, and thence found its way by natural gravitation to the Lowther Pit, from which point it was pumped out by the plaintiffs after the withdrawal of the Limefitts pumps. Towards the end of July the water was found to increase greatly in the Lowther Pit. It had previously been about 300 gallons a minute; it then rose to 500 gallons a minute, and so continued up to the 15th Dec. following. In June 1875 the defendants commenced sinking a new shaft called the New Banks Shaft, between Limefitts Shaft and Old Banks Shaft, and they continued their operations until the 12th Aug. 1875, when at a distance of sixteen fathoms from the surface they reached water. On the 18th Aug. they abandoned the sinking of the shaft, and commenced boring a bore-hole. The boring was continued until the 19th Oct. following, when a depth of about forty fathoms had been reached, and the water flowed away through the bore-hole.

The Main Seam was about five fathoms lower. The bore-hole subsequently got stopped up, and, after considerable difficulty and expense the obstruction was removed, and the water was again allowed to flow down. That was about the end of Nov. 1875. Subsequently the plaintiffs found a great increase in the quantity of water which they were compelled to pump at the Lowther pit. On the 15th Dec. the water had reached 800 gallons per minute, and it so continued till Jan. 1876, when it again fell to 700 gallons per minute, at which quantity it remained without any material variation down to the trial of the present action.

The writ in this action was issued in Jan. 1876. A motion for an injunction was made, but the motion was ordered to stand over until the trial. Paragraph 4 of the statement of claim contained the following allegations: "The said bore-hole or passage was not made for the purpose of getting the coals or other minerals removed in making the same, or otherwise in the ordinary course of mining, but was made with the intent and for the purpose of getting rid of the water found or arising in the said shaft of the defendants, and their working of the Ten Quarters Seam and Rattler Band, by discharging it into the plaintiff company's workings in the Main Seam, or at all events into old workings or hollows from whence it naturally, and in fact necessarily, flows into the plaintiff company's workings, and the defendants, by the said bore-hole or passage, have diverted and are discharging such water wrongfully into the plaintiff company's workings, so causing to flow into such workings a large amount of water which would not otherwise have found or find its way thither. The defendants, in fact, are by the means aforesaid causing an enormous quantity of foreign water to flow into the plaintiff company's workings, and the plaintiff company, to their great damage and loss, have been and are compelled at great expense, in order to continue their workings in the Main Seam and other seams at the Lowther Pit, to pump all such water to the surface, inasmuch as their workings would otherwise be inundated and have to be stopped." The water which flowed through the defendants' bore-hole found its way, as the plaintiffs alleged, into that part of their workings which was on the north side of the Derwent, and thence to the Lowther Pit.

The plaintiffs claimed: (1.) Damages for the wrong complained of. (2.) An injunction to restrain the defendants from permitting any water to flow through or by means of the bore-hole, or permitting the bore-hole to remain open, and from in any manner, through the bore-hole or any other channel or passage, diverting or discharging water from their shaft or mine, or causing water to flow therefrom directly or indirectly into the plaintiffs' workings, or any workings or hollows open to or communicating directly or indirectly therewith.

The defendants' statement of defence contained the following allegations: The bore-hole was not made with the intent and for the purpose of getting rid of the water found or arising in the defendants' new shaft, and their workings of the Ten Quarters Seam and Rattler Band by discharging it into the plaintiffs' workings in the Main Seam, or into old workings or hollows from whence it naturally or necessarily flowed into the

plaintiffs' workings. The bore-hole was made in the usual and proper manner, and in the ordinary course of good mining, for the purpose of proving the minerals in the defendants' coalfield, so as to enable them to decide whether it was worth while to continue sinking their shaft to work the minerals or not. The defendants have in fact already sunk their shaft through the Ten Quarters Seam and Rattler Band, and they worked the Rattler Band for some time by means of both the new shaft and Limefitts Shaft, so as to establish a communication between the two shafts, but they have lately ceased to work from the latter shaft. The defendants deny that they by their bore-hole have diverted and are discharging the water in their new shaft and workings of the Ten Quarters Seam and Rattler Band wrongfully into the plaintiffs' workings, and so causing to flow into such workings a large amount of water which would not otherwise have found its way there, and say that if more water than usual from the defendants' coalfield finds its way into the plaintiffs' colliery, it does so in consequence of the drawing of the pumps at Limefitts, and by percolating through the measures naturally, and owing to the law of gravitation, in consequence of the plaintiffs' colliery being at the dip of the defendants' coalfield, and not through any malice, wrongful act, or negligence of the defendants, and that such water would have found its way by percolating through the measures, even if the defendants had not sunk their new shaft or made their bore-hole at all." The defendants also denied that there had been any perceptible increase of water in the plaintiffs' collieries since the bore-hole had been made.

In an answer put in by the plaintiffs to some interrogatories delivered by the defendants, they said that since and by means of the opening of the defendant's bore-hole the quantity of water which they had been compelled to pump by their engine at the Lowther Pit had been increased by an amount of about 200 gallons per minute.

On the hearing in the court below,

*North, Q.C.* and *Ingle Joyce*, for the plaintiffs, contended that it was clear from the evidence that the bore-hole made by the defendants was made, not in the ordinary and proper course of working their mine, but only for the purpose of getting rid of the water, and therefore that they were not entitled to throw it upon the plaintiffs' mine. It was further shown that the water from the bore-hole had substantially increased the cost of the plaintiffs' pumping. In the case of *Baird v. Williamson* (15 O. B. N. S. 376), it was laid down by *Erie, C.J.*, that "the law does not authorise the occupier of the higher mine to interfere with the gravitation of the water so as to make it more injurious to the lower mine, or advantageous to himself." They also referred to

*Smith v. Kenrick*, 7 C. B. 515;

*Acton v. Blundell*, 12 M. & W. 324;

*Rylands v. Fletcher*, 19 L. T. Rep. N. S. 220; L. Rep. 3 H. L. 330.

*Ince, Q.C.*, *Cookson, Q.C.*, and *Plummer*, for the defendants, contended that they had not been active agents in sending water from their mine into that of the plaintiffs. The bore-hole was made in the ordinary and proper course of working, and it had been held that there was a material difference between water which came to the plain-



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tiffs from a natural overflow of a stream, and that which came by reason of a diversion of the stream which the defendants had made. On this point they cited

*Smith v. Fletcher*, 31 L. T. Rep. N. S. 190; L. Rep. 9 Ex. 64.

It was held in *Wilson v. Waddell* (35 L. T. Rep. N. S. 639; L. Rep. 2 App. Cas. 95), that an injury arising entirely from gravitation and percolation was not a valid ground for claiming damages. The defendants were entitled to credit for so much of the water flowing through the bore-hole as would have found its way naturally to the plaintiffs' mine if the bore-hole had not existed, and this would practically reduce the damages to nothing. They also referred to

*Rea v. Commissioners of Sewers for Pagham*, 8 B. & C. 355;

*Crompton v. Lea*, 31 L. T. Rep. N. S. 469; L. Rep. 19 Eq. 115;

*Hurdman v. North-Eastern Railway Company*, 38 L. T. Rep. N. S. 339; L. Rep. 3 C. P. Div. 168.

FAY, J., after stating the facts, said:—The defendants in effect say that they bored for legitimate mining purposes, and not solely or exclusively for the purpose of getting rid of their water. That is the issue of fact which I have to try, and it appears to me upon the whole to be reasonably clear that the boring was, at any rate, after the defendants had passed through the Rattler Band, exclusively for the purpose of getting rid of their water. I therefore, upon the evidence, come to the conclusion that the bore-hole, at any rate below the Rattler Band, was not made for a legitimate mining purpose, that is, it was not made in the ordinary, proper, and reasonable mode of working the defendants' mine. It is then said by way of defence that, if there were an injury, there was nevertheless no damage, and the mode in which that argument has been presented is twofold. In the first place it is said that the water, or at any rate a large part of the water, which was collected by the sinking of the New Banks Pit would have found its way into the Old Banks Pit, which lies to the dip of the New Banks Pit, that the Old Banks Pit communicates with the old hollows in the main seam below, that the water would have originally flowed to Limefitts Shaft, and have been pumped out there, but that when the Limefitts pumps were withdrawn it would have flowed through the barrier into the plaintiffs' working to the north of the Derwent, and thence through the old piercing of the fault to Lowther Pit, and would there have been pumped out. I think that the evidence renders that contention, at any rate as regards a large part of the water collected in the New Banks Pit, highly probable, and the question therefore arises whether that is or is not an excuse of which the defendants can avail themselves. The question arises in this way. A man by sinking a pit intercepts underground water, not flowing in any well-ascertained or known course, and throws that water upon his neighbour's land. He then says, "That water, or a portion of it, would have flowed upon you if I had not intercepted it, and you cannot charge me with the damage done by the water so flowing on to your land, because I have done you no harm; the terminus at which the water arrives is merely that at which it would have arrived independently of what I have done." I am of opinion that that

argument ought not to prevail. The difference between water flowing in a well-known and ascertained channel upon the surface or underground, and water which finds its way through channels not well known and ascertained, is well understood and established, and it may be observed that the distinction does not depend upon the incapacity of the courts to find the direction which the water would take in these unascertained channels, because, in the case of *Acton v. Blundell* (which is perhaps the leading authority on this branch of the law), the course of the underground channels was ascertained to this extent, that it was found as a fact that the consequence of sinking the pit by the defendant was to withdraw from the plaintiff's well; in other words, it was ascertained that the water which would have flowed to the well was intercepted by the pit. Water flowing in a well-established channel is, as we all know, not the subject of property. It is the subject only of usufruct. Standing water, on the other hand, is the subject of property. Now, he who sinks a well or shaft or a pit on his own land is entitled to collect into that pit from all the pores of the land, from the small rivulets and channels with which the soil is interspersed, such water as will naturally flow to that pit. That water he may make his own: it is immaterial whence it flows. A person who is injured by the sinking of the pit, though he can show that injury has resulted to him, has no right of action against the person who has sunk the pit. The water which before ran in unknown channels has now been collected into an ascertained reservoir or receptacle, and has become the property of him who has so collected it. By making it his property, the person who sinks the pit, in my opinion, takes with it and incurs all the liability which attaches to that property, and he cannot, after having so appropriated the water, cast it upon his neighbour and excuse himself by saying, It would have flowed to you if I had not appropriated it. The time of his appropriation of the water is the time at which we are to look with regard to the measure of his liability. He cannot appropriate it for the purpose of benefit, and not for the purpose of liability. If he takes the benefit of the water by accumulating it in his pit, he takes also the liability, and he is bound to protect his neighbour from the injury which that water may cause him. He takes it alike for benefit and for burden, for better and for worse. He cannot appropriate it for the purpose of benefit to himself, and then ask the court to expropriate it for the purpose of relieving him from the liability which would otherwise rest upon him. That seems to me to be the fair conclusion of law when it is once admitted that the court will not regard the underground courses through which water flows, unless they are well ascertained and known. I hold, therefore, that the defendants, having made the water their own by collecting it in their pit, are just as much responsible for it as if it had come from any other source than that from which it is suggested that it did come, and that they cannot relieve themselves from liability by showing that the water, if it had not been collected, would nevertheless have found its way to the plaintiff's workings. The next point is this. It is said in effect that no portion of the water which comes to the Lowther Pit is to be attributed to the bore-hole. But I think that a substantial

part of the increment of the water which is pumped at Lowther Pit—at least a tenth part of it—must be taken to have its source in the New Banks Shaft of the defendants, and to have been cast by them upon the plaintiffs' mine. What is the exact amount of the damage caused by this contribution of water from the defendants' pit I am not asked now to ascertain, but I have come to the conclusion that substantial damage has been caused to the plaintiffs by that water. The evidence before me is not very definite or clear; but one of the witnesses considered that, even if the contribution from the bore-hole was taken as only forty-five gallons per minute, the additional pumping would cost the plaintiffs upwards of 100*l.* a year. Now, considering that the plaintiffs have a term of something like seventeen years to run in their mine, I cannot say that an extra expenditure of 100*l.* a year is by any means an unsubstantial sum. I come, therefore, to the conclusion that damage has been caused to the plaintiffs by the wrongful act of the defendants, and I hold that there is both *damnum* and *injuria*. It follows from this that an injunction must be granted as well as damages assessed; and the judgment which I propose to give will be in these terms: I propose to restrain the defendants from permitting the bore-hole to remain open, and from causing or permitting any water to flow through or by means of the bore-hole, or through or by means of any other channel or passage, not being a channel or passage made in the ordinary, reasonable, and proper course of mining, from the shaft or mine of the defendants into the workings of the plaintiffs, or into any water communicating therewith. I then propose to declare that the difference between the actual cost of pumping at the Lowther Pit from the 19th Oct. 1875 to the time of the bore-hole being actually stopped, and the sum which would have been the cost of pumping during the same period if the New Banks Pit had been sunk down to the Rattler Band, and if no bore-hole had been carried below that seam, is the true measure of damages. Then to refer it to the chief clerk to assess the damages; and of course I must give the plaintiffs the cost of the action, including the costs of the motion for an injunction.

From this decision the defendants appealed. They abandoned the issue raised in the court below that their operation was a proper mining one, and now contended that the question had nothing to do with any particular law as applicable to mining, and must be treated as relating to something on the surface.

*Herschell, Q.C., Cookson, Q.C., and Plummer* contended that the defendants were entitled to deal with the water on their own land so long as it did not go on the plaintiffs' land in such a way as to throw an additional burden on the plaintiffs, and that the plaintiffs' land had only been affected by the acts of the defendants as it had previously been affected. They further submitted that there had been no appropriation of the water by the defendants so as to give them a control over it, and make them responsible for its escape on to the plaintiffs' land.

*North, Q.C. and Ingle Joyce*, for the plaintiffs, repeated the arguments used by them in the court below.

*JAMES, L.J.*—Upon the question of fact in this

case I have come to the same conclusion as *Fry, J.*, though to a different conclusion upon the law as applied to those facts. Upon the question of fact there is really no conflict of evidence. It is clear that the water which was tapped (for that is the proper expression) by this New Bank Shaft, and which was afterwards discharged through the bore-hole into the defendants' old workings at the Limefitts Pit, was water which, following the stratification of the country all round, did in fact find its way before by various modes into the same subterraneous hollows from which the water was pumped up by pumps which were retained for a certain time for pumping the Limefitts Shaft and would have found its way there, and that the same water was practically and substantially finding its way down into those hollows in exactly the same way and to the same extent as it found its way afterwards through the shaft and the bore-hole. Several witnesses—experts—were called who knew the country, who said as matter of opinion and as matter of science they had no doubt that every particle of water would have gone down, and consequently must have been going down in that way into the Limefitts Shaft when the pumps were going on, and therefore the fact that it was being pumped out would not have made any difference. That was the course by which these water-bearing strata discharged their water so as to prevent its rising up above the sixteen fathoms down to which distance the stratification was quite dry. It seems to me upon all the evidence that there were these water-bearing strata drawing down into the lowest levels of the principal vein of the Limefitts Pit, and that the defendants made a shaft which did to a certain extent tap that water, but only diverted into that shaft for a time the water which previously to that diversion was finding its way down into the lowest level from which it was pumped up by the old pumps. Then, if that be so, you have this fact, that the working of the defendants' shaft and the bore-hole have not been shown to have occasioned any additional water whatever to the plaintiffs. On the other hand this is to be borne in mind, that the way in which the case is presented to us on behalf of the defendants is this: We do not treat it as a mining question. It has nothing to do with the case of *Smith v. Kenrick* (7 C. B. 515) or any particular law as applicable to mining. We deal with it exactly as if it were something on the surface. We have made certain things on our land, and we have done that without doing you any mischief whatever. That is to say, we had occasion to sink a big hole and a deep shaft on our own land, as we had a right to do, and finding that that shaft was getting filled with water, we made a drain from the bottom of that shaft so as to prevent the water accumulating which would have destroyed it. But we drained that water into some old hollows in our own land which were calculated to receive the water, and from which hollows the water no doubt found its way into the plaintiffs' land, but found its way in the same course, so far as the plaintiffs are concerned, as before it left our hollow, in exactly the same place, in exactly the same way, and to exactly the same effect as it would have done if we had not done anything of the kind. Now *Fry, J.* seems to have thought that if once a man had appropriated water—which does not seem to me to be a very accurate expression, because the defendants in this

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case were not seeking to appropriate it—then in some way or another he became liable to discharge that water in such a manner that it would never reach his neighbours' land. I am not aware that there is any principle or any authority for that proposition. I have always understood that anybody had a right on his own land to do anything with regard to the diversion of water, or the storage of water, or with regard to the usage of the water, in any way he chose, provided that when he ceased dealing with it on his own land, when he had made such use of it as he was minded to make, he was not to allow that water or cause it to go upon his neighbour's land so as to affect that neighbour's land in some way other than the way in which it had been affected before. That is the common use of water. A man receives the rain water from his roof. He does not allow it to settle exactly upon the surface, but he receives it on his roof, collects it into the pipes and so on, and then lets it go down upon his own land, and from his own land it gets into his neighbour's land; but, unless his neighbour receives that water in some different way or quantity from what he had done before, there is no legal right of action. If a man chooses to make any quantity of fish ponds or mill ponds, or artificial lakes or pleasure water or fountains on his own land, he is at liberty to do so, provided that when he has finished doing so he does not increase the burden upon his neighbour, and if his neighbour complains, that man has a right to say, "What is it to you what I have been doing on my own land? When the water leaves my land to go to yours, the same quantity of water leaves my land and leaves it through exactly the same aperture and opening and gets into your field in exactly the same way that it did before." If that is so, it is like the case of a lake. If there is a lake on my property into which I drain my field, and there is a passage from that lake into my neighbour's land, how can it signify whether I drain it by one, two, or three openings, or whether I change an opening from the east side to the west side of that lake, provided the same water and the same overflow goes into it, and through the same outlet into my neighbour's land? If the fact be, as we have found it to be here, that that is what has occurred—that is to say, that water was turned by the shaft and bore-hole into the hollows and the Limefitts Pit, which same water would have found its way into the same Limefitts Pit independently of that shaft and bore-hole—it seems to me that the plaintiffs have nothing whatever to complain of, because the defendants would be entitled to say, "We were doing something on our own land, and when the effect of that was over we threw some of the water in a different way into our lake, or pond, or hollow, and what overflowed on to your property was exactly in the same position as before." As it seems to me, the same principle applies here as would be applied to the ordinary case of a man's cutting a hole or making a drain in his own land, and then letting the water from that find its way over his own land to his neighbour's in the same way that it had done before. I am of opinion that this is a case in which the defendants have used their own land, and have not been proved to have injured their neighbour in that using. I think the plaintiffs have failed in showing that they have any legal ground of action, and therefore that the judgment of the court below ought

to have been otherwise, and that the action ought to have been dismissed.

BRETT, L.J.—I am of the same opinion. The plaintiffs have relied upon the legal maxim *Sic utere tuo ut alienum non lœdas*, and the action is based upon the alleged use by the defendants of their own land in such a manner as to cause damage to the plaintiffs. The application of that maxim to the use and occupation of land is subject to certain modifications. The plaintiffs are bound to show that the defendants have used their land otherwise than in the natural manner necessary for the ordinary use and enjoyment of such land; and, secondly, that if the use by the defendants of their land has not been in the natural and ordinary manner, then that the plaintiffs have been injured by such extraordinary use by the defendants of their land. Both these propositions must be established to enable the plaintiffs to succeed; and in this case, although the plaintiffs have proved that the defendants have used their land otherwise than in the natural and ordinary manner necessary for its enjoyment and occupation, they have failed to show that they have sustained any damage by the acts of the defendants, or that any additional burden has been cast upon them. If the defendants had not made the bore-hole, the same water which drained from the bore-hole into the old workings would have found its way into those workings as it does now. All that happened was that in making the shaft the defendants for a time stopped the percolation and for a time retained the water. If the defendants had made a pond which for a time interrupted and delayed the flow of the water, and then allowed it to escape by the accustomed channel, they would not, in my opinion, have been liable for such escape. The mere fact of temporarily intercepting the water so as to make it visible does not amount to an appropriation of, or give the defendants command over, the water as a thing which they could control, in the sense of being ever afterwards prevented from restoring it to its former flow from their own to their neighbour's land, and to the condition in which it was before their operations. The evidence seems to show that the defendants did not cause the water to escape from their land on to that of the plaintiffs in any different way from what it had formerly done. Agreeing, as I do, with Fry, J. as to the inference of fact that more water has come to the plaintiffs' land than had previously been the case, I altogether differ from him in his conclusion of law that the defendants, by intercepting it, have so appropriated it as to impose upon them responsibility for any subsequent escape. In my opinion the plaintiffs' case has entirely failed, and the action must be dismissed with costs.

COTTON, L.J.—I am also of the same opinion.

Solicitors for the plaintiffs, *Bischoff, Bompas, and Bischoff*, agents for *H. and E. L. Waugh*, Cockermouth.

Solicitors for the defendants, *Speechly, Mumford, and Co.*, agents for *Hayton and Simpson*, Cockermouth.

CHAN. DIV.]

STURLA v. FRECCIA; POLLINI v. GRAY.

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## HIGH COURT OF JUSTICE.

## CHANCERY DIVISION.

Tuesday, June 24.

(Before MALINS, V.C.)

STURLA v. FRECCIA; POLLINI v. GRAY. (a)

*Evidence—Public document—Fact not stated in discharge of a duty.*

*A report of a committee appointed by a Government to inquire into the fitness of A. to be given the title of Agent to the Government, was produced as evidence. The report, after stating the character of A. as to fitness, stated his birthplace and age, the facts of his life, and some of his present circumstances.*

*Held, that, as the only duty of the committee was to report upon the fitness of A. for the post, the document could not be received as evidence of his birthplace and age.*

This was an action instituted for the purpose of establishing a claim to property left by Mrs. Brown, the daughter of Antonio Mangini, who had been for many years the Consul-General, and afterwards Diplomatic Agent of the Ligurian Republic in London, and who died in England on the 14th July 1803. Mrs. Brown died intestate on the 21st Dec. 1871, without child, brother or sister, leaving personal estate of the value of about 200,000*l.* Administration of her estate was taken out on behalf of the Crown, and the Crown took and remained in possession of her estate for some time. Various bills were filed by parties claiming to be her sole next of kin, and on the 19th Dec. 1873 a decree was made referring it to chambers to ascertain who were her next of kin. The usual advertisements for her next of kin were issued, and it being known that Mrs. Brown's father was a native of Genoa or the neighbourhood, advertisements were issued at Genoa. The chief clerk certified on the 31st March 1876, that the five defendants were the next of kin. The certificate was made on the assumption that the father of Mrs. Brown was a native of St. Illario, near Genoa, and was baptized there as Antonio Mangini in 1735. The causes coming on for further consideration on the 20th July, an order was made for payment out of court of the funds that had been brought in by the Crown to the five defendants. Before the order had been acted upon a new claim was brought forward by the present plaintiff, on the ground that the Consul was one Antonio Mangini, who was baptized at Quarto as Antonio Maria Mangini in 1744, and that the plaintiff was the granddaughter of his only brother. The Vice-Chancellor did not refer back formally to chambers for the chief clerk to review his certificate, but with the consent of all parties referred it to him to see whether the plaintiff had made a *prima facie* case. The funds to support the plaintiff's claim, and her means of subsistence in England pending the claim, were found by one Cevasco, on the terms of his receiving one quarter of what should be recovered. On the 7th Aug. the chief clerk certified that the plaintiff had not made out a *prima facie* case. On the 8th Aug. an order was made that the funds in court should be paid out to the five defendants. On the 18th Sept., upon an application made to Huddleston, B., on the ground that new evidence had been discovered at Genoa,

which showed that the Consul was born at Quarto and was the said Antonio Maria Mangini, the judge restrained further proceedings under the order. In November the Vice-Chancellor referred it to chambers to ascertain who were the next of kin. The chief clerk certified that the plaintiff was not such next of kin; that is, that Mrs. Brown was not the daughter of the Antonio Mangini who was born at Quarto in 1744, but of the Antonio Mangini who was born at St. Illario, and christened there in 1735. The case was brought before the Vice-Chancellor on a summons to vary the certificate, and judgment was now given.

Among the points considered by his Lordship, the only one calling for a report arose as follows. The plaintiff supported her case mainly by a report of the 1st March 1790, furnished to the Government of the Ligurian Republic by a committee appointed by the Government to inquire into the fitness of Antonio Mangini to be given the title of Agent to the Republic. This document was said to have been discovered by Cevasco at the end of August or beginning of Sept. 1876, and the discovery of it led to the renewal of the litigation. It was of considerable length. It stated the character of Antonio Mangini as regarded his fitness for the appointment; and then stated that he was a native of Quarto and forty-five years of age, and proceeded to give a short outline of his life, and then to state his present reputation and manner of living in London, and a fact illustrating his present position in London. This evidence was objected to on the ground that the statements as to age and place of birth were not made by persons whose duty it was to report upon those facts.

*J. Pearson, Q.C. and E. Beaumont for the plaintiff.*

*J. Napier Higgins, Q.C., Everitt, and Eyre, for the defendants.*

MALINS, V.C.—Considering that the order of the 8th Aug. 1876 had deprived Cevasco of the 50,000*l.* which he would have gained if the case had succeeded, all subsequent evidence obtained by him or those connected with him to bolster up a lost case must be regarded with the greatest suspicion. But, with regard to the genuineness of this document, I do not think it necessary to give a decided opinion. Assuming it to be as genuine as the plaintiff represents it to be, I am of opinion that it cannot be accepted as evidence as to the place of birth or the age of the Consul. Mr. Pearson read several affidavits of skilled persons to prove the genuineness of the document, and that the report was made in accordance with usage, and in strict performance of the duty of the committee. I do not think it necessary to go into that evidence, because I consider that the only duty the committee had to perform was, to report upon the fitness of the Consul for the Diplomatic Agency to which he was proposed to be appointed, and upon that question it was perfectly immaterial whether he was born at Quarto, or whether he was fifty-five or forty-four years of age, and the case therefore falls strictly within the principles decided in *Chambers v. Bernasconi* (1 Tyrw. 335; 4 Tyrw. 531). [His Lordship stated the facts of that case, and read the judgment of Lord Denman, 4 Tyrw. 545.] The principles of that decision have been steadily adhered to by the courts. The principles upon which entries of deceased persons are received in evidence are laid down in *Price v. Lord Torrington*

(a) Reported by W. M. HARRIS, Esq., Barrister-at-Law.

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(1 Salk. 285), where the entry of a deceased brewer's drayman, that he had delivered beer to a customer, was received in evidence because it was made in the ordinary course, in the discharge of his duty. Upon the same principle, in *Doe d. Patteshall v. Turford* (3 B. & Ad. 890), an entry of a deceased solicitor was received as evidence of service of a notice to quit, it being proved that it was in the usual course of business to make such entries; and in *Poole v. Dias* (1 Bing. N. C. 649), the entry of the dishonour of a bill by the deceased clerk of a notary was received as evidence, because it was made in the ordinary discharge of his duty. But in *Smith v. Blakey* (L. Rep. 2 Q. B. 326, 333), it is laid down by Blackburn, J., that in order to make such entries evidence, they should not only be in the due discharge of the business about which the person is employed, but the duty must be to do the very thing to which the entries relate, and then to make a record of it. It was certainly no part of the duty of the committee to state the age or place of the birth of the Consul, and I am therefore of opinion that, assuming the document to be genuine, its statements on these points cannot, upon the authority of these cases, be taken as evidence, and certainly not as conclusive evidence against the mass of facts which go to show that those statements cannot be correct.

*Summons dismissed with costs.*

Solicitors: *Lowless and Co.; Foster and Spicer; Eyre and Co.*

May 29 and 30.

(Before BACON, V.C.)

DICKS v. BROOKS. (a)

*Copyright—Slander of title—Engraving—Copying in part—Woolwork pattern—Assignment of copyright—Counter-claim for penalties—8 Geo. 2, c. 13.*

*The copying in the whole or in part of the main design of a copyright engraving by a chromo-printed pattern for woolwork, or by a picture worked in wool, is an infringement.*

*A written assignment of the copyright in an engraving is not necessary to establish the right of the assignee to the statutory penalties under 8 Geo. 2 c. 13, for the piracy of such copyright.*

*The plaintiffs, proprietors of a weekly periodical, had published for presentation with this periodical, a chromo-printed pattern for woolwork, called "The Huguenot," which they had advertised extensively. The defendants, who were the proprietors by assignment of the copyright in the engraving made from the original picture, the main design of which was represented in the plaintiffs' chromo-printed pattern, had issued a circular containing a warning against the sale of any copy of the subject, "The Huguenot," without the stamp of their firm, in whom the sole subsisting copyright existed, and that all such unstamped copies were imitations and unlawfully made. The plaintiffs alleging that the publication of this circular was a false and malicious libel on their chromo-printed pattern, and that the sale of their publication had been greatly damaged thereby, commenced an action to restrain, and obtain damages for this libel and slander of title.*

*The defendants, by their counter-claim, asked for*

*the statutory penalties for copying their print, and for an injunction and damages.*

*Held, that the action for slander of title could not be maintained; that the plaintiffs' woolwork pattern was an unlawful imitation of the engraving; and that the defendants had established the right set up by their counter-claim to restrain the publication by the plaintiffs of their woolwork pattern, and to have the penalty under 8 Geo. 2, c. 13, of 5s. for every copy published and exposed for sale by the plaintiffs, enforced.*

**ACTION.**

The plaintiffs were the publishers and proprietors of a periodical called *Bow Bells*. The defendants, Messrs. Brooks and Son, were the proprietors by assignment of the copyright of a print called "The Huguenot," engraved from the original picture by J. E. Millais, R.A., and of a photograph taken from the engraving.

The plaintiffs had produced and published for circulation with the 1877 Christmas number of their publication a chromo-printed pattern for woolwork, entitled "The Huguenot," taken, as they stated, from a Berlin wool pattern purchased by them in a wool warehouse in Newgate-street. This pattern was said to have been imported from Germany. Printed directions were placed at the foot of the plaintiffs' chromo-printed pattern for the guidance of persons desiring to work in wool therefrom. The leading incident of Millais's picture—the farewell of two lovers of different creeds on the eve of the massacre of St. Bartholomew—was to be found in the plaintiffs' pattern, but different background and other trifling variations had been introduced, and the colouring also differed from that in the original picture.

The plaintiffs extensively advertised their intention of publishing the pattern before they produced and published it, and they also advertised it after its publication.

In Dec. 1877 the defendants issued, and, as the plaintiffs alleged, extensively circulated in the publishing trade and among the public, a notice in the following terms:

171, Strand, W.C.

London, Dec. 6th, 1877.

Sir,—We give you notice that if you sell or offer for sale, exhibit, or distribute any copy of the subject "The Huguenot," without the stamp or imprint of our firm, in whom the sole subsisting copyright exists, that all such unstamped copies are imitations, and unlawfully made. (Signed) B. BROOKS AND SON.

The plaintiffs alleged that the publication and circulation of this notice had caused a great injury to their trade; that the publication of this notice was a false and malicious libel on their print and pattern, which was not an imitation of any picture to the copyright of which the defendants were entitled, and commenced the present action, whereby they claimed a declaration that the said circular or paper so issued and circulated by the defendants was a libel upon and a slander of the plaintiffs' title and the said print or pattern as published by the plaintiffs, as falsely depreciating the said print or pattern, and the plaintiffs' title to publish the same; an injunction and damages for the alleged libel and slander of title.

The defendants, by their statement of defence and counter-claim, asserted their title to the engraving, and alleged that the plaintiffs had unlawfully copied it in whole or in part, and greatly damaged their property therein, and claimed an

(a) Reported by W. COWELL DAVIES, Esq., Barrister-at-Law.

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injunction, an account of the number of these prints published, sold, or exposed for sale by the plaintiffs, and the penalty of 5s., under 8 Geo. 2, c. 13, for every such print published, printed, or sold by the plaintiffs, and for damages.

It appeared from the evidence of the defendant during the trial that a photograph of the engraving had been registered under 25 & 26 Vict. c. 68, to protect the copyright from German pirates, who were the worst; that in Jan. 1857 a Mr. White had caused the engraving to be executed by Mr. Barlow from the original picture; and that after White's death, in 1868, the copyright was sold by Christie and Manson, and purchased by Brooks and Co. A formal assignment from White's executors to Brooks and Co. was executed in 1871.

In 1870 the photograph of the engraving was registered under 25 & 26 Vict. c. 68.

*Horton Smith, Q.C. and Oswald* for the plaintiffs.—Assuming that the defendants prove their copyright in the engraving, the print from which our chromo-printed pattern was produced was a print issued in Germany. We never copied their engraving nor the photograph of it; for all that the defendants know this print which we have copied may have been taken from the original picture. Our right to resort to the original picture is clear; there is no monopoly of the subject:

*Sage v. Moore*, 1 East, 361.

It is no piracy of one engraving or print for another artist to make another engraving from the original picture:

*De Berenger v. Whibley*, 2 Stark. 543.

But even assuming that we had taken this chromo-printed pattern from the engraving, and that the defendants have copyright, even then, I say, ours is not such a copy as to be an infringement. To be an infringement the copy must be such as to give to every person seeing it the idea of the original:

*West v. Francis*, 5 B. & Ald. 737.

There are many and important differences between the engraving and our pattern. The purposes too for which our pattern is published are so different to those for which the engraving is published that there is no ground for an injunction against us. We have a perfect right to represent this as "Millais's Huguenot."

*Martin v. Wright*, 6 Sim. 297.

The issue and circulation of this notice by the defendants amounts to malice in law as defined in *Bromage v. Prosser* (4 B. & C. 247). Their claim was more extensive than they were entitled to make, and it was made intentionally (Bullen & Leake Prec. Pl. pp. 404, 405), and amounts to slander of title. There cannot be any copyright in the defendants for the subject of "The Huguenot." Under the Judicature Act 1873, sect. 25, sub-sect. 8, the court has a more extended power of granting injunctions than it had before, and it will restrain the circulation of a libel injurious to the plaintiffs' trade:

*Saaby v. Easterbrook*, L. Rep. 3 C. P. Div. 399;

*Hinrich v. Berndes*, W. N. 1878, 11;

*Thorley's Cattle Food Company v. Massam*, L. Rep. 6 Ch. Div. 582.

They also cited

*Garr v. Duckett*, 5 H. & N. 788.

*Hemming, Q.C. and Dauney* for Brooks and Co.—The statutes regulating this case, so far as the engraving is concerned, are 8 Geo. 2, c. 13, 7 Geo. 3,

c. 38, and 17 Geo. 3, c. 57. The Act 25 & 26 Vict. c. 68, does not affect anything but the photograph. The first of these statutes gave the right of copyright to the original engraver for fourteen years; the second extended this time to twenty-eight years, and extended the right to the person engraving another man's pictures; and the third statute extended the right to damages. The words of the first statute are very wide—"copying in the whole or in part, by varying, adding to, or diminishing from the main design." The plaintiffs are certainly within that definition. We, as the assignees of this engraving, can maintain this action for piracy. We are not bound to produce the plate; one of the prints taken from the original plate is sufficient evidence:

*Thompson v. Symonds*, 5 Term Rep. 41.

The Judicature Act 1873, sect. 25, sub-sect. 8, has not altered the principles upon which the court proceeds in granting injunctions:

*The Prudential Assurance Company v. Knott*, 31 L. T. Rep. N. S. 866; L. Rep. 10 Ch. 142;

*Day v. Brownrigg*, 39 L. T. Rep. N. S. 553; L. Rep. 10 Ch. Div. 294.

Before an action for slander of title can be maintained, the plaintiff must prove his title, and he must prove that it is falsely slandered and with malice:

*Wren v. Weild*, 20 L. T. Rep. N. S. 1007; L. Rep. 4 Q. B. 731.

Our case is that the plaintiff has no title; his production is a copy of our engraving or the photograph of it. Whether it is a piracy first or second-hand does not matter. The plaintiffs' action therefore cannot stand, but we are clearly entitled to an injunction and to the penalties provided by the Acts. We do not press for further damages.

*Horton Smith, Q.C. in reply*.—The jurisdiction to grant injunctions in such a case as the present cannot be disputed:

*Beddow v. Beddow*, L. Rep. 9 Ch. Div. 89.

The devolution of the title to this engraving must be strictly proved in a penal action, and under 8 Anne, c. 19, an assignment of copyright must be in writing and attested by two witnesses:

*Power v. Walker*, 3 M. & S. 17;

*Davidson v. Bohn*, 6 C. B. 456.

The assignment to Brooks and Co. has not been strictly proved.

*Hemming, Q.C.*—Under the Acts of Geo. 2 and Geo. 3 no such assignment is necessary; and, as far as the penalties imposed by those Acts are concerned, I am surely in no worse position than any other informer.

BACON, V.C., after going through and commenting upon the plaintiffs' statement of claim, continued:—That is the plaintiffs' claim; that is founded upon the allegation that they have the right and title to print and publish the thing in question. The answer of the defendant to that is, that he bought a copperplate engraving and paid for it, and he has proved that he bought it and paid for it: all this without any assignment—no assignment whatever being necessary; delivery from hand-to-hand would be enough for that purpose. He says, having become, by payment of this money and by delivery of the thing that he bought, the owner of that copperplate, he caused a photograph to be made from it, and he registered that photograph in the manner prescribed by or permitted

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by the Act of Parliament, and that therefore he thenceforth becomes the sole owner of a photograph at all events, and the photograph is identical in design and subject with the engraving which he has bought and paid for. It is said that he has no title to that because the statutes require that an assignment should be in writing, as it does for the purpose of justifying any person who by way of defence says, "The title is mine, for I have got a licence from somebody qualified to give me a licence." No such thing is suggested by the plaintiff in the first action here. All this story which I have read from the statement of claim, and the evidence he gives in support of it is, that being accidentally in a wool warehouse in Newgate-street, or somewhere else, he saw the thing in question, and bought it for the purpose of improving the circulation of a periodical in which he was interested. He got it copied by some printer, who is not called as a witness (a remarkable circumstance, in my opinion, in this case). He got a large number—25,000 copies of it—printed, and his complaint is that the sale of those copies has been interfered with by the defendant. Nobody ever heard of such a case. Now, the first question that presents itself is, whether it is an infringement of that title which he gets under the Copyright Act, and especially as to the registration of a photograph under the last Act that has been referred to? whether he has not the exclusive right of publishing that subject? In my opinion it does not admit of question. There have been attempts made to argue, in the first place, that there are differences between the photograph registered, which is the defendant's property, and the thing that is prepared for working in Berlin wool. Now, the differences alleged are these: It is said that in one of them there is a kind of Chinese Gothic castle introduced, or what is meant to represent a castle; that the wall which is entire in the original is only a dwarf wall here; that there are differences in the foliage; and that the male figure wears a sword and has a tuft upon his chin, and in the photograph those things are wanting; and because of those differences they say it is not the same. The object of the statute is to prevent a copy or imitation in whole or in part. The definition read from the case to which Mr. Horton Smith referred (*West v. Francis*, 5 B. & Ald. 737), which I should not adopt conclusively as applying to every case (although it applied perfectly to the case in which it was used), is that a copy is a thing which presents the same idea as the thing copied from. Can there be any doubt that this presents exactly the same idea? It may be that for the purpose of being worked in wool it would require light at the left-hand corner of the picture, and so that castle is introduced. But the painter who painted the picture which has excited universal admiration, thought right that for the purpose of his picture there should be a closed background, representing a sort of thicket, in which the lovers described in the registration are taking a farewell; and the original picture is entitled "The Eve of St. Bartholomew's Day," so that the idea intended to be conveyed by the painter was, that on the eve of the tragic events which happened on St. Bartholomew's Day a Huguenot lover was taking leave of his mistress, and that they had chosen a secluded spot in a wood. It is said that because a Chinese Gothic palace is introduced in the corner, from the gurret window of

which anybody might see these lovers, that that is an alteration which justified the plaintiff in the first action in saying that it was in no sense or respect a copy. It is only necessary to look at the two things to answer that objection. The plaintiff's publication is for worsted work; but as to its being a direct copy intentionally and purposely made from the photograph, nobody alive can entertain any doubt. Then is that what the Act of Parliament meant to prevent? The Act of Parliament meant to provide for a case which was altogether new. It meant to protect the original painter to a certain extent, and particularly to protect the engraver, treating an engraving as a commercial property, deserving of the protection of the law, and it endeavoured—and I think effectually endeavoured—to prevent any infringement of rights so obtained. The plaintiff coming with this thing, which he says is not an engraving, is not a print and is not a picture, says that he has a right to despoil the owner of the copyright of the photograph—of which alone I speak, not forgetting the right to the engraving. He says he has a right to despoil him of his property in this by fastening upon the public a very coarse imitation of a very celebrated picture to gain for his own purposes the interest which is attached to that picture. In my opinion, the case is perfectly clear. There is no pretence for the first action, and that must be dismissed. The second action under the Acts of Parliament, beginning with the Hogarth Act, and carried down to the 25th and 26th of the Queen, gives the defendant a full title to restrain this plaintiff from continuing the wrong which he has endeavoured to do, and gives him a title to have that penalty which the Act of Parliament has prescribed of 5s. for every copy in the usual form. The defendants must have the costs of the action, and of their counter-claim.

Solicitors: Crook and Smith; Bowen May.

Friday, April 25.

(Before FRY, J.)

*Re* THE WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK; *Ex parte* DALE, YOUNG, AND CO. (a)

*Bank employed to collect average orders—Agency—Following money and cheque.*

*A banking firm at S. sent to a bank at O. certain average orders for collection at O., and payment of the proceeds over to bankers in London, who were London agents for both parties. The bank at O. collected some of the orders, and received a cheque for one of them, and cash for the remainder of them (except two which were returned uncashed). They then paid the cash into their till with other moneys, and stopping payment went into liquidation.*

*Held, that the cheque could be followed by the firm at S., as it was the specific property resulting from the special agency; but that the cash could not be followed.*

"Fiduciary relationship" defined.

Observations on Pennell v. Deffell (21 L. T. Rep. N. S. 54; 4 De G. M. & G. 372).

THIS was the hearing of an adjourned summons taken out by John Brodrick Dale, James Young, and Charles Henry Green, copartners trading as



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Dale, Young, and Co., claiming payment by the official liquidators of the West of England and South Wales District Bank, of the sum of 247l. 7s. 7d., moneys of the said Dale, Green, and Co., in the hands of the official liquidators, "being the proceeds of average orders the property of the said Dale, Young, and Co., entrusted to the West of England and South Wales District Bank, as special agents for the sole and specific purpose of collecting, on behalf of the said Dale, Young, and Co., "the amounts of the said average orders, and forthwith paying over the same." The money so received was stated in the summons to have "formed part of the moneys in the hands of the said bank at the time of its suspension" or to have since been received by the official liquidator.

Dale, Young, and Co. were bankers at South Shields. They had no account with the West of England and South Wales District Bank, or any of its branches or agencies, but were in the habit, when they had orders to collect on persons residing at places where the West of England and South Wales District Bank had branches, of forwarding orders to them specially for collection, and directing them to pay over the proceeds at once to Messrs. Glyn, Mills, Currie, and Co., who were the London agents both of Dale, Young, and Co., and of the West of England and South Wales District Bank.

On the 5th Dec. 1878 Dale, Young, and Co. sent for collection and payment to London agents of the Cardiff branch of the bank several average orders for, altogether, 333l. 13s. 9d., on persons residing at Cardiff.

These orders were received on or before Saturday the 7th Dec., and all of them (except two, viz., Fry's and Edwards', which were for 54l. 15s. and 31l. 4s. 11d. respectively) were the same day paid by the parties on whom they were drawn, the sum of 74l. 17s. 7d. being paid in cash, and the remaining 172l. 1s. in a cheque of Messrs. Young and Ormsh on the Cardiff Branch of the London Provincial Bank Limited. In due course of post, Dale, Young, and Co. received from the manager of the Cardiff branch the following letter:

I retain for five days unpaid, Fry, 31l. 4s. 11d., and Edwards 54l. 15s., and have paid 247l. 7s. 7d. to your credit of Glyn and Co., being the remainder of your remittance of the 5th inst., less commission.

Between the hours of closing the Cardiff branch on Saturday, and the hour when it would otherwise have been opened on Monday, the suspension of the West of England and South Wales District Bank was determined on, and Fry's and Edwards' orders were returned uncollected to Dale, Young, and Co. It appeared, however, that the 247l. 7s. 7d. alleged to have been paid to Glyn and Co. had in fact never been so paid, but that at the time of the suspension the sum of 74l. 17s. 7d. cash formed part of the cash to a much larger amount actually in the Cardiff branch of the West of England and South Wales Bank, and that the cheque for 172l. 1s. was duly honoured, and was, subsequent to the suspension, paid to the liquidators with other moneys by the London and Provincial Bank Limited.

Higgins, Q.C. and Everitt for Dale, Young, and Co.—The liquidators ought to have paid over the 247l. 7s. 7d., which was in the hands of the bank as agents. The cheque ought certainly to have

been delivered to the claimants. In *Ex parte Cooke, Re Strachan* (35 L. T. Rep. N. S. 649; L. Rep. 4 Ch. Div. 123), where a broker was employed by a trustee to sell consols and invest in railway stock, and had notice of the trust, and sold and received a cheque which he paid into his own banking account, it was laid down by James and Bramwell, L.J.J., that the money could have been followed, even if there had been no trust, as the broker was an agent for the trustees. The claimants were not customers of the bank; they were principals. [FRY, J.—Were they not customers in respect of commissions?] Commission was charged by the broker in *Ex parte Cooke*, but James, L.J. in that case said, "I have been utterly unable throughout the whole of the argument to find the slightest distinction between this case and the case of *Taylor v. Plumer*." In *Taylor v. Plumer* (3 M. & S. 562) a draft for money was intrusted for investment to a broker, who misapplied it by purchasing other securities, and, on becoming bankrupt, surrendered the purchased securities to the principal, who was held to be entitled to them as against the assignees in bankruptcy. In the present case the bank is in the position of a trustee. [FRY, J.—The trust, if any, in this case was to turn the average orders into cash, and when that was done it was in pursuance of and not a breach of the trust. That having been done there was an end of the trust.] The orders were sent to the bank merely for the purpose of collection. [FRY, J. referred to *Whitcomb v. Jacob*, Salk. 160.] The fact of the agents being bankers makes no difference. If the money is affected by a trust and is paid into a banking account, and then money is drawn out, the money drawn out exhausts that paid in, unless there is a specific appropriation of sums paid in (*Brown v. Adams*, 21 L. T. Rep. N. S. 71; L. Rep. 4 Ch. App. 764), but here no money was drawn out. In *Pennell v. Deffell* (21 L. T. Rep. N. S. 54; 4 De G. M. & G. 372) it was laid down by Knight Bruce, L.J., that where a trustee had his own money and trust money in a chest, the blending would not be of moment as between the *cestui que trustent* and the creditors of the trustee. [FRY, J.—Suppose a fiduciary relationship to exist, not that of trustee and *cestui que trust*, is there any authority that part of a mixed fund can be ear-marked?] *Brown v. Adams* is an authority, for there the particular money had been drawn out. If a trustee mixes trust money, you can follow it so long as you can follow it to a mixed fund in a chest. If it has not gone, or only gone into securities, you can follow it. In *Ex parte Cooke* Bramwell, J.A. says, "If this payment were made by a bag of gold which the broker put into his strong box, and then misapplied part of the money, leaving the rest in the bag, there would be no doubt that what was so left could be claimed as the money of the client." They also cited

*Frith v. Cartland*, 12 L. T. Rep. N. S. 175; 2 H. & M. 417.

Glasse, Q.C. and Romer for the official liquidators, admitted that the cheque might be followed as being the specific property of Dale, Young, and Co. The cash, however, having been mixed with other moneys of the bank, formed part of its assets in the winding-up. If there had been no winding-up no complaint could have been made with regard to the fact of the money having been

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paid into the till of the bank, and the winding-up could not give the claimants any new rights.

*Higgins* replied, and cited

*Lewin on Trusts*, 7th ed. 762, 763.

*Fry, J.*—In this case it appears that on the 5th Dec. 1878, Messrs. Dale, Young, and Co., who are bankers at South Shields, forwarded to the credit account of the West of England and South Wales District Bank certain average orders, for collection. The statement made by Mr. Dale is that he employed the bank as their especial agents to collect these orders, and that he forwarded them especially for collection on their behalf, the proceeds to be paid over at once to Messrs. Glyn, Mills, Currie, and Co., who were the London agents of both Messrs. Dale, Young, and Co. and the bank. It appears that these orders were accompanied by a letter or memorandum of instructions to the bank. Two of those orders were not acted upon and were returned to Messrs. Dale, Young, and Co. The others were acted on, and, with regard to a sum of 72*l.* 10*s.*, the bank received it in the form of a cheque, which was not cashed until after the stoppage of the bank and the commencement of the liquidation. Therefore at the date of the liquidation it was *in specie*. The remainder, 74*l.* 17*s.* 7*d.*, was received by the bank in cash on the 7th Dec., and appears partly from the evidence, and partly from the admissions at the bar to have been mixed with other moneys of the bank which constituted a mixed fund in the till of the Cardiff branch of the bank on the evening of the 7th Dec. The bank stopped on the 9th Dec., and the liquidation commenced on the same day, the intervening day, the 8th, having been a Sunday. It appears to me to be clear that the bank were, in the collection of these average orders, special agents of the claimants, and that they stood in what has often been called a fiduciary relationship towards Messrs. Dale, Young, and Co. It appears, further, to be clear, that if the money which they so received under their special agency, having been transmitted to them by Messrs. Dale, Young, and Co., had been kept separate from all the other moneys in the bank, or if it had been invested rightfully or wrongfully in some property into which the specific money could be traced without any mixture having taken place, in either of those two cases, Messrs. Dale, Young, and Co., could have followed the money or the property into which the money had gone, and it appears to me, and has been admitted by the counsel for the bank, that one of those principles does govern the case of the cheque, that the cheque was the specific property resulting from the special agency at the time of the liquidation, and as such belongs to the principals. The question arises, however, with regard to money received under the agency and mingled with the money of the agent, that is to say, the 74*l.* 17*s.* 7*d.* Now there is a long line of authorities which regulate this case, to which I must pay the greatest attention. Before referring to them let me observe that it appears to me that the agent receiving these orders was bound to convert the order, so to speak, into money; that is to say, was bound to receive the money for which the order was given, and that he might with propriety place the money in his till, provided he directed his agents in London to credit the account of Messrs. Dale and

Co. in London with the amount so received, that being the nature of the authority and the duty of the agent. I now turn to the authorities; and I find as long ago as the ninth year of Queen Anne, the case of *Whitcomb v. Jacob* was determined in these terms: "If one employs a factor, and entrusts him with the disposal of merchandise, and the factor receives the money and dies indebted (in)to debts of a higher nature, and it appears by evidence that this money was vested in other goods and remains unpaid, those goods shall be taken as part of the merchant's estate, and not the factor's; but if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of a superior creditor, &c., for in regard to that money which has no ear-mark, equity cannot follow that in behalf of him that employed the factor." Now, with the single exception that it appears to have been held subsequently that money may be ear-marked in this sense, namely, that it may be followed if it has been kept separate, that authority appears to have been followed. Therefore it comes to this, that if a factor properly converts goods into money, and that money gets mixed with his own money, it cannot be followed by the principal. In the well-known and celebrated case of *Ryall v. Rolfe* (1 Atk. 172), Burnet, J., in delivering judgment, says: "Suppose goods are consigned to a factor who sells them, and breaks, the merchant for the money must come in as a creditor under the commission; but if the money is laid out in other goods, these goods will not be subject to the bankruptcy." In another case of *Es parte Dumas* (1 Atk. 234), before Lord Hardwicke, the petitioners were certain persons who had claimed bills arising from the produce of certain goods transmitted to them, and the Lord Chancellor said, "Suppose the petitioners had consigned over goods to Julian as their factor, and he had sold them, and turned them into money, the principal then could only have come in as a general creditor under the commission, but if the goods had continued in specie, and had been found in Julian's hands at the time of his bankruptcy, it would have been otherwise, and has been so determined in several cases." That was well ascertained law at that time. Then Willes, L.C.J., in delivering the judgment of the Court of Common Pleas in the case of *Scott v. Surman* (Wilkes, 403), a considered judgment of the court, says: "We are all agreed that if the money for which the tar had been sold had been all paid to the bankrupt before his bankruptcy, and had not been laid out again by him in any specific thing to distinguish it from the rest of his estate, in that case the plaintiffs could not have recovered anything in the action, but must have come in as creditors under the bankruptcy as is laid down in the case of *Whitcomb v. Jacob*, and in many other cases." In 1800 and 1801, the Lord Chancellor in *Es parte Sayers* (5 Ves. 169) adopted the same view. He there considered there were special circumstances which showed that although the money had got into the common fund of the bankrupt, it had got out again, and he said it required an identity and distinction from the rest of the fund. Still he adopted the general principle that if it had been in the form of money at the time of the bankruptcy, all the creditor could have done would have been to rank with the other creditors. Lastly, in the well-known leading case of *Taylor v. Plumer*, Lord Ellenborough

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adopted the same view. He said: "It makes no difference in reason or law into what form, different from the original, the charge may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, as in *Scott v. Surman* . . . or into other merchandise, as in *Whitecomb v. Jacob* . . . for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases where the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way, i.e., as predicated only of an individual and undistinguishable mass of current money." That decision introduces the distinction of the case of *Whitecomb v. Jacob*, and shows that money may be treated as ear-marked when it is physically separated from other moneys. Those authorities appear to me to show that the 74l. 17s. 7d. must be treated as being part of the common property of the bank, and, in respect of that, the claimants must come in as creditors. Before parting with the case I feel bound to say that upon principle I feel the greatest difficulty, because I think the principle is very much opposed to that line of decision. Let me put it in this way. If it be a case of trustee and *cestui que trust*, and the trustee mingles the money which he holds in trust with his own money, can he, as against the *cestui que trust*, say that the money has so lost its character of trust money that it cannot be followed? Upon that point the observations of Knight Bruce, L.J. in the case of *Pennell v. Deffell* (*sup.*) appear most forcible. He supposes the case of a trust fund kept separate, and he then refers to the case of a trust fund mingled, and asks whether that can make any difference. "None, as I apprehend," he says, "except (if it is an exception) that his executors would possibly be entitled to receive from the contents of the repository an amount equal to the ascertained amount of the money in every sense his own, so mixed by himself with the other money. But not in either case, as I conceive, would the blending together of the trust moneys, however confusedly, be of any moment as between the various *cestuis que trustent* on the one hand, and the executors as representing the general creditors on the other." That seems a decision, that, as between a *cestui que trust* and trustee, the mixing of the fund is immaterial so long as there is a fund in which the *cestuis que trustent* can lay their hands. Does it make any difference that, instead of the trustee and *cestui que trust*, it is a case of fiduciary relationship? What is fiduciary relationship? It is this. It is one in respect of which, if a wrong arise, the same remedy exists against the doer, on behalf of the principal, as would exist against a trustee on behalf of the *cestui que trust*. If that be a just description of the relationship, it would follow that wherever fiduciary relationship exists, and money remains in the hands of a person standing in that relationship which is not properly accounted for, it could be followed and separated from any money of his own. It seems to me the logical result of *Pennell v. Deffell* is, that it is

opposed to the long line of authorities to which I have referred, and from which I do not feel myself justified upon any reasoning of my own in departing. The result is I hold the 172l. belongs to the claimants, and the 74l. 17s. 7d. belongs to the general estate. The costs of both parties will come out of the estate.

Solicitors for the claimants, *Clarke, Rawlins, and Clarke*, agents for *T. Tinley Dale*, South Shields.

Solicitors for the liquidators, *Clarke, Woodcock, and Ryland*, agents for *Fussell, Prichard, Swann, and Co.*, Bristol.

Saturday, May 17.

(Before FRY, J.)

WELLS v. ROW. (a)

*Will—Construction—Legacies charged on real estate—Mixed fund—No direction to trustees to sell—Exoneration of realty—"Residue."*

*Subject to the payment of his funeral and testamentary expenses and debts, and certain legacies, a testator devised "all his real estate" and bequeathed "all the residue of his personal estate" to trustees in trust for A. A died in the testator's lifetime.*

*Held, that the debts and legacies must be paid out of the personal estate so far as it was sufficient in exoneration of the real estate, the testator not having shown any intention to the contrary.*

FURTHER CONSIDERATION.

Robert Dean, by his will dated the 1st Feb. 1861, directed his trustees to invest two sums of 300l. in the purchase of certain annuities. He also gave several specific and pecuniary legacies, and after some other directions continued as follows:

And subject to the payment of my funeral and testamentary expenses and just debts, the purchase of the said annuities, the several specific and pecuniary legacies hereinbefore bequeathed, and the various directions hereinbefore contained, I devise all my real estates (except estates vested in me as mortgagee or trustee), and bequeath all the residue of my personal estate and effects unto James Ley Row and Robert Smedley, their heirs, executors, administrators, and assigns, in trust for my niece, Harriet, the wife of the said James Ley Row, her executors, administrators, and assigns.

By a codicil, dated the 8th June 1867, the testator revoked some of the specific bequests given by the will, and the other specific bequests lapsed by the death of the legatee during his lifetime.

The testator died on the 25th Dec. 1878, and his will was duly proved by the said James L. Row and R. Smedley.

Harriet Row, the residuary devisee and legatee, died in the testator's lifetime.

In Oct. 1874 Alice Wells, a niece, and one of the next of kin of the testator at the time of his death, filed a bill against James L. Row and Robert Smedley, the executors and trustees of the will, for the administration of the testator's estate, claiming that, in the events which had happened, the testator's real estate which had descended on his heir-at-law was liable to contribute rateably with his personalty to the payment of his funeral and testamentary expenses, debts, and legacies.

In Dec. 1874 the usual administration decree was made, and it appeared from the chief clerk's

(a) Reported by W. C. BIAN, Esq., Barrister-at-Law.

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certificate, in answer to an inquiry directed by the decree, that the value of the testator's personal estate, at the time of his death, was about 3700*l.*, and of his real estate about 1200*l.*

Pursuant to an order dated the 27th May 1876, the funeral expenses, debts, and legacies were paid out of the outstanding personal estate, which was more than sufficient to pay them. This order was made "without prejudice to any question as to how these payments ought ultimately to be borne."

A question now arose on further consideration whether the funeral and testamentary expenses, debts, and legacies were to be paid out of the personal estate, as far as it would extend, in exoneration of the real estate, or whether they were to be paid out of the real and personal estate *pari passu*.

*Glasse, Q.C.* and *F. L. Wright* for the plaintiff.—The legacies are a charge on the real estate. The testator has created a mixed fund from his real and personal estate, and directed his debts and legacies to be paid out of it; they must therefore be paid out of the real and personal estate *pari passu*:

*Roberts v. Walker*, 1 Russ. & M. 752;  
*Greville v. Browns*, 34 L. T. 8; 7 H. L. Cas. 689.

[*Fry, J.* referred to *Allan v. Gott*, 26 L. T. Rep. N. S. 412; L. Rep. 7 Ch. App. 439.] That case shows that it is not necessary that the real estate should be directed to be sold in order to create a mixed fund:

*Hawkins on Wills*, p. 295.

They also referred to

*Gainsford v. Dunn*, 30 L. T. Rep. N. S. 288; L. Rep. 17 Eq. 405.

*Higgins, Q.C.* and *Chester*, for the trustees, referred to

*Withers v. Kennedy*, 2 Myl. & K. 607.

*Church*, for some of the next of kin, referred to *Bunnett v. Foster*, 7 Beav. 540.

[*Fry, J.*—In that case there was a direction to sell the real estate.]

*J. Pearson, Q.C.* and *O. A. Saunders* for the heir-at-law.—There is no direction to sell the real estate, and the ordinary rule that the personal estate is primarily liable to the payment of debts and legacies must therefore apply. [*Fry, J.* referred to *Boughton v. Boughton*, 1 H. L. Cas. 406, and *Francis v. Clemow, Kay*, 435.] The debts and legacies are charged on the real estate, but not in exoneration of the personal estate. [They were stopped by the Court.]

*Fry, J.* read the clause set out above and continued:—It is not disputed that these words are sufficient to create a charge on the real estate in favour of the legatees, and the question I have to determine is, whether the debts and legacies are charged on the real and personal estate *pari passu*. In my judgment they are not. Two classes of cases have been referred to. The first class, of which *Roberts v. Walker* is the leading case, shows that it is a question of intention; that, in order to throw upon the real estate any part of the burden to which the personal estate is primarily liable, you must show an intention of the testator, manifested by his will, to create a mixed fund. Under the circumstances of this case, no such intention has been manifested. I am therefore of opinion that the principle of that class of

cases does not apply. The next class of cases of which *Greville v. Browns* is the leading case turns to a great extent upon the force of the word "residue." Where a testator gives the residue of his real and personal estate, having previously given legacies, he means by "residue" that which remains after payment of the legacies, debts, and expenses out of his real and personal estate. But in this case the testator has drawn a distinction between his "real estate" and the residue of his personal estate. He says, "I devise my real estate," not the "residue" of my real estate. There is therefore a substantial difference between the language of this will and the language of the will in *Greville v. Browns*. In this case there is an entire absence of the word "residue" as applied to the real estate. The force of this word is shown clearly in the judgment of *Campbell, L.C.* in the above case. His Lordship says: "For nearly a century and a half this rule has been laid down and acted upon, that if there is a general gift of legacies, and then the testator gives the rest and residue of his property, real and personal, the legacies are to come out of the realty. It is considered that the whole is in one mass, that part of that mass is represented by legacies, and that what is afterwards given is given *minus* what has been before given, and therefore given subject to the prior gift." In the absence of the words used in those two classes of cases to which I have referred, I am of opinion that the ordinary rule must prevail. The personal estate therefore is primarily liable in exoneration of the real estate, and there must be a declaration accordingly.

Solicitors for the plaintiff, *Speechly, Mumford, and Co.*, for *G. F. D. Gaches*, Peterborough.

Solicitors for the defendants, *Speechly, Mumford, and Co.*, for *W. D. Gaches*, Peterborough.

Solicitors for the heir-at-law, *Rawlins and Clarke*, for *Broughton and Wyman*, Peterborough.

## QUEEN'S BENCH DIVISION.

Saturday, April 26.

(Before COCKBURN, C.J. and LOPES, J.)

REG. on the prosecution of THE GUARDIANS OF THE POOR OF THE PARISH OF LEWISHAM v. THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. (a)

*Metropolis Management Act* (18 & 19 Vict. c. 120), ss. 159 and 161—Rating—Exemption of property of a particular nature from the full rate levied—Particular parts of the parish to be described by metes and bounds—Equal pound rate.

The London, Brighton, and South Coast Railway Company objected to the rate levied upon their property in L. parish on the ground that a district board under the 159th section of the *Metropolis Management Act* 1855 cannot exempt or order a less rate to be levied upon different portions of a parish not described or marked out by metes and bounds in the precept ordering such rate to be levied, which portions of the parish were in such precept described only as all "land used as arable, meadow, or pasture ground only, or as wood land, orchard, market garden, hop, herb, flower, fruit, or nursery ground;" and that such rate being described in the precept as a

(a) Reported by A. H. FOTHER, Esq., Barrister-at-Law.

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general rate, but not being an equal pound rate, was bad under the 161st section of the said Act.

*Held (following Howell v. The London Dock Company, 8 Ell. & Bl. 212), that particular descriptions of property within a parish may, under the 159th section of the above Act, be relieved from the full rate as not being equally benefited with the rest of the parish by the expenditure of such rate.*

THIS was a case stated by justices at quarter sessions under 12 & 13 Vict. c. 45, s. 11. The material paragraphs are the following:—

3. By sect. 159 of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120) it is enacted that,

Where it appears to any vestry or district board that all or any part of the expenses for defraying which any sum is by such vestry or board ordered to be levied, have or has been incurred for the special benefit of any particular part of their parish or district, or otherwise have or has not been incurred for the equal benefit of the whole of their parish or district, such vestry or board may by any such order direct the sum or sums necessary for defraying such expenses, or any part thereof, to be levied in such part, or exempt any part of such parish or district from the levy, or require a less rate to be levied thereon, as the circumstances of the case may require.

4. By the 161st section of the said Act it is enacted that

The overseers of the poor of every parish to whom any such order as aforesaid is issued, shall levy the amounts mentioned therein according to the exigency thereof, and shall for that purpose make separate equal pound rates upon their parish, or the part thereof upon which any sum specified in such order is required to be levied in respect of each sum thereby ordered to be levied; that is to say, a separate rate in respect of each sum ordered to be levied for defraying expenses connected with sewerage, to be called a sewers rate; a separate rate in respect of each sum ordered to be levied for defraying expenses of lighting (where a separate sum is ordered to be levied for defraying such expenses), to be called a lighting rate; and a separate rate in respect of each sum ordered to be levied for defraying other expenses of executing this Act, to be called a general rate; and shall make such respective rates of such amount in the pound on the annual value of the property rateable as will in their judgment, having regard to all circumstances, be sufficient to raise the sums specified in such order; and such rates shall be levied on the persons, and in respect of the property, by law rateable to the relief of the poor in the respective parishes, and shall be assessed on the net annual value of such property, ascertained by the rate for the time being for the relief of the poor.

6. The order or precept upon which the said rate so appealed against was levied was as follows:

The Board of Works for the Lewisham district constituted by the Metropolis Management Act 1855 in pursuance of the provisions of the said Act, and of the Acts for amending and extending the same, hereby order and require the guardians of the poor of the parish of Lewisham to levy within the said parish the sum of 11,524*l.* for the purpose of defraying the expenses already or hereafter to be incurred by the said board in the execution of the said Act or Acts, and to pay the said sum to the London and Westminster Bank, &c., &c. And it appearing to the said board that the expenses in respect of which the said sum of 11,524*l.* is required are not for the equal benefit of the said parish, the said board do further order and require that the rate or rates to be raised in pursuance of this present precept shall, as regards all such parts of the said parish as consist of land used as arable, meadow, or pasture land only, or as wood land, orchard, market garden, hop, herb, flower, fruit, or nursery ground, be assessed and levied in [the proportion of one-fourth part only of the net annual value of such land.

8. The parish of Lewisham is very extensive in area, containing in the aggregate about 5500 acres.

Of this area a very considerable proportion is covered with houses; about 3000 acres are lands under cultivation, and fall under the classes of land mentioned in the precept. There is also land in the parish used in other ways, and rated at the higher rate. The 3000 acres do not lie together, but are scattered through the parish. The rateable value of the 3000 acres, according to the valuation list, amounts to about 11,000*l.* The total rateable value of the property in the parish amounts to 324,009*l.*

9. Throughout the said parish, all property, wheresoever situate, which consisted of land used as arable, meadow, or pasture land only, or as wood land, orchard, market garden, hop, herb, flower, fruit, or nursery ground, was rated or assessed in the rate at 2*d.* in the pound, and all other property was rated or assessed at 10*d.* in the pound upon the net annual value of such property respectively, as ascertained by the rate for the time being for the relief of the poor.

10. It was contended on the part of the London, Brighton, and South Coast Railway Company (1) that the said precept of the Lewisham District Board of Works was bad in law, inasmuch as the said district board have no power, under the 159th of the Metropolis Management Act 1855, or otherwise, to order the said rate to be levied in the manner directed by the said precept, and can only exempt or order a less rate to be levied upon any particular portion of a parish described and marked out by metes and bounds. (2) That the said rate was bad in law, inasmuch as it was not an equal pound rate as required by the Metropolis Management Act 1855, sect. 161.

The Court of Quarter Sessions dismissed the appeal.

*Meadows White, Q.C. (Paine with him),* for the guardians of the parish of Lewisham, maintained that the rate was good, and that while it was indisputably in the discretion of the district board of works to exempt local areas, it was not necessary to describe in the precept by metes and bounds those portions of a parish that were to be exempt or relieved from the full rate to be levied. It was the intention of the Legislature that relief should be extended to those portions of a parish which do not participate equally with others in the expenditure of the rate to be levied; and here the district board have proceeded not on the ground that the portions relieved are of a different kind of property from the rest, but that a difference should be made in their favour as not participating equally in the benefits of such rate; and in coming to this decision the board have exercised a proper discretion. *Howell v. The London Dock Company* (8 Ell. & Bl. 212) is to the point and conclusive in this matter.

*Oppenheim, for the London, Brighton, and South Coast Railway Company,* contended that it was competent for the district board to exempt only areas of considerable extent, and not certain portions scattered over the parish, and such areas must be described by metes and bounds in the precept, and here the district board have not done so. Again the precept of the district board calls this a general rate, and under the 161st section of the Act such rate must be an equal pound rate; but the rate appealed against was not an equal pound rate; therefore, on these two grounds, the rate was bad. *Howell v. The London Dock Company (ubi sup.)*

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does not apply, and, if it did, it has been virtually overruled by the remarks made by Erle, J. in *Reg. v. The Great Western Railway Company* (Ell. Bl. & Ell. 613).

COCKBURN, C.J.—I think this appeal must be dismissed, and the order of sessions must be affirmed. I confess that, upon the first reading of sect. 159 of the Metropolis Management Act 1855, I felt inclined to come to an opposite conclusion to that at which I have arrived; but this court is bound by its decision in *Howell v. The London Dock Company*. In that case the rate had been made uniformly on all the property of the dock company without any difference as to one portion deriving greater benefit from the expenditure of the rate than the other. The court there held that the district vestry should distinguish between the difference of benefits derived from such rate by the different kinds and classes of the property belonging to the company. In this case we think that, without distinguishing the local area and limit of each particular piece of agricultural or pasture land or of market garden or the like, the district board may in their discretion, under this 159th section, make a distinction between different portions of the parish or district on the ground that such portions would not benefit equally with others in the rate so levied. There is nothing in this case to make us distinguish it from *Howell v. The London Dock Company*, or override the latter case. The decision in that case is consonant with equity and justice. There have been countless opportunities for the Legislature to amend and alter that decision, but it has not thought fit so to do. We therefore, notwithstanding the remarks made upon that case by my brother Erle in *Reg. v. The Great Western Railway Company*, cannot take upon ourselves to alter or override it.

LOPES, J.—I am of the same opinion, and for the same reasons.

*Order of sessions affirmed.*

Solicitor for the guardians, S. Edwards.

Solicitors for the company, Norton, Rose, Norton, and Brewer.

#### COMMON PLEAS DIVISION.

*April 26 and May 12.*

(Before LINDLEY, J.)

DIXON v. WHITWORTH; DIXON v. SEA INSURANCE COMPANY. (a)

*Marine insurance—Insurable interest—Description in policy—Action to determine amount of salvage—Liability of assurers to repay salvage, but not costs of action—Sue and labour clause in policy, construction of.*

D. entered into an agreement by which he was to receive 10,000*l.* if he succeeded in transporting from Egypt and erecting uninjured in London an obelisk belonging to the British nation. D. expended 4000*l.* in constructing a vessel or case for the obelisk, in properly stowing it therein, and in providing for its transport. He then insured the obelisk and the vessel it was in with one underwriter for 2000*l.*, and with another for 1000*l.* The vessel and obelisk had to be cast off in a storm in the Bay of Biscay by the steamship that was towing them. Another steamer

subsequently found them, and towed them into Ferrol, where they were refitted, and were afterwards towed to London. The salvors brought an action in the Admiralty Division of the High Court, and were awarded 2000*l.* salvage, the obelisk being estimated at 25,000*l.*

D., having paid the sum awarded and the costs of the action, brought actions to recover these and other payments from the underwriters. The policies, which were against total loss only, contained a provision that the vessel and obelisk, "for so much as concerns the assured," should by agreement be valued at 4000*l.*, and a sue and labour clause in the ordinary form.

Held, that D.'s insurable interest in the obelisk and vessel containing it was 4000*l.*, the amount of his expenditure at the time that he insured; that it was not necessary to describe the nature of that interest in the policies; that the underwriters were liable to repay D., in proportion to the sums they had insured, the 2000*l.* awarded as salvage, it being expenditure in respect of preservation from loss that would have fallen on them; that they were not liable to repay D. the costs of the Admiralty proceedings, the expense of refitting at Ferrol, and towage to London, as these were not charges incurred by D. to avoid a loss insured against; and that D. was entitled to receive from the underwriters with whom he had insured the whole of the 2000*l.* that he had paid to the salvors, in contributions proportionate to the amount that each had subscribed, notwithstanding that the estimated value of the obelisk that had been saved was far larger than the amount of his interest in it.

THESE were consolidated actions tried before Lindley, J., and reserved by him for further consideration. The facts are fully stated in the judgment.

BUTT, Q.C., GAINSFORD BRUCE, and HOLLANDS, for the plaintiff.—The obelisk has been estimated by the Admiralty Division to be worth 25,000*l.*; the interest that the insured has in the cargo, not the cargo itself, is what is valued in the policy. In Arnold's Marine Insurance, 5th ed., l. 311, the principle is laid down as follows: "The presumption is that the valuation in the policy is, not the whole estimated value of the subject of insurance, but merely of the interest of the assured therein. Hence, where insurance was made on goods 'valued at 19,000*l.*,' of which the assured owned four-ninths, it was contended that the valuation was intended for the entire property, and accordingly that the interest of the assured was to be taken as four ninths of that sum; but the Court said, 'We must take it that the value insured is the value of the assured's interest' (*Feiss v. Aguilar*, 3 Taunt. 506). So in respect of freight (*Allison v. Bristol Marine Insurance Company*, 1 App. Cas. 209"). It is clear from the correspondence in this case that the exact nature of Mr. Dixon's interest was disclosed to the underwriters before the policy was effected. The 4000*l.* is to be read not as the value of the obelisk, but of the plaintiff's interest in it. It is submitted that the assured is entitled to recover everything that he has paid. It may be contended, on the other side, that he has paid salvage for the uninsured portion of the whole value, and that that was not paid in the interest of the assurers, and cannot be recovered. But that is not so. He was

(a) Reported by A. H. BINGLETON, Esq., Barrister-at-Law.

forced to pay the whole salvage in order to avoid a total loss on this policy. There was so much salvage money claimed, for which the claimants had a lien on the ship, and there was no one to pay it in this case but the plaintiff. *Kidston v. The Empire Insurance Company* (L. Rep. 1 C. P. 535, 2 C. P. 357; 15 L. T. Rep. N. S. 12, 16 ib. 119) is an authority that the suing and labouring clause is an entirely separate contract, under which the assured may recover more than the whole amount for which he is insured. If by perils of the sea the thing insured has got out of the hands of the assured, and he has to pay a sum of money to get it back, he can recover the amount paid under the sue and labour clause:

*Dent v. Smith*, L. Rep. 4 Q. B. 414; 20 L. T. Rep. N. S. 868.

The vessel and the obelisk are cast away in the Bay of Biscay, are picked up by a steamer, and are taken in tow. It is conceded that, there having been no notice of abandonment, there was no constructive total loss of the vessel. But there would have been a total loss of the obelisk but for the services of the steamer. We can recover the costs of the salvage suit under the sue and labour clause, because it was the only way to avert a total loss. There was a lien on the ship and obelisk for the salvage. It would not have been reasonable for the assured to pay any amount of salvage demanded. Therefore, the only way to free the ship was to bring the suit. The test of what can be recovered is what it is reasonable to do to free the vessel and to avert the loss:

*Lee v. Southern Insurance Company*, L. Rep. 5 C. P. 397; 22 L. T. Rep. N. S. 443.

Would it have been more reasonable to pay an exorbitant demand than to dispute it? In *The Legatus* (Swab. 169) Dr. Lushington says: "With regard to the practice of this court, so far as I have any knowledge of it, it has been uniform. It has always been the custom, wherever an action for damage has been brought against another vessel, and where it has been necessary to have recourse to assistance in the nature of salvage, for the remuneration paid for that salvage service to form a part of the claim for damage as well as the costs incurred on both sides in the salvage suit. It may be true that there never has been a case of this sort brought before the court, but I think that is so for a plain and obvious reason: the practice of the court has been such that it would have been considered a desperate attempt to disturb what had been so uniformly and so long done." [LINDLEY, J.—How is it that there is no authority to be found where underwriters have been held liable to indemnify the assured for the costs of a salvage action? Is it not that it is altogether outside the contract between them?] If we had paid the claim of the salvors without disputing it, they would have said that we had acted unreasonably. Then, the interest of the assured is sufficiently described in this policy:

Part on Insurance, 8th ed. I, 9;

*Carruthers v. Shedden*, 6 Taunt. 114;

*Mackenzie v. Whitworth*, L. Rep. 1 Ex. Div. 36.

We are entitled to recover the whole amount of salvage, as that is not a sum proportioned to the value of the vessel and cargo, but a payment for services rendered. The question of value is not of great importance in estimating salvage when the value is very great. In *The Amérique* (L. Rep.

6 P. C. 468; 31 L. T. Rep. N. S. 854) Sir James Colville sums up the authorities on that point. He says: "It was argued on the authority of a case decided by Dr. Lushington 1866 (*The Syrian*, reported in 2 Maritime Law Cases, p. 387), that the value of the property saved is material only in so far as it supplies a fund adequate to the payment of a liberal remuneration for the services rendered; and that it ought not further to affect the measure of that remuneration. . . . That the value of the property saved is, to some extent, to be treated as an ingredient in the calculation of the quantum of salvage remuneration, is a proposition which might be supported by a long series of decisions, beginning with those of Lord Stowell in *The William Beckford* (3 C. Rob. 355) and Sir John Nicholl in *The Industry* (3 Hagg. 208), and coming down to the present time. And their Lordships do not conceive that it was the intention of the learned judge who decided the case of *The Syrian* to run counter to, or even to qualify the decisions of his predecessors on this point. The rule seems to be that, though the value of the property saved is to be considered in the estimate of the remuneration, it must not be allowed to raise the quantum to an amount altogether out of proportion to the services actually rendered. And this is consistent with what is said by Lord Stowell in *The Blendon Hall* (1 Dodson, 421):—'In fixing a proportion of the value the court is in the habit of giving a smaller proportion where the property is large, and a higher proportion where the value is small, and for this obvious reason—that in property of small value a small proportion would not hold out a sufficient consideration; whereas in cases of considerable value a smaller proportion would afford no inadequate compensation. Applying these principles, their Lordships, with the most anxious desire not to infringe the wholesome rule which allows great latitude to the discretion of the court of first instance in cases of this description, have been unable to resist the conclusion that the learned judge has given undue weight in this case to the value of the property saved, and has consequently awarded a sum which, having regard to the services rendered, their Lordships must pronounce to be excessive.' The plaintiff was trustee of the needle, in possession of it, and the only person who would have lost anything if it had gone to the bottom; therefore he had the insurable interest in it:

*Seagrave v. Union Marine Insurance Company*, L. Rep. 1 C. P. 305; 14 L. T. Rep. N. S. 479;

Arnold's Marine Insurance, 5th ed. 1, c. 3.

#### They also cited

*Holdsworth v. Wise*, 7 B. & Cr. 794;

*Stringer and others v. The English and Scottish Marine Insurance Company*, L. Rep. 4 Q. B. 676.

*Russell, Q.C. and J. O. Matthew* for the defendants.—There are four questions in this case: (1) Whatever was the interest of the assured, was that interest properly described in the policy? (2) the policy being against total loss only, are the sums that are claimed recoverable under it? (3) what is the proportion of expenses incurred that the underwriters in question, if liable, ought to bear? (4) are the costs of the salvage action, re-fitting at Ferrol, &c., expenses properly to be taken into account in estimating that proportion? First, Mr. Dixon was not the owner of the obelisk;



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that is conceded. [LINDLEY, J.—Mr. Butt tried to persuade me that he was.] He could not deal with it in any way. He had entered into an agreement to bring it to London for 10,000*l*. He was to get that sum if it came to London, otherwise nothing. His interest was, therefore, that of the shipowner in the freight. The owner of the ship cannot describe his interest as in the freight; and the person interested in the freight cannot describe his interest as in the ship. [LINDLEY, J.—The mortgagee of a ship may describe his interest as in the ship.] Because he is really the owner. Whitworth's policy is for 1000*l*. "upon the goods and merchandizes in the good ship or vessel called *The Cleopatra* iron vessel containing the *Cleopatra* obelisk. . . . The goods and merchandizes, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy are and shall be valued at 4000*l*. . . . Vessel and obelisk being insured against the risk of total loss only." The Sea Insurance Company's policy is for 2000*l*. "upon any kind of goods and merchandizes, and also upon the body, &c., of and in the good ship or vessel called *The Cleopatra* iron vessel containing the *Cleopatra* obelisk. . . . The said ship, &c., goods and merchandizes, &c., for so much as concerns the assured by agreement between the assured and the company in this policy are and shall be, vessel and obelisk, valued at 4000*l*." The description in these policies is not sufficient to cover Mr. Dixon's insurable interest. Secondly, these policies being against total loss only, are the sums claimed recoverable? On the authorities, before there can be any liability here, there must have been a rendering of services such as would avert liability from the underwriters; in other words, such as would avert a total loss:

*Booth v. Gair*, 15 C. B. N. S. 291; 9 L. T. Rep. N. S. 386.

Thirdly, in what proportion, if liable, are the defendants bound to contribute? The interest insured is not an interest in the ship, as has been already said, but in the ship's arriving at London. The argument upon the other side is that he had salvaged all, and as salvor of all had a claim upon all, whosoever might be the property. It is quite conceded that if notice of abandonment had been given when the vessel was derelict, there would have been a constructive total loss; but it was not given. For whom has the salvor rendered services? For all who have an interest in the ship. There may be any number of interests in a ship, and it is clear that each of those interests must bear its quota of the salvage money. The plaintiff's interest is described in the policy as an interest to the amount of 4000*l*. Why should a man who only has insured 2000*l*, on a declared value of 4000*l*, be called upon to contribute upon the whole value of 25,000*l*? It does not matter for this purpose who was the owner of this obelisk—whether Mr. Erasmus Wilson, the Board of Trade, or anyone else. Suppose a ship and its cargo, owned by one man, but insured with entirely different underwriters; and the ship and cargo were salvaged, and a claim made against the owner for salvage. Where is there any authority to show that a claim upon the underwriter who had insured the cargo for the whole amount of the salvage money would be good, and that he would have to look for indemnity to the underwriter who had insured the ship? The plaintiff can only throw

on the underwriter that proportion of his loss which he has insured with him:

Lowndes on General Average, 2nd edit. p. 298.

In this case the premium is a 4 per cent. premium; the monument is of very large value; can it be supposed that the defendants would have incurred the risk that it is argued they did on such terms? Fourthly, what expenses can be properly taken into account, if the defendants are liable at all? If the defendants are liable at all it is admitted that they must pay their proportion of the amount awarded for salvage. But as to the costs of the salvage action it is submitted that the defendants are in no case liable to pay them. If the principle was that the underwriters were liable for all that was reasonably done to free the vessel, the defendants would be liable for these costs. That is not the principle. These costs were not the natural consequence of the perils insured against, and were outside the contract altogether:

*Mors le Blanche v. Wilson*, 8 L. Rep. C. P. 227;  
*Fisher v. Val de Travers Asphalt Company*, L. Rep. 1 C. P. Div. 511; 35 L. T. Rep. N. S. 366;  
*Basendale v. London, Chatham, and Dover Railway Company*, L. Rep. 10 Exch. 35; 28 L. T. Rep. N. S. 849.

The expenses in connection with taking the vessel into Ferrol, refitting there, and towing her to London, are also not expenses for which the underwriters can be liable. They are not expenses to avert a total loss.

*Cur. adv. vult.*

May 12.—LINDLEY, J.—These are actions brought by an assured against the underwriters of two marine policies, in respect of losses occasioned by the accident which befel the celebrated *Cleopatra* obelisk on her voyage from Alexandria to this country. The plaintiff is a civil engineer, and it appears from his evidence that he was desirous of seeing the obelisk brought over to England, and had a conversation with Mr. Erasmus Wilson on the subject. Ultimately, by an agreement dated the 31st Jan. 1877, and made between Mr. Wilson of the one part and the plaintiff, Mr. Dixon, of the other part, it was in effect agreed that Mr. Dixon should, at his own expense and risk, transport the obelisk to London and erect it there uninjured, and that, in the event of his succeeding, Mr. Wilson should pay him 10,000*l*. Mr. Dixon, however, was to incur no liability to Mr. Wilson in the event of failure in the enterprise. On the other hand, Mr. Dixon was to have no claim whatever against Mr. Wilson, except in the event of success. Further, it appears from Mr. Dixon's evidence that he did not anticipate any profit to himself from the transaction; in other words, it was not expected that the 10,000*l*. would more than cover the expenses. The only evidence before me respecting the ownership of the obelisk is the plaintiff's statement that there was a dispute about it, and the Khedive presented it to the British nation and handed it to him (the plaintiff) on their behalf. Having made the above agreement, Mr. Dixon commenced to prepare for the transport of the obelisk. He spent considerable sums of money and much labour in doing this, and he built the vessel called the *Cleopatra*. This was, in fact, little more than an iron case in which the obelisk was stowed, and in which it would float. The vessel had no other use, and was fit for no other purpose. The vessel was quite subordinate to its cargo, and the cost of

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its construction was for all practical purposes nothing more than part of the cost of transporting the obelisk. In Sept. 1877 the obelisk was in its case, or, in other words, was on board the *Cleopatra*, and was ready to be towed to England. On the 15th Sept. an agreement was entered into between the owners of the steamship *Olga* of the one part and Mr. Dixon of the other part for the towage of the *Cleopatra*, with the obelisk on board, from Alexandria to London for the sum of 900*l*. The expenses and liabilities which Mr. Dixon had incurred up to this time in constructing the vessel, in getting the obelisk on board, in properly stowing it there, and in providing for its transport, were estimated by him at 4000*l*, and did in fact amount to about this sum. On the 20th and 21st Sept. 1877 the policies on which these actions were brought were effected by Messrs. Barr and Co. for Mr. Dixon. I will state their language and legal effect presently. The *Cleopatra* and the obelisk left Alexandria on the 21st Sept. 1877 in tow of the *Olga*. All went well until the 14th Oct., when a severe storm was encountered in the Bay of Biscay, and the *Olga* was compelled to cast the *Cleopatra* off. On the 15th the *Olga* took the crew of the *Cleopatra* on board, and afterwards lost sight of her, and, having vainly endeavoured to find her, gave up the search and came on to England without her. On the evening, however of the same day the steamer *Fitzmaurice* fell in with the *Cleopatra*, and, after great risk and labour, succeeded in saving her and in towing her into Ferrol. The *Cleopatra* and obelisk afterwards reached London in safety. The Court of Admiralty awarded salvage to the *Fitzmaurice*. For the purpose of determining the amount to be awarded, the obelisk was estimated to be worth 25,000*l*, and the sum awarded to the salvors was fixed at 2000*l*. This sum the plaintiff paid. He also paid the costs of the proceedings in the Admiralty, and certain expenses in refitting the *Cleopatra* at Ferrol, and in towing her with the obelisk from that port to London. The present actions are brought to recover contribution from the underwriters in respect of these salvage and other expenses. The policies on which the actions are brought are worded as follows: Whitworth's policy is for 1000*l*. "upon the goods and merchandizes in the good ship or vessel called the *Cleopatra* iron vessel containing the *Cleopatra* obelisk. The goods and merchandizes, &c., for so much as concerns the assured by agreement between the assured and assurers in the policy are and shall be valued at 4000*l*. Vessel and obelisk being assured against the risk of total loss only." The risks insured against are the ordinary sea risks, and the suing and labouring clause is in the ordinary form. The Sea Insurance Company's policy is for 2000*l*. "upon any kinds of goods and merchandizes, and also upon the body, &c., of and in the good ship or vessel called the *Cleopatra* iron vessel containing the *Cleopatra* obelisk. The said ship, &c., goods, and merchandizes, &c., for so much as concerns the assured by agreement between the assured and the company in this policy are and shall be, vessel and obelisk, valued at 4000*l*." This policy also is against total loss only. The clauses relating to the risks insured against and suing and labouring are in the ordinary form. The actual wording of the suing and labouring clause was in both policies as follows: "And in case of any loss or misfortune

it shall be lawful for the assured, their factors, servants, and assigns to sue labour and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandizes, or any part thereof, without prejudice to this insurance, to the charges whereof we the assurers will contribute each one according to the rate and quantity of his sum herein assured." Although the language of the first policy is not quite clear as regards the subject matter insured, I think the first policy is on both ship and cargo, and not on cargo only. The second policy is clearly on both. The plaintiff's interest in the *Cleopatra* and obelisk were as follows: he was owner of the *Cleopatra*; he was not owner of the obelisk; but he had spent money upon it, had possession of it, and probably had a lien upon it for his expenditure. Taking the *Cleopatra* and obelisk together, the value of his interest in them at the date of the policy was 4000*l*. This was all he really had at risk, and all that was worth insuring. It is true that in certain events he might become entitled to 10,000*l*. under his agreement with Mr. Wilson; but this sum was only calculated to cover expenses, and Mr. Dixon, as a prudent man, would hardly incur further expense until the risks of the voyage were over. I regard the policies as being exactly what they purport to be, viz., policies on the obelisk and the vessel it was in; and I regard Mr. Dixon as having an insurable interest in them to the value of 4000*l*, and having insured that interest by the policies. The description in the policies is sufficient, in my opinion, to cover that interest. *McKenzie v. Whitworth* (L. Rep. 10 Eq. 142, and 1 Ex. Div. 36) shows that it is sufficient to specify the subject matter of insurance; and that it is not necessary to describe the assured's interest in it, unless his interest is such as to affect the risk insured against, which was not the case here. It was suggested that these policies ought to be regarded as analogous to policies on freight to be earned on the safe arrival of cargo; but in my judgment this is not the correct view. The analogy is too fanciful and far fetched to be of any practical use. The true effect of the policies is, in my opinion, what I have above described. The first question which arises is whether the underwriters are bound to pay anything in respect of any of the expenses to recover which the actions are brought. These expenses are: (1) the 2000*l*. paid for salvage; (2) the costs of the proceedings in the Admiralty; (3) the expenses of refitting at Ferrol and of towing from that port to England. It will be convenient to consider each of these in turn. 1. As to the 2000*l*. paid for salvage. The policies are against the risk of total loss only. Neither the *Cleopatra* nor the obelisk was totally lost; both were in fact saved, and the defendants therefore contend that they are under no liability whatever. But, although there was no total loss, it is clear beyond all doubt that the *Cleopatra* and her cargo were in imminent danger of destruction, and were saved from total loss by the services of the salvors. The underwriters therefore have had the benefit of these services, and are bound, in my opinion, to indemnify the plaintiff against his liability in respect of them. It is true that the language of the suing and labouring clause does not in terms extend to any services except those rendered by the assured, their factors, servants, and assigns; and it is also true that the salvage services in this

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case were not rendered by Mr. Dixon, nor by any factor, servant, or assign of his, unless the salvors are to be regarded as having been his agents by necessity or by ratification. But, without discussing how far the salvors can properly be regarded as agents, I take it to be settled that the suing and labouring clause ought to be construed to cover expenditure which the assured necessarily became liable to pay by way of salvage in respect of preservation from loss which, if it had occurred, would have fallen on the underwriters. See *Lohre v. Aitchison* (3 Q. B. Div. 566, &c.); *Kidstone v. Empire Marine Insurance Company* (L. Rep. 1 C. P. 535 and 2 ib. 357; 15 L. T. Rep. N. S. 12, 16 ib. 119). In truth, Mr. Russell did not seriously contest this point, although he thought it his duty to submit it to the court for decision. The same case of *Lohre v. Aitchison* (2 Q. B. Div. 501 and 3 ib. 558) shows that this clause is operative even although there is no total loss and nothing abandoned to the underwriters; and in my opinion they are bound by this clause to indemnify the plaintiff in proportion to the sums they respectively insured against his loss of the 2000*l.* awarded for salvage. 2. As regards the costs of the Admiralty proceedings, I am of opinion that the underwriters are not liable for these costs, or any part of them. I quite accede to the view that they were necessarily and properly incurred in ascertaining the proper amount of salvage to be paid; and I agree in the observation that, in order to enable Mr. Dixon to get the obelisk out of the hands of the salvors, it was as necessary to pay or secure their costs as to pay or secure the salvage itself. But the costs which Mr. Dixon has had to pay are not, in my opinion, charges incurred by him to avoid a loss insured against, or at all events they are too remotely so to be covered by the words of the policies before me. The suing and labouring clause is silent about costs, and no authority has been produced in which costs have been recovered under it. I do not regard *Xenos v. Fox* (L. Rep. 3 C. P. 631 and 4 ib. 665) as conclusive against the plaintiff on this point, but it certainly is rather against him than for him; and the fact that the suing and labouring clause did not cover such losses as are now usually provided for by the collision clause goes far to show that the costs which I am considering cannot be thrown on the underwriters. Their contract does not cover them. 3. As regards the expense of refitting at Ferrol and towage from that port to London, I am of opinion that these matters cannot be thrown on the underwriters. They were not incurred to avoid a total loss by perils of the sea of the obelisk or of his interest in it. They were not incurred until after the obelisk had been saved. It is true that Mr. Dixon would have lost the benefit of his agreement with Mr. Wilson if he had not got the obelisk home. But, as has been seen, he did not insure the benefit of that agreement; and as soon as the obelisk was saved the interest in it which he insured by the policy was saved also. These policies are against total loss only, and every loss sustained by the plaintiff in getting the obelisk home after it was safe at Ferrol must be borne by him. See *Great Indian Peninsular Railway v. Saunders* (1 Best & Sm. 41 and 2 ib. 266). I pass now to the next and last question, which arises, viz., whether the plaintiff is entitled to recover in respect of the whole 2000*l.*, or only in respect of some portion of that sum, viz., in respect of what as between him-

self and the other persons interested in the obelisk would be his proper proportion, supposing the obelisk to have been uninsured? This question depends on the true construction and effect of the suing and labouring clause, and curiously enough appears never yet to have been decided, at least in this country. The language of the clause is in favour of the plaintiff, and so, in my opinion, is its true effect. By it the underwriters agree to contribute in proportion to the amount subscribed to such charges as the assured shall be put to in preventing a loss which, if not prevented, would fall on the underwriters. There are no words to the effect that the assured shall only be repaid such proportion of those charges as in an equitable adjustment between himself and others would fall on him alone. The agreement is to contribute (in proportion to the amount subscribed) to the charges of his services. In other words, the underwriters agree to pay him for his services, each underwriter agreeing to pay in proportion to the amount for which he insures. Moreover, the early part of the clause authorises the assured to endeavour to save, not his interest in the thing insured, but the thing itself; and the language of the clause is adapted to cases in which other persons besides himself are interested in that thing. Further, it is now clearly established that this clause is a distinct and independent agreement, which, although occurring in and forming part of the policy, may entitle the assured to recover more than the amount underwritten. See *Lohre v. Aitchison* (*sup.*). Having regard to this principle, to the language and known object of the clause, I am of opinion that whatever services or charges of the assured fairly come within it must be paid for by the underwriters in proportion to their subscriptions. This view is in accordance with that adopted by Chancellor Kent in *Watson v. Marine Insurance Company* (7 Johns N. 757); and although that decision is controverted by Mr. Phillips (*s.* 1742, note 5) and by Mr. Lowndes (*Law of Average*, p. 231, 4th ed.), I am of opinion that Chancellor Kent's view is more in accordance with the true intent and meaning of the suing and labouring clause than are the views of his critics. They do not, I think, attach sufficient importance to the clause being a distinct agreement to pay for services rendered to avoid a loss insured against. The underwriters will be at liberty, on paying Mr. Dixon, to enforce such rights, if any, as he may have against other persons in respect of their proper shares in the salvage expenses (see *Dickinson v. Jardine*, L. Rep. 3 C. P. 639); and, although in this particular case those rights will probably be of no avail, yet whatever they may be worth the underwriters will be entitled to enforce them. In the result my judgment is for the plaintiff for 500*l.* against the defendant Whitworth, and for 1000*l.* against the defendants, the Sea Insurance Company, these sums being their respective shares of the 2000*l.* In each action the defendants must pay the costs.

#### *Judgment for plaintiff, with costs.*

Solicitors for plaintiff, *Hollams, Son, and Coward*.

Solicitors for defendant Whitworth, *Robinson, Hodding, and Cameron*.

Solicitors for defendants Sea Insurance Company, *Gregory, Rowcliffe, and Co.*

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*Ex parte* MANCHESTER AND COUNTY BANK; *Re* MELLOR.

[BANK.]

**COURT OF BANKRUPTCY.**

May 26 and June 16.

(Before the CHIEF JUDGE.)

*Ex parte* MANCHESTER AND COUNTY BANK;  
*Re* MELLOR. (a)*Partnership—Business of, carried on by surviving partner and executors of deceased partner—Subsequent bankruptcy—Assets remaining in specie—Joint and separate creditors.*

*By a partnership agreement, made between father and son, it was agreed that certain machinery should be considered as belonging to the father alone, and should not form any part of the partnership assets. The father, by his will, directed his trustees, of whom the son was one, to carry on, or wind-up the business at their discretion, and he further empowered them to employ any part of his general estate in carrying on the business, if they should elect to do so. Upon the father's death, the son and the trustees carried on the business under the provisions of the will for about two years, when the son filed his petition for liquidation. At the date of the petition part of the machinery which had been employed in the business carried on by the father and son still remained in specie, and was represented by a sum agreed upon between the parties lodged in a bank to abide the decision in the action.*

*Held (reversing the decision of the court below), that the moneys arising from the sale of the machinery which remained in specie at the date of the petition were joint assets of the father and son, and were divisible amongst their joint creditors, and not amongst the general body of creditors of the business carried on after the father's death.*

*The Court of Bankruptcy is a court of equity, and the principles which govern the administration of property in the Court of Chancery are applicable to administration in bankruptcy.*

*Ex parte* Morley, *Re* White (L. Rep. 8 Ch. App. 1026; 29 L. T. Rep. N. S. 442) followed.

*Ex parte* Satterthwaite, *Re* Simpson (L. Rep. 9 Ch. App. 572; 30 L. T. Rep. N. S. 448) distinguished.

JOSEPH HAGUE MELLOR, who had carried on business by himself as a cotton-spinner and doubler at Oldham, on the 19th Oct. 1871, took his son, Joseph Wainwright Mellor, into partnership, and the firm thus constituted carried on business under the name of "J. H. Mellor and Son." By a memorandum of agreement, dated the 19th Oct. 1871, and made between the father and son, it was agreed, *inter alia*, that the machinery, stock-in-trade, book debts, and capital then belonging to and used by the father should belong to him, and should not form part of the capital of the partnership, and that the father should receive interest upon the capital so belonging to him at the rate of 5 per cent. per annum; that the rents and expenses incident to the partnership and all losses, should be paid out of the profits, and that the deficiency, if any, should be borne by the father and son in the proportion of five-sixths to one-sixth; and that the profits of the business should be divided between the father and son in the like proportion.

J. H. Mellor and Son carried on business under the above agreement until the death of J. H.

Mellor on the 20th Nov. 1875. At that date the firm was indebted to the Manchester and County Bank in a sum of 3854*l.* 7*s.* 9*d.*, against which the bank held as security a policy upon the life of J. H. Mellor for 1000*l.* This security, upon being taken into account, reduced the indebtedness of the firm to the bank to the sum of 2729*l.* or thereabouts. J. H. Mellor, by his will dated the 19th Jan. 1875, devised all his real estate to his wife, Hannah Mellor, his son Joseph Wainwright Mellor, and his son-in-law Henry Buckley, upon trust for sale, and bequeathed all his personal estate to the same three persons upon trust, as soon as conveniently might be, to sell and convert into money all such part thereof as should not consist of money, and declared that the moneys arising from such sale and conversion should, after payment of testamentary expenses and debts, be invested as therein authorised, and held upon the trusts in favour of his widow and his three sons. Then followed this clause:

And I direct my trustees or trustee, at their, his, or her discretion, either to wind-up or dispose of or to continue, either alone or in conjunction with any person or persons, any business in which I may be engaged at my death and which I may not have bound my executors to continue.

The will also contained powers to the trustees to employ the capital employed in any business which they might continue to carry on in carrying on such business, and also to employ any money, part of his general estate, and to retain legacies bequeathed by his will for the purpose of carrying on his said business, so long as they should elect to do so. The testator appointed the three trustees named in the will to be executors thereof, and provided that, if the trustees or executors could not unanimously agree upon any matter relating to his will, the decision of two of them should decide the matter in dispute. Immediately after the death of J. H. Mellor, Mrs. Mellor and Mr. J. W. Mellor agreed to carry on the business as before, subject to the provisions in the will. J. W. Mellor thereupon, on the 14th Dec. 1875, wrote to T. Charlesworth, the manager of the Manchester and County Bank, to inform him that, owing to the death of J. H. Mellor, Mrs. Mellor was to be considered a partner in the firm, and would sign cheques. By a subsequent letter addressed to the bank, and dated the 12th June 1876, Mrs. Mellor and J. W. Mellor, who therein described themselves as the executrix and executor of the late Joseph Hague Mellor, and carrying on business as "Joseph Hague Mellor and Son," confirmed all the transactions between them and the bank, and authorised the signature of either one of them to be honoured. Upon or shortly after the receipt of the first letter, the bank closed the old account and opened a new account under the same name, and continued to do business with the firm as before. On the 31st Dec. 1875 a balance-sheet was made out by the executors, taking into account upon the one side the machinery in the mill, the stores, stock, &c., and on the other side the debts due from the testator's firm, including the balance then owing to the bank upon the old account. It appeared that Henry Buckley, the remaining trustee and executor of the testator, was cognisant of what had been done by his co-trustees, but took no active part in the trusts declared in the will. Subsequently, in 1877, he retired altogether from the trust, and obtained a release, John Henry Mellor, another son

(a) Reported by A. A. DORIA, Esq., Barrister-at-Law.

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of the testator, being appointed trustee in his place. J. W. Mellor filed his petition for liquidation on the 2nd Nov. 1877, and the question arose as to whether the machinery in the mill, which had been the property of the old firm of J. H. Mellor and Son, and which at the date of the liquidation petition still remained *in specie*, was to be applied in satisfaction of the debt due to the bank, or to be applied in payment of a dividend to the general body of the creditors. All the other creditors of the old firm had been paid off except the bank. The trustees in the liquidation sold all the machinery by arrangement, and paid the amount into the Manchester and County Bank. The value of the machinery existing *in specie* at the time of the liquidation was ascertained to amount to 2535*l*. An issue was directed to be tried before the County Court judge, in which William Butcher, one of the liquidation trustees, was made plaintiff, and the Manchester and County Bank were defendants, for the purpose of trying the question as to whom the proceeds of the sale of the machinery belonged. The learned judge decided in favour of the general body of creditors, upon the ground that from what had taken place there had been a conversion of the assets from being the property of the old firm into that of the new firm, the fact of the executors of the deceased partner carrying on the business under the authority of the will with the assets of the partnership operating, in his opinion, as an abandonment by them of the right to have those assets employed in payment of the partnership debts.

From this decision the Manchester and County Bank appealed.

*Herschell*, Q.C. and *Smyly*, for the appellants, submitted that the sum of 2535*l*., representing the machinery formerly belonging to the old firm, ought to be administered amongst the creditors of the old firm. This case came within the case of

*Ex parte Morley*, *Re White*, 29 L. T. Rep. N. S. 442; L. Rep. 8 Ch. App. 1026.

The partnership of J. H. Mellor and J. W. Mellor was dissolved by the death of the former, and his executors were, with the surviving partner, liable in equity to satisfy the debts of the firm. There was nothing in the present case to alter that position. The real question was whether any change had been introduced by the executors of the deceased partner carrying on the business of the firm in conjunction with the surviving partner who was himself one of the executors. The continuance of the business was entirely discretionary on the part of the executors. They exercised that discretion, and thereupon the business became an entirely new business, and the executors would be personally liable as between themselves and the creditors. The machinery, which did belong and still belonged to the old firm, remained *in specie*. There was no winding-up of the old business or sale to the surviving partner, but it was carried on by the executors of the deceased partner, in their character of executors, and nothing else. The County Court judge based his decision upon the fact that the executors of the deceased partner by carrying on the business after his death effected a conversion of the property and transferred all the assets to the new firm. The present case was distinguishable from *Ex parte Satterthwaite*, *Re Simpson* (30 L. T. Rep. N. S. 448; L.

Rep. 9 Ch. App. 572.) The following cases were also cited:

*Ex parte Dear*; *Re White*, 34 L. T. Rep. N. S. 631; L. Rep. 1 Ch. Div. 514;  
*Ex parte Ruffin*, 6 Ves. 119;  
*Ex parte Garland*, 10 Ves. 110;  
*Hankey v. Hammock*, Buck. 210;  
*Ex parte Richardson*; *Re Hodson*, Buck. 202.

*Ambrose*, Q.C. and *Finlay Knight* for the respondent.—We contend that the machinery which is represented by the sum in question in this case having become the assets of the new firm of J. H. Mellor and Son, as carried on by the executors of J. H. Mellor and J. W. Mellor, the surviving partner of the old firm, is properly distributable amongst the general creditors of the firm under the liquidation. Immediately after the death of J. H. Mellor a balance-sheet was prepared which contained a list of all the property taken over by the new firm, and in that balance-sheet the machinery in the mill was valued at 16,000*l*. At that time the position of the surviving partner and the executors of the deceased partner was that the surviving partner was entitled to wind-up the concern, and get in and pay all the debts; and if that had not been done the executors of the deceased partner could have enforced payment by an action for the administration of the testator's estate. There was nothing to prevent the executors of the deceased partner from selling to the surviving partner their right to break up the concern, and as the only right of the joint creditors was enforceable through the executors, since they did not sue the surviving partner for their debt, or take any step to impugn the arrangement upon the ground of fraud, they could not now, after standing by and letting the joint estate become the assets of the new firm, procure payment of their debt in the manner contended for. The arrangement between the executors of the deceased partner and the surviving partner was *bona fide* and amounted to a sale of the assets of the old firm to the new firm. It might well be that if the joint creditors had taken the proper steps the joint assets would have been applicable for the payment of their debts, but not having done so the joint assets were gone. The reason why the Manchester and County Bank, the only remaining joint creditors, were not paid the debt due to them from the old firm was that the debt was written off and a new account started with the new firm. They therefore contended that there was an agreement by the new firm to take over all the debts and liabilities of the old firm, and that thereby the executors of the deceased partner, through whom alone the joint creditors could make any claim, had waived the right of having this debt paid out of the estate of the deceased partner remaining *in specie* at the date of the liquidation. Supposing, however, that there was not a conversion of the assets of the old firm into the assets of the new firm, yet the machinery in question was assets under the liquidation, as being in the order and disposition of the bankrupts at the date of the petition. The following cases were relied upon:

*Ex parte Satterthwaite*; *Re Simpson*, L. Rep. 9 Ch. App. 572; 30 L. T. Rep. N. S. 448;  
*Kitchen v. Ibbetson*, L. Rep. 17 Eq. 46; 29 L. T. Rep. N. S. 450;  
*Owen v. Delamere*, L. Rep. 15 Eq. 134; 27 L. T. Rep. N. S. 647;  
*Ex parte Butterfield*; *Re Butterfield*, De Gex's Cases in Bankruptcy 319, 570.

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THE CHIEF JUDGE.—The question is by no means very clear. The principle of the administration of the joint and separate estates of bankrupts has been well established by the authorities, a number of which have been referred to, especially by the case of *Ex parte Morley, Re White*. I have no hesitation in saying, that the fund or the property which was the joint estate of the partners at the date of the death of the late Mr. Mellor, is to be administered amongst his joint creditors in the first place. The question is purely one of administration in bankruptcy. Mr. Mellor and his son carried on business together, Mr. Mellor being the capitalist, and most likely the owner of all, certainly the larger part of the joint property. Mr. Mellor died. What was the state of things then? Mr. Mellor could not by his will, nor by any act that he had done in his lifetime, withdraw from the partnership any part of that joint estate until the joint debts of the partnership had been paid. The right of a partner to withdraw from the partnership is always subject to the equitable right which the co-partner has, to see that all the debts are paid. In administration in bankruptcy it must always be borne in mind that the equitable rights of the partners are *inter se*, because the decision of that question as to their equitable rights governs all that can flow from the transaction. That is the principle of that case so often quoted, and I am sorry to say not always according to my notion understood, of *Ex parte Waring* (19 Ves. 345). That is the backbone and meaning of that case. In the argument Lord Eldon having hesitated very much about it, said that it presented considerable difficulties. I am only speaking from recollection of that case, but I believe he said that the right principle to be applied was the one used by Mr. Cooke in argument, and that that was the only way of settling the equities between the partners. They were not partners there, but they were adventurers in a particular transaction. The question before me is, however, as I have already said, simply one of administration in bankruptcy. At the date of Mr. Mellor's death a large amount of joint debts were due, but it seems that, with the exception of that which is owing to the appellants and which has yet to be satisfied, they have all been paid. Upon Mr. Mellor's death, there being a certain authority contained in his will to his executors to carry on his trade with a partner if they thought fit, the widow and the son, in some helter skelter way, without any articles of partnership, without any agreement that I can lay my finger upon, or from which I can draw any just conclusion, carried on the business and have become bankrupt. It is said that, acting upon some authority in the will, a balance-sheet was made out, but if so, they made it out for their own purposes only. In that balance-sheet they assumed and put a certain value upon the joint assets, and on the opposite column they placed what they believed to be the joint debts. It is no part of my duty to examine that. It is a matter of no importance, which affects anybody, and certainly does not affect this case. They carried on their business in this way. The surviving partner who had a right to have every shilling of the joint estate applied in payment of the joint debts, writes to the bank saying, "We have begun a new partnership, my mother and I are carrying on the business. You will accept her signature to the cheques she may draw upon you." So it goes on, and the

bank remains a joint creditor of the old firm down to the present time when the new firm has become bankrupt. I have to administer the assets which are found in the possession of that new firm. This is joint estate remaining *in specie*. It is not a question of money as in *Richardson's* case and the other cases, in which sums of money were taken from the testator's estate. As to this specific joint estate which is now to be realised for the benefit of creditors, can there be any doubt that the only persons who answer the description of joint creditors ought to have it. I think I can see no answer to that except what has been attempted to be argued, that this is "in the order and disposition" of the new partners. At the date of the death of the elder Mellor it was in the sole order and disposition of the son, the present bankrupt, and it has never undergone any change. There has been no contract between him and his mother as partners, and no change whatever; and there is no doubt that at the time of the bankruptcy it remained in the possession of the younger Mellor as the lawful owner and surviving partner, and it is still only to be administered as joint estate under the bankruptcy. Now the cases which have been referred to really strike me as having very little application to this case, if they have any at all. *Ex parte Richardson* was referred to, and part of the judgment was read by Mr. Ambrose, in which reference was made to the previous authorities of *Ex parte Garland* and *Hankey v. Hammock*. It may be worth while to see how the case was presented by the judge in *Ex parte Richardson*. He says: "An executor carrying on his testator's trade pledges to the creditors of that trade his own responsibility. In addition to his personal liability, the trust fund committed to him for the purposes of the trade by the testator is also pledged. In cases of this nature the natural inquiry therefore is, to what extent has the testator authorised the executor to employ his assets in the trade. If the executor do not go beyond his authority, then the assets employed by him in the trade can never be proved under the commission, they are part of the capital of the trade to pay its debts." That is precisely what is the case here. The joint estate is part of the capital of the business to pay its debts, and never was part of that estate which could pass by his will until the joint debts were paid. "But, on the other hand, if in breach of his trust he makes use of the assets in the trade to an extent not authorised by the will, the excess so employed may be proved as a debt under the commission. It is the same thing as if the executor had employed the assets of another estate in the trade, which cannot be said to be an employment of the joint estates and joint assets in carrying on a subsequent business. Then he refers to *Ex parte Garland*; there the executrix had not only made use of the fund entrusted to her management, but also a further sum of 768*l.* 12*s.* 4*d.* In the result of that petition the Lord Chancellor allowed a proof to that amount. Supposing that a testator died, having a sum in 3 per Cent. Consols, and the executors drew that out and lent it to the continuing partnership, it would be as plain a debt as if there had been no original partnership existing. Then he refers to *Hankey v. Hammock*. He says: "Lord Kenyon was of opinion that the testator authorised the employment of the whole estate in the trade. Upon looking into this will, I cannot

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find any authority given to the executor to add to the capital employed in the trade at the time of the testator's death from his other effects." Then he goes on to refer to the partnership articles: "By the partnership articles the profits were to accumulate till the shares amounted to 10,000*l.*, but there was no stipulation that the partners should bring in money to make up that sum, and the executors were not empowered to employ assets for that purpose. Upon the whole, I am of opinion that it was the intention of the testator that his executors should not employ in the trade any part of his personal estate which they did not find so employed at the time of his death, and that the executrix by acting in a contrary manner has been guilty of a breach of trust." Then *Hankey v. Hammock* and *Ex parte Morley* were referred to, but I do not think it necessary to say anything about the former case. In *Ex parte Morley* the point in discussion was decided. The elder Morley died, and the joint estate of the son vested in the elder Morley's executors. The son carried on the business, no matter under what authority, and became bankrupt. The decision of the court in *Ex parte Morley* was, that that part of the assets belonging to the joint estate in the lifetime of the father was distributable amongst the joint creditors of the firm in which the father was a partner. I am not at liberty, if I had the inclination, which certainly I have not, to go against a plain and distinct authority and recent decision of the highest court in the land. It was very fully considered in the judgment of James and Mellish, L.J.J., and nothing I have heard tends to impeach that opinion which I have formed upon the authority of that case. I may be wrong in what I was about to say, but I believe the judge whose decision is appealed from referred to the case of *Ex parte Morley*, and he made no observation upon it, which leads me to think that he dissented from it. I may be quite sure he had no such intention, for it is an authority which binds all. *Re Simpson* was a case of a totally different character. There two retiring partners were to allow all their interest in the partnership to vest in their continuing partner. That which was their and his joint estate should thenceforth be joint estate of the persons carrying on their business. That is authorised by other cases which I will not trouble to refer to, because they are common cases of administration in bankruptcy. The Court of Bankruptcy is a court of equity, and it has always been so from the earliest bankruptcy statute that has been passed down to the last. The administration of the court has always been equitable. The execution of the Act was entrusted to and remained for a great many years in the hands of the head of the Court of Chancery, and all the decisions which can be referred to proceed upon equitable principles, except those few cases which are to be found at common law, where common law authorities alone prevailed. Whenever any question of the equities between partners arises the court refers to the principles which govern the administration of property in the Court of Chancery, and they only are applicable to the administration in bankruptcy. In this case it is not a matter of dispute that all the joint debts existing at the date of the death of the elder Mellor were paid, except that of the bankers; and it is also admitted that there are certain specific assets which were the property of

the joint estate at the date of the elder Mellor's death. If, therefore, there had been more joint creditors than one, the assets would have been distributable amongst them, but as the only remaining joint creditors of the old firm of Mellor and Son are the bankers, the assets in question are payable to them.

*Appeal allowed with costs.*

Solicitors for the appellants, *Phelps, Sidgwick, and Biddle*, for *Sale, Seddon, Hilton, and Lord, Manchester*.

Solicitors for the respondent, *Yielding and Co.*, for *Cobbett, Wheeler, and Cobbett, Manchester*.

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT LINCOLN'S INN.

March 21 and 24.

(Before JAMES, BAGGALLAY, and BRAMWELL, L.J.J.)

Re DAVIDSON; MARTIN v. TRIMMER; DAVIDSON v. TRIMMER. (a)

*Trust for sale—Election to take property in its actual state—Reconversion.*

A testator devised certain real estate to trustees upon trust for sale "with all convenient speed" after the death of the survivor of his two daughters. The survivor of the two daughters died in 1863, and thereupon, under the will, the wife of A. (one of the trustees) became entitled to one moiety of the proceeds of sale absolutely for her separate use, subject to a charge of a legacy of 500*l.*, and B. (another of the trustees) became entitled to the other moiety absolutely. The real estate consisted of a large house, with eleven acres of land attached to it, which was subject to an old lease of which twenty-six years were unexpired, and two cottages. In 1864 A. paid off the 500*l.* legacy to which his wife's moiety was subject, and the trustees let the two cottages for three years, and in 1867 and 1869 they again let them for a similar term. In 1865 B., who was the acting trustee, employed a surveyor to prepare plans for laying out the estate for building, and presented a petition to Parliament in opposition to a Bill for a railway, which was intended to pass through the estate. The petition was stated to be presented "on behalf of the owners and trustees" of the estate, and it alleged that it was their intention to let the property in plots for building.

There was no evidence that A.'s wife had concurred in the three years' leases, or in the petition to Parliament. She died in 1870, and her husband died in 1876.

Held (reversing the decision of Hall, V.C.), that the dealings with the property were sufficient to indicate an election on the part of the beneficiaries to take the property as real estate, and that the share of A.'s wife, therefore, went to her heir-at-law as realty, and not to the personal representatives of her husband.

THIS was an appeal from a decision of Hall, V.C. The facts of the case were as follows:

By his will, dated the 26th March 1821, Benjamin Hopkinson devised his real estate at High-

(a) Reported by H. FEAR, Esq., Barrister-at-Law.



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bury, in the county of Middlesex, to the use of trustees in fee, upon trust, that, during the lives and life of his two daughters, Mary Stones and Isabella Sotheby, and the survivor of them, they should stand seised of the premises upon the trusts thereafter declared, and should with all convenient speed after the decease of the survivor of his two daughters sell the property and invest the proceeds as therein mentioned, with power from time to time to vary the securities, and should stand possessed of the trust fund and the income thereof, and of the rents, issues, and profits of the estate during the lives and life of his two daughters, and the survivor of them, and until sale, upon trust for his said two daughters during their respective lives in equal shares as tenants in common, for their separate use respectively, with a restraint on anticipation. And after the decease of each of his said daughters he directed that his trustees or trustee for the time being should stand possessed of one undivided half share of the trust fund and the income thereof, and of the rents and profits of the estate until sale, in trust for all or such one or more of her issue, whether children or grandchildren, and in such manner as she should by deed or will appoint, and in default of and until such appointment and so far as no such appointment should extend, in trust for such child or children of hers as being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry under that age, and, if more than one, in equal shares.

The testator died in 1821, leaving both his daughters surviving him.

Isabella Sotheby died in 1859, without having exercised her power of appointment. She left one child only, Hans William Sotheby, who had attained the age of twenty-one in 1849.

Mary Stones died on the 25th Aug. 1863, having exercised her power of appointment by a deed-poll, dated the 14th March 1859, whereby she appointed that 500*l.* should, as soon as conveniently might be after her decease, be levied and raised out of the moiety or equal half part of the Highbury estate to the rents and profits of which she was entitled for her life, or found out of the moneys to arise from the sale thereof, and should belong to her grandson W. L. Collins, and carry interest from her death, and that subject to the payment of the 500*l.* and interest, the said moiety of the Highbury estate or the moneys to arise from its sale and the funds on which they should be invested, should belong to her daughter Isabella, the wife of Thomas Davidson, her heirs, executors, and administrators, for her sole and separate use. And it was thereby declared that the above appointments were subject and without prejudice to the payment to Mary Stones during her life of the rents and income to which she was entitled under the will.

At the time of the death of Mary Stones, the trustees of the will of Benjamin Hopkinson were William Hopkinson, Thomas Davidson (whose wife was entitled to one moiety of the Highbury estate or the moneys to arise from its sale for her separate use, subject to the 500*l.* charged upon it by Mary Stones in favour of W. L. Collins), and Hans William Sotheby, who was absolutely entitled to the other moiety.

On the 16th March 1864 Thomas Davidson paid the 500*l.* to W. L. Collins, who thereupon executed

a deed releasing Mrs. Davidson, her heirs, executors, and administrators, the trustees of the will, and Mrs. Davidson's moiety of the Highbury estate, from the 500*l.* and all claims in respect thereof.

Mrs. Davidson died intestate on the 7th Dec. 1870, leaving her husband surviving her, and leaving an only son, Thomas William Davidson.

On the death of Thomas Davidson in 1876, the question arose whether the Highbury estate, which had not been sold, devolved as personality in consequence of the trust for sale, or as realty in consequence of the parties having elected to take it as real estate.

The Highbury estate consisted of a messuage and eleven acres of land let in 1814 for a term of seventy-five years at a rent of 200*l.*, and two other messuages known as Vine Cottage and Highbury Park Dairy.

At the death of Mrs. Stones, in Aug. 1863, the last-named messuage was in the occupation of a yearly tenant at a rent of 45*l.*

In April 1864 the three trustees let Vine Cottage for a term of three years. Hopkinson died in 1866, and the two surviving trustees let it for three years to another tenant, and that tenant having left in 1869, they let both Vine Cottage and Highbury Park Dairy for three years to another tenant, who still remained in occupation.

The rents of the three messuages were received by Sotheby, the acting trustee, who paid one moiety of them to Mrs. Davidson.

On the death of his mother in 1859, Sotheby paid succession duty on one moiety of the estate. On the death of Mary Stones, a succession duty return was made and signed by Mr. and Mrs. Davidson in respect of the other moiety of the estate, but the Commissioners of Inland Revenue declined to receive it, and claimed legacy duty, which was eventually paid by the two surviving trustees.

There was no evidence of any agreement to retain the estate in the shape of realty; nor, on the other hand, did it appear that it had ever been offered for sale.

Mr. Davidson having died, and his estate being in course of administration by the court, the question arose whether Mrs. Davidson's moiety of the Highbury estate formed part of Mr. Davidson's personal estate, or had descended as realty to her heir-at-law.

HALL, V.C., before whom the case was heard in April 1878, gave judgment as follows:—It appears to me that there is a feature in this case which does not exist in any of the cases which have been referred to, that feature being this, that this property was not held in its entirety by one person, but was held in undivided shares. That is a very important feature; because, in all cases where property is held in undivided shares, you must have clear evidence as to all the parties interested in the undivided shares concurring in the property being taken in its then state, and not in the state in which, according to the terms of the trust, it would exist by means of the performance of that trust. In this particular case one of the parties was entitled to the undivided moiety now in question, as personal estate for her separate use. She was under coverture; and, as I collect, the acts done with reference to the property, with the exception of one formal act of her signing a succession duty paper which was treated afterwards as being in-

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operative, and with the further exception that the sum of 500*l.* charged upon the moiety of the property was, as I collect from the deposition, paid by a cheque of her husband's, but though paid by a cheque of the husband's, was paid in reality out of her moneys. I think this is the fair inference that, she being entitled to this share, the property not being converted, though she was entitled for her separate use, she never gave her husband any control, or did any act to vest any property in him during the coverture in respect in any way of the corpus of her interest; but what she probably did was that she allowed her husband to receive her income, though she was entitled to it as a married woman for her separate use. Now the question is whether under these circumstances I am to consider this lady as having been sometime in her lifetime—it does not matter how long before her death—in the position of having changed by her acts and conduct her ownership of a moiety of the proceeds of sale of a certain real estate into the equitable ownership of a moiety of that real estate. In the absence of any more direct act on the part of a married woman, though she was not restrained from anticipation, I cannot hold that there was on her part such conduct, or such a dealing with the property upon the footing of its being at home, if that be the proper expression, or such an election on her part not to require these trusts for sale to be carried into effect, as would change the character of the property, and so change the devolution upon her death as to prevent it from devolving upon her husband, and make it devolve upon her heir-at-law, subject to the right which the husband would have as tenant by the curtesy. I shall therefore treat Mrs. Davidson's interest in this property as part of the personal estate of her husband.

From this decision the heir-at-law appealed.

The hearing of the appeal was postponed that the widow of Hans William Sotheby, who was entitled to both his real and his personal estate, might be brought before the court. From her evidence it appeared that in Feb. 1865 her husband employed a surveyor to examine the estate and draw a plan for laying out the land for building sites; and that in the session of 1865 a petition was presented to Parliament on behalf of "the owners and trustees of the Highbury House Park Estate" in opposition to a Bill for making a railway, which was intended to pass through the estate, in which petition it was stated that the property was well adapted for the erection of first-class residences, and that it was the intention of the petitioners to let the property out in plots for that purpose, but that should the Bill be allowed to pass into a law the value of the property for the erection of such residences would be entirely destroyed.

There was no evidence whether Mr. and Mrs. Davidson knew anything about this petition to Parliament, or about the survey and the preparation of the plans.

*Hastings, Q.C.* and *Menby* for the appellant.—The acts of the parties since the death of Mrs. Stones clearly indicated an intention to retain the estate as realty and not to sell it. The attempt to pay succession instead of legacy duty is an indication of this. So are the various lettings of the houses for three years. The petition to Parliament points in the same way. So also

does the length of time during which the property was kept unsold. They cited

*Harcourt v. Seymour*, 2 Sim. N.S. 12, 45;

*Dixon v. Gayfere*, 17 Beav. 433;

*Mulrow v. Bigg*, 34 L. T. Rep. N. S. 273; L. Rep. 1

Ch. Div. 385;

*Griesbach v. Freemantle*, 17 Beav. 314;

*Re Gordon* 37 L. T. Rep. N. S. 627; L. Rep. 6 Ch. Div. 531.

*Sturges*, for Mrs. Sotheby, did not argue the point, as she was entitled absolutely in either case, though he stated that if she had any right of election she would elect to take as realty.

*Bristowe, Q.C.* and *Chapman Barber* for Mr. Davidson's personal representative.—The reason for postponing the sale was that it would be disadvantageous to sell subject to the lease. There is no act on the part of Mrs. Davidson sufficient to show that she elected to reconvert the property into realty. In *Griesbach v. Freemantle* the beneficiary had taken possession of the title deeds and received the rents for sixteen years. In *Dixon v. Gayfere* also there were such dealings with the property as to indicate a clear intention to retain it in its original shape. So too in *Re Gordon*. Here there is no sufficient indication of such an intention. *Brown v. Brown* (10 L. T. Rep. N. S. 83; 33 Beav. 399) and *Liesson v. Giles* (8 L. T. Rep. N. S. 780; 3 De G. J. & S. 614) are in our favour. They also referred to

*Crabtree v. Bramble*, 3 Atk. 690;

*Triset v. Thornton*, 13 Ves. 345;

*Davis v. Ashford*, 15 Sim. 42.

No reply.

*JAMES, L.J.*—I am of opinion that the decision of the Vice-Chancellor in this matter cannot be sustained. It is not a question of Mrs. Davidson being bound by anything prejudicing her interest. She being absolute owner of the property, whether it was taken as freehold, or as freehold to be sold and converted into money, having exactly the same interest in it in the one way as in the other, the only question is whether upon the facts and circumstances of the case it is to be assumed that she, together with the other tenant in common—of course they must be of the same mind in order to bind the trustees—was minded not to have the property sold, but to keep it as real estate, until it suited her and her co-tenant in common to deal with it as they might think fit. Now the trust for sale came into operation in the year 1863. It was a trust for sale "with all convenient speed." That must mean within a reasonable time, within a few months, within a year, unless there were some particular circumstances connected with the market—not with the property—making it advisable to postpone the sale. The property was not sold within a twelvemonth; it was not sold for years afterwards; no one asked the trustees to sell it. A reason for that is stated in this way: As sensible people the parties interested in the property had come to the conclusion—and that is the argument on both sides—that as the large bulk of the estate was subject to a lease, of which there was I think at that time twenty-six years unexpired, it would not be desirable to sell the property before the expiration of the lease, that it was not desirable to sell the other two small bits of the property which were so intimately connected with the larger one, and that it would not be worth while or right to sell them separately. Therefore, we start with this, that the

great probability is that all parties agreed to postpone the sale until the end of that lease, that is, in fact, to put an end to the trust for sale which was to be executed by the trustees "with all convenient speed," and to take the property for the purpose of selling it when they (the co-owners) should think fit to do so. That seems to me to be the presumption. Then what is done afterwards? First of all, the trustees enter into several three years' leases or agreements as to one part of the property, and then into a three years' agreement as to another part of the property, all of which dealings would be utterly inconsistent with the execution of the trust for sale within any reasonable time, but perfectly consistent with the notion that the parties intended to postpone the sale of the property until the lease expired, and the property could be brought into the market free from the lease. It seems to me to be the presumption that the parties came to the conclusion between them that it was not advisable to execute the trust for sale. If so, then there was an election by the persons who jointly held the whole estate, that that trust should not be executed, and that the property should be retained in its position of real estate until all of them came to the conclusion that it was advisable to sell. Now, there happened to be one other person who had a right to have the property sold, namely, a person who was entitled to have a legacy of 500*l.* paid out of it. If it was intended to sell the property, the ordinary course would have been to pay the 500*l.* out of the proceeds of the sale. It seems to me that for no other reason than in order to prevent the property from being sold in order to enable it to be kept as real estate, and for no other purpose, the husband of the lady who was the beneficial owner of the one half of the property, found the 500*l.* on behalf of his wife, and paid the 500*l.* so as to get rid of the only other person who could call upon the trustees to sell. Then it so happens that two of the persons who were trustees were the very persons who really and substantially were the owners of the property; that is to say, the one trustee, Mr. Sotheby, was one of the co-tenants in common, and the other, Mr. Davidson, was the husband of the lady who was the absolute owner of half the property. Then they go on receiving the rents and profits of the property, and we have this further fact, which I cannot help thinking is a very strong additional fact which was not before the Vice-Chancellor, that a petition was presented to Parliament in opposition to a Bill affecting the property, and we have the employment of a surveyor for the purpose of making building plans. It is true that there is no direct evidence to show that Mrs. Davidson or Mr. Davidson directed that petition to be prepared; but I think we must assume, after the death of Mr. Sotheby, against whose character there is no imputation, that he did not act for himself only, without the concurrence of his co-tenant in common, and that in directing that petition to be prepared and presented, and in having the plans prepared, for the purpose, no doubt, of making the strongest possible case against the railway company, he did so for the purpose of enhancing the value of the property. But, if for the purpose of enhancing the value of the property they do that, of course they thereby elect to take the property in that shape for the purpose of making it so much more

valuable in their hands as against the railway company, which was their object. For that same purpose, with a view of showing that they ought to receive more for the property than on an ordinary sale, which would not be the case if it was to be sold immediately afterwards, or ought to have been sold in the next year by the trustees, I think it must be assumed that they all joined, and that Mr. Sotheby, for the other parties interested and with their authority, did make this statement to Parliament: "That your petitioners' property, both by its elevation, aspect, and prospect, is well adapted for the erection of first-class residences, such as now exist on the estate immediately adjoining, and it was the intention of your petitioners to let the said property out in plots for that purpose, but should the said Bill be allowed to pass into law, the value of the said property for the erection of such residences will be entirely destroyed." That is in itself sufficient to raise a presumption that all the parties thought at that time that it was better not to sell the property, but to keep it and let it on building leases; that is quite sufficient to show that that was their intention. All that is required here is an intention on the part of all the parties beneficially interested that the property should not be converted into money, but kept as land. Looking at all the facts, they seem to me to show that which I have suggested, namely, that having regard to the nature of the property at the time the trust for sale came into operation, and to the fact that land in the neighbourhood was becoming building land, it was their intention to preserve it indefinitely, that is to say, to preserve it until the expiration of the lease, for which purpose it is quite clear that the trust for sale must have been put an end to. It is utterly inconsistent with the continuance of the trust for sale that there should be an agreed intention between both the beneficial owners that the property should not be sold until the expiration of the lease. Under all those circumstances, I am of opinion that there is sufficient evidence in this case to show that both the parties beneficially interested did intend to keep the property as land, and if they did intend to keep it as land, there is what is called in this court a reconversion of that which was directed to be converted and was not converted by the trustees.

BAGGALLAY, L.J.—When Mrs. Stones died in Aug. 1863, the property, which is the subject of this appeal, was vested in the trustees of Mr. Hopkinson's will upon trust to sell with all convenient speed, and the persons who were then entitled to the proceeds of that sale were Mrs. Davidson, the daughter of Mrs. Stones, for her separate use, and Mr. Sotheby. They were absolutely entitled to the fund to be produced by the sale in equal moieties. But at the time it was perfectly clear that it was quite open to them, if they had thought fit then, or at any time subsequently, before any sale of the property took place, to determine to take it as real estate. The question is, whether that determination was arrived at in the present case. Now I think it is not immaterial to observe the conduct of the trustees in this matter. There were three trustees—Mr. Hopkinson, who lived three years after the death of Mrs. Stones, and who died in 1866, Mr. Davidson, and Mr. Sotheby. The two latter gentlemen died respectively in 1874 and 1876. Therefore, for a long period of time we have the trustees acting contrary to their trust. The

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trust being a trust for sale, there was no sale by the trustees attempted before the time when the survivor died in 1876. When we find trustees acting in disregard of their trust, it naturally raises a presumption that they have acted in disregard of the trust under full authority for that purpose, and certainly it raises a strong presumption that the persons beneficially entitled to the property were consenting parties to its not being sold. What is the evidence to show that they were consenting parties or parties desiring that the property should not be sold? As regards one of them, Mr. Sotheby, he was himself one of the trustees who abstained from selling. He, as I have said, was absolutely entitled to one moiety of the property, and he was a party concurring in the leases which were from time to time made of portions of the property, and he evidently, from what has been said on both sides, was the chief acting trustee, if not almost the sole acting trustee as regards this property. It seems to me impossible to say that so far as Mr. Sotheby was concerned, there was not a determination or an election, whichever it is proper to call it, to take the property as real estate. Then as regards Mrs. Davidson, she lived for seven years having the right during that time to insist upon the performance of the trust by naving the property sold, and taking one moiety of the proceeds. She is an assenting party in that sense, standing by and taking no steps to secure a sale of the property. But that is not all. She had taken this property under a deed poll executed by her mother in her lifetime, and by that deed poll 500*l.* was charged upon the property, which was appointed in her favour, and was to be paid out of the rents and profits until sale, or out of the produce of the sale when the property was sold. There was no right, therefore, on the part of the person entitled to that 500*l.* to have the property otherwise than in one of those two ways, either by having the rents and profits from time to time as they accrued due paid to him until the 500*l.* was satisfied, which would have taken several years, or by insisting upon a performance of the trust which was a trust for sale. Then what do we find? We find that Mrs. Davidson comes forward, her husband immediately finding the money in the first instance; and the 500*l.*, which was a charge upon the produce of sale, was in effect discharged in that way. That appears to me to be a very strong illustration of the desire of Mrs. Davidson, at this time, that the property should remain as real estate, and the property so remained. I need not refer again to that to which the Lord Justice has referred, namely, the steps taken a year later, in 1865, treating this property as real estate, and the opposition to the Bill in Parliament upon that footing. Again, I do not think that the question about the circumstances connected with the proposed payment of succession duty, and the subsequent payment of legacy duty, has any bearing upon the question now before us. At the same time I do not think that there is anything in those circumstances inconsistent with the view that Mrs. Davidson desired to take this property as real estate. Upon the whole I can arrive at no other conclusion in this case than that the beneficiaries under the will of Mr. Hopkinson determined to take this property as real estate, and that that determination was in force at the time of Mrs.

Davidson's death, and therefore the property will go to her heir-at-law.

BRAMWELL, L.J. concurred.

*Appeal allowed.*

Solicitors: *J. L. Dale; Bozall and Bozall; Young, Jones and Co.*

Thursday, April 24.

(Before JAMES, BRETT, and COTTON, L.JJ.)

*Ex parte ROSEVEAR CHINA CLAY COMPANY;*  
*Re COCK. (a)*

*Stoppage in transitu—Contract to deliver goods free on board—Ship chartered by purchaser—Ultimate destination not stated.*

*Delivery of goods by a vendor on board a ship chartered by the purchaser is only constructive, and not actual, delivery to the purchaser, inasmuch as the contract with the master of the ship to carry the goods does not make him the agent of the purchaser, and so long as the goods remain in the hands of the master of the ship as carrier, the vendor's right of stoppage in transitu continues.*

*Till the goods are actually delivered to the purchaser or his agent the transitu is not at an end, and it makes no difference that the ultimate destination of the goods has not been communicated by the purchaser to the vendor.*

*A contract was made for the sale of a quantity of china clay to be delivered free on board at a specified port, payment to be by the purchaser's acceptance. The purchaser chartered a ship and gave notice to the vendor, who then delivered the clay on board the ship at the specified port. Before the ship left the port the vendor, hearing that the purchaser was insolvent, gave notice to the master of the ship to stop the clay in transitu. No bill of lading had been signed, nor had the purchaser given any acceptance in payment of the contract price:*

*Held, that the clay was in the possession of the master of the ship only as carrier, and not as agent of the purchaser, that the transitu was therefore not at an end, and that the vendor had duly exercised his right of stoppage in transitu.*

*Decision of Bacon, C.J. reversed.*

*This was an appeal from a decision of the Chief Judge in Bankruptcy.*

The facts of the case were as follows:

On the 20th Nov. 1877, David Cock, a china clay merchant, carrying on business at Roche, near St. Austell, wrote to the Rosevear China Clay Company, a letter of which the material parts were as follows:

Your favour respecting china clay to hand. I have this morning been on the works and took several samples of what is now in stock. I regret very much to ascertain that in consequence of what appears to me to have been put in the clay by way of adulteration will prevent me from purchasing. It might, and probably would be ruinous to all my connection. There are about 100 tons of the old stock which has not been so treated, and which I would purchase at 15*s.* per ton f. o. b. Fowey, payment to be by four months' acceptance, from date of bill of lading. Same to be shipped during this month, or if not bill to date 1st Dec.

On the 27th Nov. the secretary of the company replied:

We now offer you the balance old Rosevear make, 80 to 100 tons f. o. b. Par or Fowey, four months draft dated

(a) Reported by H. FRAT, Esq., Barrister-at-Law.

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from 1st Dec., whether shipped or not. Please say if you confirm this.

On the 30th Nov. Cock replied confirming.

On the 1st Dec. the secretary wrote to Cock as follows:

I am in receipt of yours of the 30th ult., which is two days over return of post. This delay of your confirmation of the purchase has left the matter open for others. But as we have not definitely closed, if you are prepared to have the clay offered you taken on board within fourteen days from the date of my offer, and accept our draft from the 1st Dec. at four months next, we will withdraw from confirming sale to another party, but you must reply here definitely 4th inst., or the matter falls through.

On the 12th Dec. Cock wrote to the company:

I have a vessel of 215 tons which will load at Fowey on Friday next, so now I can take your 100 tons of Rosevear clay upon your terms as per your last letter. Let me know not later than Friday morning if I am to have the clay or not.

On the 13th Dec. a clerk of the company replied:

In reply to yours of the 12th inst., I beg to say, in the absence of Mr. Carr (the secretary), who is away from home, we will sell you the 80 to 100 tons china clay (old Rosevear make) as per conditions mentioned in Mr. Carr's letters to you of Nov. 27 and Dec. 1. I have instructed Capt. Dyer of this port to send on same to Fowey at once.

On the 27th Dec. the secretary of the company wrote to Cock:

Mr. Dyer has handed account to-day by letter which makes 108 tons 2 qrs. 2 cwt. clay as shipped for your account, value 81l. 1s. 10d. There is an old balance due to us of 11l. 7s. 8d. Do you wish this added to the draft 81l. 1s. 10d. If so, I have no objection, and will send draft for your acceptance in a day or two.

Cock had on the 5th Dec. entered into a verbal agreement to charter a ship called the *Forester* to call at Fowey and convey the clay for him, with other clay, to Glasgow, where he had consigned it to an agent for sale. No charter-party was signed.

On the 29th Dec. the company delivered 100 tons of the clay on board the *Forester* at Fowey.

No bill of lading was signed.

On the 31st Dec. the company having heard that Cock, who had committed an act of bankruptcy by absconding, was insolvent, gave notice to the master of the *Forester*, which was still at Fowey, to stop the clay *in transitu*.

The master afterwards signed a bill of lading in favour of the company, and by their directions the clay was taken to Runcorn instead of to Glasgow, and was there sold on their account.

Cock was afterwards adjudicated a bankrupt in the Truro County Court.

The trustee in the bankruptcy claimed the clay on the ground that the transitus was at an end when the clay was shipped on board the *Forester*, and that therefore the notice to stop *in transitu* came too late.

The trustee applied to the County Court for an order that the company should pay over to him the invoice price of the clay. On the hearing of the application the bankrupt was examined and deposed that he was in the habit of buying and sending clay all over the country; that he did not inform the Rosevear Company of the destination of the clay; that he never used to reveal the ultimate destination of cargoes; and that he communicated the name of the vessel to the vendors on the 12th Dec.

The invoice of the clay and the bill of exchange for Cock's acceptance were posted by the secretary of the company on the 29th Dec.; but the bill was never accepted.

The County Court judge refused the trustee's application, being of opinion that it was the intention of both the parties that the property in the clay should not pass to the purchaser until the bill of exchange for the price had been accepted by him; and that, even if the property did pass, the clay never came into the possession of the purchaser, that the transitus was not at an end when the clay was placed on board the ship, and that consequently the company had a right of stoppage *in transitu*, which right they had effectually exercised.

From this decision the trustee appealed.

On the hearing before the Chief Judge in Bankruptcy, the following cases were cited:

*Valpy v. Gibson*, 4 C. B. 837;

*Ex parte Gibbs*, *Re Whitworth*, 33 L. T. Rep. N. S. 479; L. Rep. 1 Ch. Div. 101;

*Berndtson v. Strang*, 16 L. T. Rep. N. S. 583; L. Rep. 4 Eq. 481; 3 Ch. 588;

*Blozaman v. Sanders*, 4 B. & C. 941;

*Mirabita v. The Imperial Ottoman Bank*, 38 L. T. Rep. N. S. 597; L. Rep. 3 Exch. Div. 164;

*Ogg v. Shuter*, 33 L. T. Rep. N. S. 492; L. Rep. 1 C. P. Div. 47.

BACON, C.J. delivered judgment as follows.—I cannot see what the bill of lading has to do with this question. (His Lordship alludes to the argument that no bill of lading having been signed so as to make the goods deliverable to any one, the vendors retained a *jus disponendi*, in support of which proposition, *Ogg v. Shuter* had been cited). No doubt the vendors might, if they had thought fit, have taken a bill of lading, which would have secured, not the possession of, but a right to the property mentioned in the bill of lading; but they did not. Their omission to do so cannot be used in their favour. The transaction is as plain a one as ever was stated. A man wants to buy china clay, a heavy commodity or thing which he cannot carry in his own waggons, and does not mean to do so, but he tells the company that he will get a ship to transport this clay which he buys of them. He afterwards gives them the name of the ship, and directs them to deliver the clay which he has bought on board that ship. If it had been a warehouse instead of a ship, could there have been any doubt that after the clay had been carried to the warehouse the transitus would have been at an end? I have no doubt that the transitus, such as it was, ended when the clay arrived upon the quay at Fowey and was put into the ship *Forester*, which the bankrupt had hired for the very purpose of carrying it. *Valpy v. Gibson* is directly in point on the part of the case I am now considering. In that case there was that which was a little more remarkable, and which probably gave rise to some argument. The vessel in which the goods were to be shipped was destined for Valparaiso, and the vendors of the goods wanted some patterns or cards of theirs to be sent along with the goods, and, knowing well enough that the ship was going to Valparaiso, they gave a direction to that effect when they delivered the goods. The court decided that, when the goods were delivered on board the ship, which had been hired for the purpose of transport by the purchaser, there was an end of the transit. Delivery "free on board"

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*Ex parte ROSEVEAR CHINA CLAY COMPANY; Re COCK.*

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only means "the price shall be that which we stipulate for, and you shall not have to pay for the waggons or carts necessary to carry the clay from the place where it is dug; we will bear all those charges and put it free on board the ship, the name of which you are to furnish." I cannot think that any question arises. The fact that the bill of exchange had not been accepted does not alter the case in the slightest degree. On the 29th Dec. the china clay, which had been bought and sold, was by the vendors placed on board the ship; they never thought of taking a bill of lading, or of retaining any right over it, but they delivered it to the man who had bought it of them. There is no doubt upon the facts of the case, and there can be no doubt whatever about the law. There was no transit, except from the quarry to the ship's side; the transit was ended so soon as the clay was on board the ship, and the right to stop it was therefore entirely gone. None of the cases which have been referred to give any kind of colour to the contention raised on the part of the vendors to have this clay treated as still belonging to them, although they had delivered it free on board in the manner, and at the price stipulated for in the contract between the parties. However, the learned judge of the County Court took a very different view of the subject. He seems to have bestowed a great deal of attention upon it, and to have considered many cases, the bearing of which on the question before me I have not been able to perceive; but as he gave a very deliberate and considered judgment, which is entitled to all respect, and as, moreover, he invited the parties to take the case up to the highest court, I am content that it should go there. But I should be sorry if it went with any expression of doubt on my part. I am clear that this is a case in which the vendor's right of stoppage *in transitu* ceased to exist the moment the clay was put on board the ship.

From this decision the Rosevear China Clay Company appealed.

*Winslow, Q.C.* and *E. C. Willis*, for the appellants.—In the ordinary course of business the vendors would have applied to the master of the ship for a bill of lading, and they would have taken it to their own order. They would then have sent it to the purchaser with the bill of exchange for its acceptance. He could not have retained the bill of lading without accepting the bill of exchange; if he had done so, no property in the goods would have passed to him:

*Shepherd v. Harrison*, 24 L. T. Rep. N. S. 857; L. Rep. 5 E. & I. 116.

The vendors cannot be in a worse position, because no bill of lading was signed. Therefore the property in the clay never passed to the purchaser. [BRETT, L.J.—What right had the vendors to the bill of lading? They were to deliver free on board for the purchaser. JAMES, L.J.—What privity was there between the vendors and the master of the ship? The bargain to charter the ship was made between the purchaser and the shipowner.] The shippers of the goods would nevertheless be entitled to have the bill of lading made out to them:

*Craven v. Ryder*, 6 Taunt. 433;  
*Abbott on Shipping*, 11th edit. p. 279.

[BRETT, L.J.—In *Craven v. Ryder*, the ship was either a general ship, or it was chartered by the

vendor.] In *Turner v. The Trustees of the Liverpool Dock* (6 Ex. 543) it was held that the property in goods did not pass to the purchaser, though they were delivered on board his own ship, because by the terms of the bill of lading the vendors reserved to themselves a *ius disponendi* which the master of the ship acknowledged by signing the bill of lading making the goods deliverable to their order. [BRETT, L.J.—It was held in that case that if the goods had been delivered on board the purchaser's own ship, without any restriction, that would have been a delivery to the purchaser; but the master had assented to the vendor's restrictions. In the present case the question is whether there was any intention when the clay was delivered on board the ship to take a bill of lading to the vendors.] You cannot assume that it was intended to deliver the clay to the purchaser's order, when he had not accepted the bill of exchange; the inference would be the other way. At all events, whether the property in the clay passed to the purchaser or not, the right of stoppage *in transitu* remained. The transitus was not at an end when the clay was put on board the ship at Fowey; it would not have been at an end till the clay was delivered to the purchaser's agent in Glasgow. The master of a ship, which has been chartered by a purchaser to carry goods for him is not his agent or servant, and the goods are in the master's possession only as carrier, and so long as the possession is of that nature the vendor's right to stop *in transitu* continues:

*Berndtson v. Strang*, 16 L. T. Rep. N. S. 583; L. Rep. 4 Eq. 481; 3 Ch. 588, 590;  
*Gibson v. Carruthers*, 8 M. & W. 321, 328;  
*Benjamin on Sales*, 2nd edit. p. 698.

*Northmore Lawrence* (with him *De Gas, Q.C.*) for the trustee.—The vendors did not reserve their right, as they might have done. The contract was to deliver free on board at Fowey, and when that was done the transitus was at an end. If the ship had been the purchaser's own ship the delivery on board would have been delivery to him, and *Schotemanns v. The Lancashire and Yorkshire Railway Company* (16 L. T. Rep. N. S. 189; L. Rep. 2 Ch. 332), shows that the transitus would then have been at an end. What difference can it make that the ship was only chartered by the purchaser? On demand, the master would have been bound to give the clay to the purchaser, subject only to his lien for freight. *Valpy v. Gibson* (4 C. B. 837) shows that the fact that there is to be a subsequent transit prescribed by the purchaser does not prevent there being a complete delivery to the purchaser. *Ex parte Gibbs, Re Whitworth* (33 L. T. Rep. N. S. 479; L. Rep. 1 Ch. Div. 101), shows that the right of stoppage *in transitu* is gone when the transitus prescribed by the vendor is at an end. Here the vendors had nothing to do with the further destination of the clay after they had delivered it on board at Fowey. That distinguishes the present case from *Berndtson v. Strang*, and other cases in which the ultimate destination of the goods was communicated to the vendor when the contract for sale was entered into. In such cases the vendor has in contemplation the transit to the ultimate destination, and delivers to the carrier as carrier. No reply.

JAMES, L.J.—With all respect for the decision of the Chief Judge, I am of opinion that this case cannot be distinguished from the authorities

which have been referred to, and in particular from that of *Berndtson v. Strang* (*ubi sup.*) The authorities show that the vendor has a right to stop *in transitu* until the goods have actually got into the hands of the purchaser, or of some one who receives them in the character of his servant or agent. That is the cardinal principle. In order that the vendor should have lost that right the goods must be in the hands of the purchaser, or of some one who can be treated as his servant or agent, and not in the hands of a mere intermediary. It is admitted that if it had been mentioned in the original contract for sale that the goods were to be carried to Glasgow the present case could not have been distinguished from *Berndtson v. Strang*, but it is said that the fact that no ultimate destination was mentioned makes a distinction. It seems to me, however, that the mere fact that the port of destination was left uncertain or was changed after the contract for sale, can make no difference. The principle is this, that when the vendor knows that he is delivering the goods to some one as carrier, who is receiving them in that character, he delivers them with the implied right, which has been established by the law, of stopping them so long as they remain in the possession of the carrier as carrier. I am of opinion that in the present case, although the vendors' liability was at an end when they had delivered the clay on board the ship, which indeed is the case in most instances of stoppage *in transitu*, that did not deprive them of the right to stop *in transitu*, so long as the clay was in the possession of the master of the ship as a carrier. To use the language of Lord Cranworth (then Rolfe, B.) in the case of *Gibson v. Carruthers* (8 M. & W. 321, 328), "I consider it to be of the very essence of that doctrine that during the transitus the goods should be in the custody of some third person, intermediate between the seller who has parted with, and the buyer who has not yet acquired, actual possession;" and that language was adopted by Wood, V.C., and by Lord Cairns in *Berndtson v. Strang* (16 L. T. Rep. N. S. 583; L. Rep. 4 Eq. 481; L. Rep. 3 Ch. 588, 590.) In the present case the clay was delivered to a third person, intermediate between the vendors and the purchaser, and therefore the vendors still had a right of stoppage *in transitu*.

BRETT, L.J.—It seems to me that there was a binding contract between the vendors and the vendee, though by it alone the property in the clay did not pass to the vendee. But as soon as the clay was appropriated by the vendors to this contract, and was placed on board the ship, the property in it passed to the vendee, and at the same time, as between the vendors and the vendee, there was a delivery of the clay to the latter. But it was a constructive, not an actual delivery. If by the contract the vendors had been bound to deliver to the vendee at Fowey, and the clay had been there delivered to him or to his agent, and he or his agent had there shipped it, I should have thought that after that there would have been no transit. But the contract was to deliver at Fowey on board a ship, and to deliver free on board, that is, the vendors undertook the delivery of the goods. The ship was to be chartered by the vendee, it is true, and he must charter the ship to carry the clay to some port. The distinction taken by Mr. Northmore Lawrence is an ingenious one, but it seems to me

that it can make no difference whether the destination of the goods is communicated at the time of the contract for sale, or whether the destination is to be named after the contract, but before the shipment. Here the purchaser entered into an agreement with the owner of the ship that the ship should take the clay to Glasgow, and the vendors were bound to put the clay on board that ship to be carried to Glasgow. It was not the purchaser's own ship, but that of the shipowner, and the clay when delivered on board was to be carried to Glasgow. The question is whether the transit was at an end before the arrival of the ship at Glasgow. It seems to me that several decided cases show that it was not. In *James v. Griffin* (1 M. & W. 20; 2 M. & W. 623) Parke, B. laid down the law thus (at page 632): "Of the law on this subject, to a certain extent, and sufficient for the decision of this case, there is no doubt. The delivery by the vendor of goods sold to a carrier of any description, either expressly or by implication named by the vendee, and who is to carry on his account, is a constructive delivery to the vendee; but the vendor has a right, if unpaid, and if the vendee be insolvent, to retake the goods before they are actually delivered to the vendee, or some one whom he means to be his agent, to take possession of and keep the goods for him, and thereby to replace the vendor in the same situation as if he had not parted with the actual possession." The distinction there taken is between a constructive and an actual delivery to the vendee, and Parke, B. says that if there is only a constructive delivery to the vendee the transit is not over; it is not an end until the goods have been actually delivered to the vendee or his agent. Then in the case of *Berndtson v. Strang* (*ubi sup.*) the test put by Lord Cairns is whether the goods have been delivered only to a carrier, although he may have been named by the purchaser. There the ship had been chartered by the purchaser, and therefore when the goods were placed on board there was a constructive delivery to him. Yet, because the goods were in the hands of the shipowner as carrier, it was held that the transit was not over until that carriage was over. So too in Smith's Leading Cases, in the notes to *Lickbarrow v. Mason* (vol. 1, p. 818, 7th edit.) it is said: "The rule to be collected from all the cases is, that the goods are *in transitu* so long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee." In the present case the clay was placed on board the ship for the purpose of being carried to Glasgow; it was in the actual possession of the shipowner and only in the constructive possession of the purchaser. Therefore the right of stoppage *in transitu* existed. If the purchaser had been the owner of the ship, the vendors would have had no such right, unless they had reserved it by express stipulation. But in the actual state of things, I think that, both on principle and on the authorities, the transit was not over, and the right to stop *in transitu* remained.

COTTON, L.J.—I am of the same opinion. Assuming that there was a binding contract for the sale of the clay, I think that the right to stop *in transitu* existed when the notice was given. The right of an unpaid vendor continues until the goods have come into the actual possession of the purchaser, treating for this purpose the possession of his agent or servant as his possession. The



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rule was stated by Lord Cairns in *Berndtson v. Strang*, and I think it is clearly established that so long as goods are in the hands of a carrier as carrier, they are not in the actual possession of the purchaser, whoever may have nominated the carrier. The contract with a carrier to carry goods does not make the carrier the agent or servant of the person who contracts with him whether he be the vendor or the purchaser of the goods. Here the verbal agreement which the purchaser entered into to charter the ship did not make the captain the agent or servant of the purchaser; he was only a carrier. But Mr. Northmore Lawrence ingeniously raised the point that there can be no stoppage *in transitu* unless there is a transit, and he said that the contract being only to deliver the clay on board the ship, and no further destination having been communicated to the vendors the transit was at an end so soon as the clay was delivered on board the ship. The cases no doubt show that there is no right to stop *in transitu* if the goods have once come into the possession of the purchaser, even though the vendor has afterwards regained the possession of them. The argument must come to this: it must be shown that the goods have come into the hands of the purchaser, and that the shipment has been then made by him. Here the contract was that the goods were to be placed on board by the vendors, not by the purchaser. The purchaser was to indicate where the goods were to go, and only when they had reached that destination would they come into the actual possession of the purchaser. If the contract had been to deliver the clay to an agent of the purchaser at Fowey, it would have been a very different matter. The case would then have been like that of *Valpy v. Gibson* (4 C. B. 837), in which the shipment was made by the purchaser, not by the vendor.

*Appeal accordingly allowed with costs.*

Solicitors for the appellants, *Ingledew, Ince, and Greening*, agents for *Ingledew, Ince, and Vachell*, Cardiff.

Solicitors for the respondent, *Gregory, Bowcliffes, and Bawle*, agents for *Hoop, Hockin, and Marrack*, Truro.

May 29 and 30.

(Before JAMES, BRETT, and COTTON, L.JJ.)

SWANSTON v. THE TWICKENHAM LOCAL BOARD OF HEALTH. (a)

*Local Board of Health—Public Health Act 1848* (11 & 12 Vict. c. 63), ss. 45, 46, 144—*Public Health Act 1875* (38 & 39 Vict. c. 55), ss. 16, 308—*Sewer—“Man-hole”—Compensation or purchase.*

A “man-hole” or side entrance into a sewer, for the purpose of cleansing it, is part of a “sewer” within the meaning of the 45th section of the Public Health Act 1848, and the 16th section of the Public Health Act 1875, and the local authorities may construct a “man-hole” on any land within their district without first purchasing the land required for the purpose, the landowner being entitled to compensation only.

*Decision of Fry, J. reversed.*

This was an appeal from a decision of Fry, J.

The hearing in the court below is reported in

40 L. T. Rep. N. S. 208, where the facts of the case are sufficiently stated.

The judge below having granted an injunction to restrain the defendants from making man-holes in the plaintiff's land until they had acquired a right in the land by purchase, the defendants appealed from his decision.

*J. Pearson, Q.C. and Vaughan Hawkins*, for the appellants.—A “man-hole” is part of a sewer within the meaning of sect. 45 of the Act of 1848, and sect. 16 of the Act of 1875, and by sect. 144 of the former Act, and sect. 308 of the latter Act compensation is all that the plaintiff can claim. They cited

*Rodericks v. Ashton Local Board*, 36 L. T. Rep. N. S. 170, 328; L. Rep. 5 Ch. Div. 328;

*North London Railway Company v. Metropolitan Board of Works*, Johns, 405;

*White v. Hindley Local Board of Health*, 32 L. T. Rep. N. S. 460; L. Rep. 10 Q. B. 219.

*Higgins, Q.C. and E. J. Payne*, for the respondent.—We say that a “man-hole” is not part of a sewer. A sewer is a horizontal structure through which the sewage flows, while a man-hole is a vertical structure through which men descend into the sewer. The defendants propose not to carry a sewer through our land, but to sink a shaft, and they have no power to do so without first buying the land. They cited

*Sutton v. The Mayor and Aldermen of Norwich*, 27 L. J. N. S. 739, Ch.;

*Taylor v. The Corporation of Oldham*, 35 L. T. Rep. N. S. 696; L. Rep. 4 Ch. Div. 295;

*Wood v. Veal*, 5 B. & Ald. 454.

*Pearson, Q.C.*, in reply.

BRETT, L.J.—I am sorry to say that I cannot agree with the decision of Fry, J. in this case. It seems to me that what we have to determine is whether within the meaning of either statute this is part of a sewer. Now I think exactly the same question arises under both Acts of Parliament (the Public Health Acts 1848 & 1875). I cannot see, with regard to the question that we have to decide, that there is any difference between the two statutes. The two statutes seem to be identical except that in the second there is a power of compulsory purchase. With regard to the manholes, or whatever they are called, in the two roads, I cannot see myself that there is any difference between the cases of the two roads. If it were necessary to determine it, I should upon the plans and evidence say that the pavement or the part called W.W.W. in Station-road is a part of the street. I should say also, taking the plans and evidence into account, that the Avenue-road is a place laid out and intended for a street. No doubt the property in the land below the surface of the Station-road belongs to the owner of the land, who probably is the plaintiff, and certainly the land in Avenue-road belongs to the plaintiff. If it were necessary to determine whether within the meaning of this Act of Parliament these streets are private ground or not, I should have thought that no part of Station-road was private ground in that sense, and Avenue-road, although it is private property, and not yet dedicated to the public, is an intended street. However, it seems to me to be immaterial to consider that, because, supposing they are both private land, the notice is to be given, and if this structure is a part of a sewer, then it is immaterial whether the land is private land or not, or whether

(a) Reported by H. FRAY, Esq., Barrister-at-Law.

it is a street or an intended street. The whole question, therefore, is whether this is a part of a sewer within the meaning of the statutes. Now, let us for a moment consider it. The way it strikes me is this: it is either within the 46th sect. of the Act, or it is within the 45th sect., or it is not within the statute at all. Now can it be that it is a *casus omissus*, and that it is not within the statute at all? It is the means of getting into that part of the sewer which requires cleaning. The statute insists that the persons who have to deal with these sewers shall keep them clean, and is it to be supposed that, although the statute insists that the sewers shall be kept clean, the statute has omitted something which is the means of getting to them in order to clean them? It would be a monstrous conclusion, as it seems to me, to suppose that this is not within the statute at all. Then, if it is within the statute, it is either within the 45th section, or it is within the 46th section. The 46th section empowers the local board to construct such reservoirs, sluices, engines, and other works as may be necessary, and provides that it may cause all or any of such sewers to communicate with and be emptied into such places as may be fit and necessary. How can it be said that a man-hole is a work which is necessary, or which causes all or any of the sewers to communicate with and be emptied into the place which is fit and necessary? That has nothing to do with it. It is not that kind of work at all. It is plain to my mind that it is not within the 46th section. Then it follows logically, as it seems to me, that it is within the 45th section. It is a shaft. It is not used for the purpose of passing sewage through it. That is quite clear; but it is built structurally as part of the sewer, for the sewer purposes, and for the purpose of making the sewer more effectively a sewer. It is said that it is only put at the junctions. That is not true. It is wanted more at junctions than at other places; but, if there were no junctions in the drains all through the system, it would be necessary to have these man-holes, in order to get at the drain for the purpose of cleaning the drain, or to see to the drain being cleaned. It was built for that purpose, and therefore it is structurally, as it seems to me, part of the drain, although no part of the sewage is made to go through it. If that is so, it is within the terms of the 45th section, and it is a part of the sewer. Now, what Fry, J. has held is this: that it is not a part of the sewer, that it is a work within the 46th section, and for all works within the 46th section there must be the purchase of land before the works are made. With regard to the second point, as to land which is required for the purpose of reservoirs, sluices, engines, and works such as are described in the 46th section, whether there must be purchase of land, or whether they are to be the subject-matters of compensation, I desire to give no opinion on the present occasion, because it does not seem to me to be necessary to do so. It may be that, for the things described in the 46th section, under the first Act there must have been a purchase or agreement, and it may be that under the second Act there must be compensation. However, it is not necessary to decide that because we hold that the present case is within the 45th section, and, with regard to matters within the 45th section, it is clear to my mind that the only right which the person has

who is injured by anything done under the 45th section is a right to compensation. The plaintiff therefore is not entitled to the decree or order that has been made by Fry, J.—that is to say, to an injunction until the land, or his rights in the land through which this thing is made, be purchased and paid for, and therefore I think that the order was wrong, and must be reversed. The plaintiff is entitled only to compensation.

CORROD, L.J.—I am of the same opinion. It is no doubt true that the existence of a man-hole may cause greater inconvenience to a person whose property adjoins, or through whose property the sewer is made, than if the sewer had had at that place no man-hole. Of course the greater or less inconvenience is not an argument which can prevent us putting a reasonable construction upon the words used in the Act of Parliament, especially when we consider this, that there is in the Act of Parliament a provision for giving compensation to anyone who is injured by putting in exercise and in force the powers of the Act. I do not think it can be contended for a moment that that does not apply to any inconvenience arising from the construction of a sewer, whether involving a man-hole or not, because it is done in exercise of the powers given by the Act, and for any loss or injury sustained in consequence of it, compensation is given by the 144th section. The question we have to consider is in substance whether or not this case comes within the 45th or the 46th section of the Act of 1848. There is a substantial difference between the sections. If it comes within the 46th section, I do not see that which gives power to the local board or authorities to do what is there referred to in any land whatever, but only general power to do certain things, and it may very well be that under the 46th section power is given to them to do certain things as to which they are to apply the funds at their disposal, but not, on the contrary, to enable them to go into another man's land, and do what is pointed out. They cannot under the section go into another man's land, but they must buy it. In the 45th section power is given to them to do the things pointed out in any land under a street or any other land. The substantial question is whether the present case comes within the 45th or the 46th section. It is not necessary, to my mind, to decide what the effect of the 46th section is, and although I do not dissent from Fry, J. as to that, I think the present case is not within the 46th, and that it is within the 45th section. I think these openings are clearly part of the sewer—a sewer properly made, and that it is right and proper as a matter of construction of the sewer, and not for the purpose of constructing some work auxiliary to the use of the sewer, that there should be these openings in the sewer. That being so, and these openings being strictly a part of the sewer, they are within the 45th section, and come within the term "sewer," to which we must give a reasonable construction. Of course that obviates the necessity of their buying the land, but leaves the local board, or whoever the authorities are, liable to the clause of the Act of Parliament, which makes them subject to the responsibility of paying compensation. The two Acts are precisely the same, and therefore it is not necessary to deal with the Act of 1875, and the question of the Avenue-road sewer separately from the other question.

JAMES, L.J.—For certain reasons I have not

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given a judgment in this case, but I may say that I have heard it all through, and I entirely concur in the judgment.

Solicitors for the appellants, *Wright and Pilley*, agents for *Buston, Clark, and Buston*, Brentford.

Solicitor for the respondent, *W. H. Thompson*.

May 5 and 9.

(Before JAMES, BRETT, and COTTON, L.JJ.)

GLOSSOP V. THE HESTON AND ISLEWORTH LOCAL BOARD. (a)

*Nuisance—Pollution of stream—Local board—Omission to perform statutory duty—Action by individual injured—Mandamus—Public Health Act 1875.*

In an action brought in July 1876 by a landowner, whose property was situate within the district of the defendants, to restrain them from permitting a brook which flowed through his land to be polluted with sewage, the plaintiff alleged that the pollution of the stream was caused by the omission of the defendants to discharge their statutory duty of constructing sewers to carry the drainage of the whole district. The defendants were not constituted as a local board till Nov. 1875, and they alleged that they had not been guilty of unreasonable delay in trying to place the drainage of the district in a satisfactory state. The action was commenced in July 1876. *Malins, V.C.* having granted an injunction in the terms of the claim, the defendants appealed.

Held (reversing the decision of *Malins, V.C.*), that the defendants had not been guilty of any neglect to perform the parliamentary duty cast on them as the sanitary authority of a particular district, and that, even if there had been any default on their part in that respect, the present action could not be maintained.

The local board were liable, just as any other owner of a sewer, for an unlawful use of it to the injury of any other person, but the statute imposed on them no duty to any particular individual.

If there is any neglect or refusal by a local board to perform their public duties, the proper remedy is by an application for a mandamus to the Queen's Bench Division in the exercise of its prerogative jurisdiction over all public bodies.

There is no precedent in the practice of the Court of Chancery for granting a mandatory injunction to compel a public body to do something for the benefit of an individual.

THIS was an appeal from a decision of *Malins, V.C.*—The plaintiff, Mr. F. Glossop, the owner and occupier of an estate known as Silver Hall, Isleworth, brought his action against the local board for Heston and Isleworth, claiming an injunction to restrain the defendants from permitting sewage or water polluted with sewage or other offensive matter to pass through the drains or channels under their control into the river Crane in such a manner as to render the water in the river at or near the plaintiff's residence unfit for use by the plaintiff, or injurious to the health and comfort of the persons resident on such premises. The river Crane passed through the plaintiff's pleasure grounds and garden for a distance of 200 yards, and within thirty yards of his resi-

dence. The plaintiff alleged that formerly the river was a clear running stream, with a clean gravel bottom, and full of clean feeding fish. Water plants of various kinds grew in the stream, and the water was used for bathing by some of the plaintiff's family and other persons, and was fit for ordinary domestic purposes; but now the water, as it passed through the plaintiff's garden, was always turbid with fecal matter more or less disintegrated. Much solid sewage matter might occasionally be seen floating on the surface of it. The bottom was seldom visible, and was found to be covered for the most part with black offensive mud. No water plants grew in it, and none of the clean feeding fish ever visited it. The stream frequently gave off an offensive smell, and was a constant nuisance to the plaintiff and his family, and in hot weather he was unable to permit the windows of his house overlooking the stream to be left open all night in consequence of the smell from it. The plaintiff further alleged that his family had suffered from attacks of low fever and other forms of disease, which, so far as could be ascertained, arose from the poisonous gases given off by the water of the river Crane. He then charged that the altered condition of the water was caused by the drains and sewers flowing into it, and which were under the defendants' control; that the district was not provided with any system of sewers, that no attempt was made to deodorize or disinfect the water, and that it was their duty under sect. 15 of the Public Health Act of 1875, to remove the cause of nuisance, to make such efficient drains as to render the water free from the pollution complained of, and to make the locality a healthy residence for persons in the neighbourhood of the river as it formerly was.

The action was commenced in July 1876. The defendants were first constituted under the Public Health Act in Nov. 1875, the previous sanitary authority of the district having been the rural sanitary authority of the Brentford Union. Under sect. 15 of that Act the duty of the board was to "cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

By their statement of defence the defendants denied many of the plaintiffs' allegations as to the condition of the river. They admitted that the stream was not now so pure as it was many years ago, when the neighbourhood was thinly populated; but they stated it was not in the condition of pollution represented by the plaintiff, and that there was nothing which should render the residence of the plaintiff unhealthy. They also alleged that the river had been in the same state for the last twenty years and upwards. They had not at present had time to provide a proper system of sewers for their district, but they intended as speedily as possible to do so, and they were now preparing to construct sewage works, and to procure an Act of Parliament which would enable them to carry out the scheme.

When the case first came before the Vice-Chancellor in March 1878, a considerable amount of evidence was produced before the court, but it was of so contradictory a nature that his Lordship proposed to appoint a scientific man to inspect the locality, and to make a report to the court upon the subject. That had been done by consent of the parties, and the report of Lieut.-Col. Hope, the gentleman appointed, was to the effect that

(a) Reported by E. S. ROGGE, Esq., Barrister-at-Law.

Mr. Glossop had a real and substantial grievance, though it was not so great as the plaintiff imagined. It might also be that the plaintiff, looking back to the days of his boyhood, invested the river of those days with a purity which modern science would not have certified to. Nevertheless, there was more putrescent matter discharged into the stream than it could oxidise. He believed that the report which had been furnished by a medical man as to the unhealthy state of the water was not exaggerated, and that a species of fever might be produced from the exhalations from the water.

On the 4th June 1868 the Vice-Chancellor came to the conclusion on the evidence that the plaintiff had good grounds for his complaints, and his Lordship granted an injunction.

The defendants appealed.

*Higgins*, Q.C. and *Methold*, for the appellants, contended that even assuming the nuisance to be such as the plaintiff alleged, the defendants were not responsible to him, inasmuch as they had done no act to cause the nuisance, but, at the most, had neglected or omitted to perform the duty imposed on them by section 15 of the Public Health Act of 1875 of making such sewers as might be necessary for effectually draining their district for the purposes of the Act. If they had been guilty of any neglect, that would not justify a private person in bringing a distinct action because he had not the advantages he otherwise would be entitled to have if the Act had been properly put into execution; the remedy in that case being by an application to the Queen's Bench Division for a *mandamus*, in the exercise of its prerogative jurisdiction over all public bodies. They, however, contended that the defendants had not been guilty of neglect of such duty; and that the neglect of any previous board to exercise the powers given them by Acts of 1848 and 1872, could not be imputed to the present board.

*Glasse*, Q.C. and *Decimus Sturges*, for the plaintiff, contended that in delaying to carry into execution the powers of the Act, the defendants clearly rendered themselves liable to an action. Although the fact of prospective nuisance was not in itself a ground for the interference of the court, yet if some degree of present nuisance existed, the court would take into account its probable continuance and increase. Here, unless the cause of nuisance, which was under the defendants' control, was removed, the plaintiff's residence would be rendered still more unhealthy. The court might take into consideration the delay of the previous local board and attribute that to the present defendants who were also liable for any negligence on the part of their servants. They cited

*Goldsmid v. The Tunbridge Wells Improved Commissioners*, 14 L. T. Rep. N. S. 154; L. Rep. Ch. App. 349;

*Foreman and wife v. Mayor of Canterbury*, 24 L. T. Rep. N. S. 385; L. Rep. 6 Q. B. Div. 214;

*Hartnall v. The Ryde Commissioners*, 4 B. & S. 361; 33 L. J., Q. B. 39;

*Gibson v. The Mayor of Preston*, 22 L. T. Rep. N. S. 293; L. Rep. 5 Q. B. 218;

*The Attorney v. The Sheffield Gas Consumers' Company*, 3 De G. M. & 304;

*The Attorney-General v. The Mayor, Alderman, &c. of Kingston-on-Thames*, 12 L. T. Rep. N. S. 665.

JAMES, L.J.—I am of opinion that whatever may have led to this action, it was commenced through a misapprehension of what the plaintiff's

legal rights were against the board. It is manifest from the form of the claim and the evidence, that the action was not based upon any act whatever done by the defendants. It was based entirely upon their alleged neglect to perform the parliamentary duty cast upon them as the sanitary authority of a particular district. It is said that this is a serious matter to the plaintiff and to the public generally. It appears to me that, if this action could be sustained, it would be a very serious matter indeed for every ratepayer in England in any district in which there is any legal authority upon whom duties are cast for the benefit of the locality. If this action could be maintained I do not see why it could not in a similar manner be maintained by every owner of land in that district, who could allege that if there had been a proper system of sewage his property would be much improved. I do not see why, if that is so, every owner of property in London who has not received the benefit he ought to have received from a complete system of sewage carried out by the Metropolitan Board of Works, may not say "my court or alley is not properly cared for," and who might not bring an action against the Metropolitan Board of Works, or any local board having duties in the district, and why he would not be entitled to bring it on the very day the boards were constituted, and the duties cast upon them. According to my view there is no sufficient principle to sustain that, and no authority which comes near it, except the authority of the case before Hall, V.C., which I will refer to. Let us see how the rights and liabilities stand under the Act of Parliament. By the 13th section, all existing and future sewers within the district are vested in the sanitary authority, and vested in them, to a certain extent, as owners. It is difficult to say whether the exact ownership is the same as it is with regard to the surface of a road as to persons having control of the roads. The sewers *qua* sewers are under their control and vested in them; and by that section alone, as it appears to me, they are under the same liabilities, and have the same defence in respect of any alleged liability, as any private owner of a sewer would have. But the case here is not based upon any common law nuisance or any nuisance or damage existing irrespective of the Act of Parliament, but upon the alleged neglect to comply with the provisions of the Act. Now, as far as I can make out, the greater part of the mischief alleged here is, mischief caused by a brewery, which we know historically to have existed from the time of the siege of Brentford in the time of Oliver Cromwell, and which therefore had apparently acquired a legal right that could not have been interfered with under the 14th and 18th sections of the Act. The rights are to be preserved if they require preservation. By the 14th section any person who "has acquired a right to use such sewer shall be entitled to use the same or any sewer substituted in lieu thereof to the same extent as he would or might have done if the purchase had not been made." Then the 18th section provides that any local authority may from time to time enlarge any sewer," and so on, on condition of providing a sewer as effectual for the use of any person who may be deprived in pursuance of this section of the lawful use of any sewer, "provided that the discontinuance, closing up, or destruction of any sewer shall be so done as not to create a nuisance."

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Now, therefore, they were in this position: there were certain persons who had a lawful use of the sewer as the law then stood. If any person were using any existing sewer unlawfully as against the plaintiff in respect of his rights of property as they stood before this Act, he had his remedy against them, and was in no way deprived by the Act nor by anything the defendants had done or permitted to be done, of any right he had against any person who had not acquired a prescriptive right to throw the sewage water or foul matter so as to affect his property. That, as it appears to me, was the right, and that was really all that was determined in those cases to which we have been referred. There are a long series of cases of which *Goldemid v. The Tunbridge Wells Commissioners* (*supra*) may be considered as the principal example. That was a case in which what was done was itself a legal wrong—a legal nuisance not justifiable or excusable, unless it could have been justified or excused under the Act of Parliament and it was held that the Act did not justify or excuse it, and the defendants not being able to allege justification or excuse were put in exactly the same position as any private person would have been of being restrained—not of having a mandatory injunction to make works or do anything of that kind—but put under an injunction to restrain the continuance of that which was, independently of the Act, a legal wrong and not justified or excused by the Act. That will be found to be exactly what occurred in every one of the cases referred to except the case before Hall, V.O., in which, however, there may have been exactly the same thing because we have not the facts sufficiently clear before us to state positively that that was true in that case; but I see no reason to doubt that there the board had got a sewer vested in them, which according to the view that the Vice-Chancellor took of the facts, would have made them liable, as a private owner of that sewer would have been, unless they could escape from the jurisdiction of the court by reason of their particular character; and what the learned judge decided was that they were not entitled to escape from the jurisdiction of the court, which so fixed itself upon any private person, by reason of any particular character which was alleged as the ground of their immunity. That is the position upon the facts as to the transfer, and the vesting of the sewers. Now what are the duties the board have to perform? Their main duty is described in the 15th section: "Every local board shall keep in repair all sewers belonging to them and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act." Then there are certain powers to take the sewer under carriage roads and so on, independently of rights; and then comes the 17th section which I read as being a proviso. It was so expressed in the other Acts of Parliament. It provides that "Nothing in this Act shall authorise any local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse," and so on. Supposing there had been a prior Act of Parliament authorising the board to make the sewer; or supposing, before this board was constituted, their predecessors or they themselves had acquired by actual grant from the absolute owner of a canal, pond, lake, or stream of water which nobody but

that one proprietor had any interest in whatever—supposing they had acquired by grant from such a person a right to make a sewer, it appears to me impossible to say that this section would avoid any such grant, or deprive them of the right they had acquired under such grant. It would be equally impossible to say that the section applies to the defendants in this case unless they find it necessary to excuse or justify themselves in what they are doing under that Act of Parliament. Then they are in this position: They are to cause the whole district to be drained; that is to say, they have no particular duty cast upon them with reference to any particular individual, but it is a duty cast upon them for the effectual draining of the whole district. How is that to be done? It is impossible that that can be done except upon some deliberate scheme. It is a system of sewage which requires to be prepared and to be put into operation. They have practically no compulsory powers. They are to drain the whole district, and their duty is to the district, and the limitation of the exercise of that duty in sect. 17 is a thing that affects, not only the district, but any running stream which may be affected by what they are doing. How are they to do it? It cannot be expected that the local board are to do it with their own hands except by the employment of labour to be paid for out of the rates of the district. They cannot do it without going on somebody's property, and it is utterly impossible they could make a single drain or sewer without acquiring property for that purpose. Then we must consider how that property is to be acquired. By part 5 of the Act they have power to contract for carrying the Act into execution. Then "any local authority may for the purposes and subject to the provisions of this Act purchase or take on lease, sale, or exchange any lands." Then sect. 176 says, "With respect to the purchase of lands by a local authority for the purposes of this Act the following regulations shall be observed;" and the first subdivision of that section states that the Lands Clauses Consolidation Acts 1845, 1860, and 1869 shall be incorporated with this Act with a certain exception mentioned. Then, before they put in force any of the powers of the Act they must publish once, at least, in each of the consecutive weeks in the month of November in some local newspaper circulated in their district, an advertisement describing shortly the nature of the undertaking in respect of which the lands are proposed to be taken. Now, I believe this board was constituted in November, and therefore they could not have advertised in each of the consecutive weeks in that month. Then they are to serve a notice in the month of December on every owner or reputed owner, defining the particular lands intended to be taken. Then they are to present a petition, under their seal, to the Local Government Board, stating what they are going to do, and then the "Local Government Board shall take such petition into consideration, and may either dismiss the same or direct a local inquiry as to the propriety of assenting to the prayer of such petition, but until such inquiry has been made no provisional order shall be made affecting any lands without the consent of the owners;" and then, "after the completion of such inquiry the Local Government Board may by provisional order empower the local authority to put in force, with reference to the lands referred to in such order, the powers of the Lands Clauses

Consolidation Acts with respect to the purchase and taking of lands otherwise than by agreement." It then provides, "That the notices required to be given by the Act in the month of November and December may be given in the month of September and October, or of October and November, but in either of such last-mentioned cases an inquiry preliminary to the provisional order to which such notices refer, shall not be held until the expiration of one month from the last day of the second of the two months in which the notices are given," that is to say, they are put in exactly the same position as a company is which requires to get the compulsory clauses. These local bodies are able to get the substitute for an Act of Parliament; that is to say, an order of the Local Government Board authorising them to acquire lands compulsorily, being satisfied, of course, that the whole thing is right. They cannot do anything of that kind until they have made a scheme which they can submit to the Local Government Board, and you cannot say that these persons were guilty of neglect up to the month of May, because, being only elected in Nov. 1875, they were absolutely powerless to comply with that section that they should cause such sewers to be made as should be necessary for effectually draining the district for the purposes of the Act. Then it appears to me they were not guilty of neglect; but if they had been guilty of any refusal, such as is necessary for the purpose of applying for a *mandamus*, or guilty of any *mala fides*, for it must be brought up to that to make it equivalent to a refusal to take steps, that is not the ground of an action by any proprietor in the district who is deprived, as he says, and it may be so in fact, of the benefit he expected to derive from the performance of their public duty. If the neglect to perform a public duty for the whole of the district is to enable anybody and everybody to bring a distinct action, or to file a distinct claim, because he has not had the advantages he otherwise would be entitled to have if the Act had been properly put into execution, it appears to me the country would be buying its immunity from nuisances at a very dear rate indeed by the substitution of a far more formidable nuisance in the litigation and expense that would be occasioned by opening a door to litigiousness, or to persons who might be anxious to make profit and costs out of this Act of Parliament. If there has been any neglect or refusal by such a board to perform its public duties it appears to me the proper remedy would be by an application for a *mandamus*. This suit is not, in substance or in form, an application for a *mandamus*. It is said to be an application which shall have the effect of a mandatory injunction; that is to say, the application is in form to restrain the defendants "from permitting sewage, or water polluted with sewage or other offensive matter, to pass through the drains or channels under their control into the river Crane in such a manner as to render the water of the river injurious to the plaintiff." That is an injunction to restrain them from doing that which is wrong; that is to say, if the thing itself were legally wrong, independent of the neglect to make an effectual system of drainage, it would be a right thing to say, "You have got a sewer, and you are permitting the sewage to flow so as to be a legal wrong to me." Now, under colour of that, it is said we are to grant what would be a mandatory injunction which would

operate as a *mandamus* to compel them to take all the steps necessary for putting into force the provisions of the Act of Parliament. I am of opinion there is no ground for that. We are dealing with a matter of Chancery jurisdiction, and the Court of Chancery never granted a *mandamus* to a public body to compel it to do things for the benefit of private persons who might be benefited thereby. A *mandamus* to compel a man to erect a building was never granted except in one case, I think, where a railway company had to make a bridge—it was an injunction granted where a railway company, in severing a man's land, did not make a bridge. A *mandamus* might, on proper evidence of refusal, of which I can see none here, be applied for in the Queen's Bench Division for the exercise of its great prerogative jurisdiction to compel all bodies having an authority under an Act of Parliament to perform the duties the Legislature has imposed on them. That *mandamus* might be applied for by any individual who could show a sufficient cause, and the court might grant it if it could see that something the public body ought to do was neglected to be done. The statute that has created that duty has given a very special provision for enforcing it, a provision which is very material in considering what the court ought to do, and that is, that there is power to apply to the Local Government Board, and if it thinks the local authority has made default in providing the district with sufficient sewers, or in maintaining the existing sewers, or in providing the district with a supply of water, and so on, they can apply for a *mandamus*, or they may appoint some person (which is a very special additional duty) to do the duty, and to order the costs of doing that duty to be provided for at the expense of the district by its own authority. There is that remedy given which seems to me to make the whole system tolerably complete. The Legislature has provided a particular duty and a mode by which that can be enforced. It would not oust the jurisdiction of any court, either that of the old Court of Chancery, or any division of the existing High Court, in the case of any legal wrong done. I use the words "legal wrong" as distinct from neglect to perform the duties cast upon them by this Act. If this board were to create a nuisance which they were not excused from; if they were, in the apparent exercise of their duties, using or making a sewer which would convey sewage or filthy water into any natural stream or watercourse, or any canal, pond, or lake, that would not prevent the jurisdiction attaching which existed before, or prevent it being exercised, to remedy the wrong being done. That again is the case of an actual legal wrong accompanied with a local damage such as in those cases at common law, where actions for damages have been maintained against such bodies. If the same thing had occurred here—if this local board, while in the course of exercising its duties and rights under this Act, were to make a hole or cut a drain in a public thoroughfare, or put a heap of stones or drain pipes unlighted, as in the case of *Foreman v. The Mayor of Canterbury*—if anything of that kind were done, and damage arose which could be attributed to the unlawful neglect of the persons they employed, they would be liable for it just as any person making a hole and not sufficiently lighting it, or putting a heap of stones or other matter and not

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sufficiently warning people against it, would be liable. But those cases have no application to this case where all that can be alleged against the defendants, even if the allegation were sustained, which it does not appear to me to be, is that they have not, within a reasonable time, performed the public duty which they owed, not to the plaintiff, but to the district of which the plaintiff is an inhabitant, if the plaintiff had suffered any legal wrong. The only case the plaintiff has alleged or attempted to prove, is that he has not been relieved from a damage to which he was subject before this body were called into existence—that he has not been relieved from that damage in the way he hoped to be, and as he would be if they had done their work in draining this district. Under all these circumstances I am of opinion that the order of the Vice-Chancellor cannot be sustained, and that the action was brought upon an inaccurate view of the relations between the several landed proprietors in the district and the sanitary board.

BRETT, L.J.—It seems to me that in this case the defendants have not been guilty of any wrongful act or neglect which gives the plaintiff a right to a remedy of any kind; but if they had been guilty of any neglect the proper remedy has not been asked for, neither has the proper court been applied to. I should be very sorry to hold that this river was not in a state which gave reasonable cause of complaint to the plaintiff. There was conflicting evidence on the subject, but looking to the correspondence between the parties, and to the report made to the Vice-Chancellor by Colonel Hope, which it seems to me was only a report and not a binding decision, which report therefore we might have disregarded, but which we ought not to disregard unless convinced it was wrong—looking to the correspondence, the report, and the evidence I should be sorry to disagree with the Vice-Chancellor as to his holding that there was a substantial grievance with reference to the state of this river, and that it was a substantial grievance affecting the plaintiff. I should also be sorry to hold that the drainage of the district was in a satisfactory state. On the contrary, it seems to me to be made out as a matter of fact that the drainage of the district is in an unsatisfactory state, and in a state which requires remedying. I should also be extremely sorry to hold that it is not the duty of the defendants to cure the unsatisfactory condition of the drainage of the district; and it seems to me that that duty is imposed upon them by the 15th section of the Public Health Act. No district can be said to be satisfactorily or effectually drained for the purposes of that Act where any part of the drainage causes a nuisance, so that if the drainage running through any open ditch causes in that ditch a nuisance, or if the drainage running into any stream causes that stream to be offensive, then so long as that state of things exists, it seems to me the district cannot be said to be effectually drained for the purposes of the Act, which purposes are that the district may be in a sanitary condition. I agree with James, L.J., that the 17th section would not impose any obligation upon them on the mere ground that they turned sewage into a running stream, or that they allowed sewage to run into a stream or pond without having freed the sewage from excrementitious or other foul or noxious matter. But I still think, taking the 15th, 17th,

19th, 91st, and 92nd sections together, that although the owner of the stream or pond could not object to the mere fact of their draining sewage into his stream or pond, yet that if the sewage is in a stream in the district so as to make that stream offensive and dangerous, that district is not effectually drained, and that the local authority would be omitting to do their duty if they did not drain it. These defendants therefore are, as it seems to me, in this position—they have a district which is not effectually drained, within the statute; they are bound to cure that defect, and to do so, among other instances, with this result, that they should prevent the river Crane from being offensive to the inhabitants of the district, and among others, to the plaintiff. But the defendants had a duty to perform, and they had certain powers given to them by and through which they were to perform that duty. It is obvious that the remedy they are called upon to apply is one of the utmost difficulty. They have under their control only one district. They are not to be allowed to drain into a running stream so as to make it offensive; they are not to be allowed to drain into the Thames so as to make it offensive, and they have no right to make any works which shall create a nuisance to any individual, and yet it is said they are to effectually drain their district. How are they to do it? Where are they to take the sewage? I agree with what has been suggested, that it is most difficult for them to do it, although perhaps not impossible, unless they can make arrangements with the authorities of other districts so as to have some combined effort by which to get the sewage away to a considerable and safe distance. They therefore, have a very difficult duty to perform, and one that must naturally require a considerable time for its accomplishment, and anybody who has to deal with them in finding fault with the ineffectiveness of what they have done, is bound to look at their conduct with the greatest indulgence. Now, it seems to me made out in fact, that they have never refused to endeavour to perform the duty which is imposed on them, but on the contrary they have always, when challenged, admitted their duty and have answered that they were endeavouring to perform it. Then has there been any neglect so great as to enable anybody to say that by long and continuous negligence, they are really refusing to perform their duty, although they do not refuse expressly? Taking into account the difficulty of their position and the magnitude of the operation they must perform, it would not be right to say so; and even up to the time of the hearing it is impossible to say they have been so negligent as to enable any court to hold that they were refusing to perform the public duty imposed upon them. Under these circumstances what is their position with regard to the law? They have done no wrongful act. It is suggested that it might have been proved they have done some wrongful act, but I cannot accede to that argument. It seems to me that the statement of claim, which must have been drawn before any act of the defendants that could mislead the course of the litigation had occurred, assumes that the plaintiff could not state any act done by the defendants which was a wrongful act, but that his claim was founded solely upon a neglect by the defendants to perform their duty under the Act; and it also seems to



me that the paragraphs alluded to in the statement of defence make the main defence of the defendants this, that they had never refused to perform their duty, but on the contrary had always been endeavouring to perform their duty. So that they accepted the charge made against them in the statement of claim to be a charge of refusal or neglect to perform their duty; that is to say, in the statement of defence they have set up the very defence for which they have argued throughout this long discussion. The defendants having done no act, it seems to me that the Court of Chancery has never, without some act done by such a body as this, granted what is called a mandatory injunction. The Court of Chancery has never granted a mandatory injunction which could be in effect a *mandamus* against a public body, in order to force them merely to enter upon and to do their duty. There was a long list of cases cited to us, and I watched them carefully, and there was not one of them in which the defendants had not done an act which had caused an injury to a private individual and was unjustified by any statute; and which was such an act as if, done by a private individual, would have given a cause of action at law. That being so, and that being done which might have given a claim for damages in a common law court, the Court of Chancery in those days gave a large remedy which it had the power to give, and which the common law courts had not. A common law court could only give damages, but the Court of Chancery could not only give damages if it thought right, but either with damages or instead of damages, they granted a mandatory injunction against the defendants directing them to cease from continuing the act which was a wrongful act against the individual. That is the proper function of a mandatory injunction, and they never gave it in any any other cases. To-day the case of *Foreman v. The Mayor of Canterbury* (*supra*) has been cited, but that comes within the category of all the other cases. There the servant of the defendants first of all placed a heap of stones on the highway, and then left that heap of stones without being lighted. There was an act done, but an act done which he was entitled to do, namely, the laying of the heap of stones on the road, if he did it with reasonable care; but he did it without reasonable care because he left it there in the dark without being lighted. That obviously would give a cause of action. The case in which no act was done, and where it was mere negligence was the case of *Hartwell v. The Ryde Commissioners* (*supra*). That was an exceptional case. Lord Blackburn, one of the judges, put it upon the statute which imposed that duty, and which statute not only imposed on those commissioners the duty to keep the highway in repair, but had an express enactment that if they did not, they should be liable to an indictment. He founds his judgment upon that, and applies the well-known common-law rule, that if people do that which, as against the public, amounts to misdemeanour and lays them open to an indictment, and if besides the injury to the public, they so do it as to do any injury to a private individual, that individual may maintain an action for damages for the breach of the statutory enactment which lays them open to an indictment. Now, with regard to the case before Hall, V.C., my impression is, that the predecessors of the defendants there, had been

the people who diverted sewage into artificial sewers, and by those artificial sewers diverted sewage into the drain which belonged to the plaintiff. If so, their predecessors had done an act which would bring the case within the ordinary principle of all the other cases; and, probably, in that case there was some enactment that carried down the obligation of what their predecessors had done to the defendants, and so made the defendants liable also under the ordinary rule, as indeed, I am inclined to think that, under this statute, if the former board had done an act that would have given the plaintiff here a right to damages or to a remedy, and the effect of that act continued in the defendants' time, the defendants would have been liable for the continuance of the consequence of that act, and would have been liable to an injunction. Therefore, it seems to me that the case is not brought within the rule that would enable the Court of Chancery to grant a mandatory injunction. Then it is said that nevertheless the defendants are open to a *mandamus* to do their duty. Now supposing they had neglected or refused to do their duty, then I think they would have been liable to a *mandamus*, but not to a *mandamus* to be granted by the Court of Chancery. It would have been a prerogative *mandamus*, as it is called, to a public body to enter upon and do their duty. That, under the Judicature Act, as it was before, is a matter that can be taken only in the Court of Queen's Bench. I think the *mandamus* spoken of in the 8th sub-section of the 25th section of the Judicature Act is not the prerogative *mandamus*, but only a *mandamus* which may be granted to direct the performance of some act—of something to be done which is the result of an action where an action will lie. Therefore, supposing the defendants here had refused to enter upon or to perform their duty, they would have been liable to a *mandamus*, but only to a *mandamus* granted by the Court of Queen's Bench, and not here. It seems to me their conduct has not laid them open to such a *mandamus*. They have never refused to perform their duty. They have done all acts towards performing their duty. They have not been guilty of any such negligence as amounts to a refusal to enter upon the jurisdiction that is given to them, and even, therefore, if a *mandamus* could have been asked for from this court, there are not materials on which the court ought to grant it. In every view, therefore, the defendants are right. I doubt whether the point which has been so long argued before us was really argued before the Vice-Chancellor. I doubt whether we are overruling any formed opinion of his. If we are I am sorry, with great deference, to differ, but I must say that here I think the plaintiff has made out no case for any legal remedy whatever.

COTTON, L.J.—The plaintiff in the present action bases his case upon this, that a stream running through his grounds is in such a state as to be a nuisance, and in consequence of that he asks for relief against the defendants, not by way of damages, but for a decree which will relieve him from the nuisance he complains of. I agree with Brett, L.J. that as regards the question of fact, if the right of the plaintiff would follow the decision on that, he has made out his case; that is to say, he has shown, in my opinion, that the water in this stream is in such a state that if that were the result of an act of an individual or of a body not

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having parliamentary authority to put the stream in such a state, or to do acts which necessarily brought the stream into that state, he would have a ground of action against them; but although that is established, it is a very different thing and a very different consideration whether, as against these defendants, he is entitled either to the decree granted by the Vice-Chancellor or to any decree in this action. Now, the decree made by the Vice-Chancellor went further than what has been considered in the argument, for the decree was against the defendants restraining them from causing or permitting any sewage to go into the river Crane, and also from causing or permitting any new outfall or sewer for the conveyance of sewage into the river Crane to be made. Now, in this case there is no evidence at all, as I understand it, that they have expressed any intention to make any new sewer which would have the effect of bringing fresh sewage into the Crane, nor is there anything to show that they had before the commencement of the action, or at any time, by their own act in any way brought any fresh sewage down the existing sewers which go into the river Crane; and I think that part of the decree to which I have referred, which restrains them from causing or permitting any new outfall to be made, must have got into the decree *per incuriam*, without the attention of the Vice-Chancellor being directed to it. I advert to that for this reason, that it must not be supposed, although I concur in thinking that the plaintiff is not entitled to any decree, that I am of opinion—and I am sure that the rest of the court are not—that the defendants have a right under this Act of Parliament to make any new sewer and thereby to conduct any sewage matter into the river Crane. In my opinion, if they were intending to do so or had done so, there would have been a clear case on the part of the plaintiff for an injunction against the defendants, because that would be within the clear prohibition of the Act of Parliament. The decree against them in substance, no doubt, was intended to be a decree to restrain them from permitting any sewage to go into the river Crane. It is not said they have done any act the consequence of which has been to bring the sewage down to the Crane. If that were so, unless they could show that that act, causing a nuisance to the plaintiff, as in my opinion it has done, was protected by the Act of Parliament, then of course it would be the duty of this court, as it has done in many cases already, to restrain the defendants from creating a nuisance; and although they are a public body having public duties and powers to perform those duties, that would not exempt them from legal liability in consequence of a nuisance caused by them. On the evidence there is no ground for saying they have done that. I shall have to refer to the cases on this point on another part of the case, but it is sufficient to say here that those cases, for the present purpose, may be disregarded. There has been no act done by the defendants. It is not their act that has caused any nuisance to the plaintiff. Then it is said that, although the decree asked for is in the form of a mandatory injunction to restrain them from permitting the sewage to fall into the Crane, that is done to enforce obedience to obligations imposed by the Act under which they are constituted. It is necessary to consider what are the duties imposed by the Act which the plaintiff seeks to enforce, because

the consideration would be very different if the Act, either directly or indirectly, contained that which amounted to a prohibition against them from doing a particular thing, of which the plaintiff complains as causing him a nuisance. In fact, that was felt by counsel for the plaintiff, who contended that there was in the Act of Parliament that which amounted to a prohibition, either in the form of a direction, or in the form of a prohibition against their allowing any sewage to go down into the river Crane. Let us see whether there is any such prohibition. For the purpose of convenience I will take first of all the 19th section, which is the last of those referred to on this point. It says, "Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept, so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied." That was relied upon. I may dismiss it in a word. The complaint here is, not that injury is caused to the plaintiff by sewers constructed by the defendants being improperly constructed, or by their leaving sewers not constructed by them in a state to be offensive to him and his health, but that the sewers are constructed in such a way as independently of their being in a good or bad state, to bring down sewage into his stream. The complaint, therefore, is of the way in which the sewer brings down sewage water, and not of the state of the sewers. That section has nothing to do with it. Then sect. 17 was more relied upon. James, L.J. has already referred to it. The section begins thus: "Nothing in this Act shall authorise any local authority to make or use any sewer," and so on. That is not a prohibition, but it is a direction that nothing in the Act is to be supposed to give them the power of doing that which is afterwards mentioned in the section—it is not to authorise any local authority to make any sewer, drain or outfall, for the purpose of bringing sewage or filthy water into a running stream. It is said that they were using it by permitting it to be used. I cannot agree to that. "Making or using a sewer" means that you must not make a sewer which brings down the sewage into the river; you must not use existing sewers for bringing sewage which you by other means bring into the old sewer. The answer to the whole thing is that it is not prohibitive or directory of what they are to do unless they exercise, or before they exercise, the powers given by the Act, but only that in exercising the powers given by the Act they are not to continue that particular form of nuisance. We then come to sect. 15, and upon that the question must turn. "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act." I think I may respectfully differ a little from what has been said by Brett, L.J. I hardly think this can be considered as a direction that they shall make sewers for the purpose of diverting from running streams any sewage that then went into them. It is a direction that they shall effectually drain the district; that is, that they shall provide drainage for every house in the district. They are to provide sufficient and proper drains for the purpose of carrying off all the sewage and other matter that is to go through the district, and no doubt, doing that in a proper way will have the consequence of making

a series of drains, and a system of drainage which will have the result of not allowing any sewage to go down into the running water, and the natural streams in the district. That is the result of effectually draining a district by a proper system of drainage, and not the consequence of anything in the Act that can be looked upon as a direction that they shall divert sewage going into streams by drains. The result will be that, no doubt, but there is nothing in the Act that can be looked upon as a direction to that effect. I ought to advert to sects. 91 and 92 which refer to the abatement of nuisances. In my opinion those sections have no bearing on the present question. They refer really to this, that the local authority are to inspect their district, and to see what individuals in it are doing acts which are nuisances, as there defined, and then to take proper proceedings, and a summary remedy is pointed out for those individuals to abate the nuisance; and power is given to them to remove it themselves if the individuals do not do it. What then is the result? By this decree the plaintiff says, I am directing and causing the defendants to do their duty under the Act of Parliament—not to do their duty by restraining them from infringing a direct intimation in the statute by not doing a thing that they ought to do; but that having a duty and obligation under this Act of Parliament effectually to drain the district, I, indirectly, by this injunction, by restraining them from allowing the sewage to go into my stream, am compelling them to do that, because that is the only way by which they can do it. Putting aside for the present the difficulty of doing such a thing by means of an injunction of this nature, I will deal with it as if it were a question of a mandatory order; that is to say, a *mandamus* in the sense of a decree directing the defendants on proper grounds at the instance of the plaintiffs to perform the duties and obligations thrown upon them by the Act of Parliament in which he has a special interest. Then comes this question: Ought we to do that unless we can see either something definite which the court can direct the defendants to do, or some practical way by which they can carry out that scheme of drainage by which the plaintiff will, he says, benefit? In my opinion we ought not to do so. We are asked to make a decree, something in the nature of a decree for specific performance, and the plaintiff says, "If the defendants will do their duty the result will be a consequential benefit to me practically, and therefore I have a right to call upon you as if it was a private claim I had against you, to perform that duty and to give that benefit to me." Granted; but it would be contrary to the practice of the court to make a decree of that nature against the defendants, unless one was satisfied that there was some particular mode by which they could carry into effect this scheme of drainage, and then direct them to do that, and in that way exercise the powers of this Act of Parliament. But it was said, that is not the way in which the Court of Chancery has dealt with cases of this sort, where a public body has been brought before it by an individual, or by the Attorney-General, complaining either of a private or public nuisance; and it was argued that in such cases the Court of Chancery has said it had nothing to do with the question how these bodies can perform the duty of

draining the district which the Act has thrown upon them. All they had to do was to relieve the plaintiff from the nuisance. But cases not at all analogous have been quoted in support of the plaintiff's contention. In those latter cases the complaint was, not that the defendants were not carrying into execution the powers of the Act, but that the plaintiffs were complaining of a nuisance which the defendants said they had caused in the discharge and execution of their duties under the Act. The answer was, "No; the Act gave you, for the purposes of a particular district, certain powers of drainage; but it also said that, in doing this, you should not create any nuisance, or you should not do what you are doing, namely, draining the sewage into a stream." If once the proceeding has been established to be a nuisance, and not within the protection of the statute, it is no answer to the plaintiff to say, "We are doing this in discharge of a duty," when the Act that gave them the power and obligation of discharging that duty for the benefit of other persons, had expressly reserved the right of the plaintiff to complain of any act being done to his prejudice or wrong. Therefore the court said, "We have nothing to do with how you are to perform the duties imposed by the Act, if this act, wrongful against the plaintiff, is stopped. We must stop that. You have your powers on condition of not doing a wrongful act; the act is wrongful; and therefore is not protected by the statute, and you must be, as regards the district you are to drain, just as if you had no parliamentary powers." Therefore those cases are entirely out of the question. Here it is not that the defendants have done a wrongful act, and that they are seeking to protect that wrongful act by saying that unless they do that, they cannot do something else; but the plaintiff asks that they may be called upon to exercise the powers of this Act, because that will consequentially relieve him from the nuisance and injury—an injury, not done by the act of the defendants, but which existed before the defendants came into existence. Those cases are not at all authorities for the suggestion that we should make a mandatory decree without seeing that there is a practical mode of carrying into effect the powers given by this Act of Parliament effectually to drain the district. One may say, besides that, that the Court of Chancery ought not, and no branch of the High Court ought, to direct the defendants by its decree to exercise powers and to do their duty, without being satisfied that there has been something in the nature of a refusal on the part of the defendants to do their duty, and comply with the obligation of the Act. Here it is clear there has been no refusal. The delay of the defendants was only from November, when they were constituted, till the month of July, when the action was brought. Then it is said, if there has been no omission on the part of the defendants amounting to a refusal, one may take into consideration the delay of the previous local board, and attribute that to the present defendants. For that purpose sect. 12 of the Act was relied upon. Without looking at the special words of the section, it is obvious it could not be intended to apply to such a case, on any fair construction. The previous local board had to exercise the powers given to them by the then existing Act under which they were then constituted, and over a different area. The present board have to

exercise powers under this Act of 1875 over their area; and how can neglect to perform duties imposed by the Act of 1848, or of 1872, be neglect to perform the duties created by the Act of 1875 in a body existing only under that Act, and having duties to perform specified and defined by that Act? Really it comes to this, that as regards the property vested in the late board, the defendants take it subject to all the obligations and liabilities imposed upon it while under the control of the former board; and if the former board had, by any act done by them, given a right of action or incurred any liability—if by any contract they had incurred any debt, or if they had come under any obligation capable of being enforced by action, then that would have been enforced in the same way as if they were still the same persons who entered into the contract, or had done the act or incurred the obligation. It cannot be said, in my opinion, that the delay, if there were delay, on the part of the old board, can be imputed to the present board so as to make it a refusal to exercise the powers given by the Act of Parliament. Then there are two other points. This is not a decree to direct them to perform certain duties imposed by the Act, but it is a decree in the form of a mandatory injunction. Now, in my opinion, if the court can order the defendants to carry into execution the powers given by the Act, it ought to do so directly, and not to do so by restraining them from permitting a thing to be done which it is not clear will necessarily be removed by their exercising the powers given by the Act. It ought to be to direct them what they are to do and how to exercise the powers of the Act. It certainly ought to be to direct them to exercise the powers of the Act, and not to put them under an injunction for breach of which there might be a sequestration, by enjoining them from permitting a thing to continue which they may not have power to remove under the Act. There is one other matter which I may refer to, although James, L.J. referred to it, because I think Mr. Glasse did not quite see the point I put. I mean with regard to sect. 299. That section provides a mode by which steps shall be taken to compel a public body to discharge its duties under the Act. If they had done any act, it is impossible to say that that section could have taken away any jurisdiction of the court either to grant damages or an injunction to restrain them from continuing that act, if the act was one which the plaintiff could complain of as a legal wrong done to him. Nor do I suggest that the existence of that section takes away the power of the court to interfere by decree to compel them to do their duty. When it is at least doubtful how this scheme can be carried into effect, and the Local Government Board have great control over the manner in which the scheme is carried into effect and may say whether it is done reasonably or not, it would be the duty of the court not to grant a decree in such a case compelling them to do their duty, but it might interfere when there is a way pointed out, guiding the court to say whether, under the circumstances, it ought, if the jurisdiction exists, to make a decree for the defendants to carry out such works and system of drainage as under the Act they might have power to carry into execution. On all these grounds I am of opinion the plaintiff fails, and the action must be dismissed.

JAMES, L.J.—I think there is no sufficient ground

to alter the general rule that costs must abide the result. The defendants will have the costs of the suit in the court below and here.

Solicitors: *Young, Jones, Roberts, and Hale; Pyke, Irving, and Pyke, agents for Briggs, Isleworth.*

## SITTINGS AT WESTMINSTER.

May 13 and 17.

(Before BRAMWELL, BAGGALLAY, and THESIGER, L.JJ.)

COCHRANE v. RYMILL. (a)

*Trover and conversion—Auctioneer—Wrongful sale of goods.*

*Plaintiff by agreement let some cabs on hire to P., who took them to defendant, an auctioneer, and obtained from him an advance upon them. Defendant, by P.'s instructions, and without any notice of plaintiff's property in the goods, subsequently sold them by auction, and, having recouped himself for his advance, commission, and expenses, handed over the balance to P.*

*Held (affirming the decision of Lord Coleridge, C.J.), that plaintiff was entitled to recover damages from defendant for a conversion of the goods.*

THIS was an appeal from the judgment of Lord Coleridge, C.J. on a special case, and in which he had given judgment for the plaintiff.

### SPECIAL CASE.

1. The present action was brought to recover the value of certain property claimed by the plaintiff to belong to him, and which he alleged had been converted by the defendant. The property in question consisted of the following articles, viz., four Clarence cabs, seventeen carriage horses, ten sets of harness, eight collars, and seven odd wheels.

2. The defendant (among other defences not material to this case) denied the alleged conversion.

3. The action came on for trial before Lord Coleridge, C.J. and a special jury on the 21st March, at the sittings for Middlesex, when the following facts were proved or admitted:

4. On the 9th April 1877 one John Peggs, a cab-master of Wilson's-yard, Highbury, applied for an advance of money to the plaintiff, whose business principally consists in lending money on real and chattel securities.

5. The plaintiff agreed to advance the sum of 200l. on the security of thirteen Hansom cabs and four Clarence cabs belonging to the said John Peggs. The transaction was thus carried out: the plaintiff purchased the cabs from John Peggs for the sum of 200l., for which amount he gave him his cheque, and received from him a receipt in these terms:

9th April, 1877.

Received of Mr. A. S. Cochrane the sum of 200l. for the absolute sale to him of thirteen Hansom cabs and four Clarence cabs, numbered as follows: 3646, 3653, 3658, 3671, 3834, 3955, 1963, 5616, 3555, 3412, 4140, 3637, 3579, 5642, 8841, 9490, and 9607.

JOHN PEGGS.

200l.

6. Upon the completion of the said alleged purchase the plaintiff, by a memorandum of agreement entered into on the same day between himself and the said John Peggs, let the above-mentioned cabs on hire to the said John Peggs for the term

(a) Reported by W. AFFLTON, Esq., Barrister-at-Law.

of sixty-five weeks for the sum of 250*l.* payable by weekly instalments of 4*l.*

7. The said memorandum of agreement provided, among other things, that in the event of any of the said instalments not being duly paid it should be lawful for the plaintiff to seize, remove, and repossess, and if he thought fit to sell and dispose of the said cabs.

8. In the month of June 1877 the plaintiff made the said John Pegg a further advance of 100*l.* The repayment of this sum, together with a further sum of 30*l.* for interest and expenses, making in the whole 130*l.*, was secured by a bill of sale of (*inter alia*) all the horses, harness, and other goods, chattels, and effects of the said John Peggs, being in and about his aforesaid premises, Wilson's-yard, Highbury.

9. The said bill of sale, which bore date the 22nd June 1877, provided for the repayment of the said 130*l.* by weekly instalments of 2*l.*, and contained the usual clauses empowering the plaintiff, in the event of default being made in the payment of any of the said instalments, pursuant to the said provisions to seize, take possession of, and sell the property mortgaged by the said bill of sale.

10. Neither the hiring agreement nor the bill of sale was registered under the Bills of Sale Act.

11. At the time of the sale hereinafter mentioned the said John Peggs had made default in payment of the said instalments, under both the agreement of hire and the bill of sale, and several of such instalments were then in arrear. Of the money advanced upon the security of the hiring agreement the plaintiff has been repaid 108*l.*, and of that secured by the bill of sale he has been repaid 32*l.*, leaving a total balance of 250*l.* still due under both securities.

12. The plaintiff did not exercise his power to seize, repossess, remove, and sell the property included in such agreement or bill of sale, but such property was suffered by the plaintiff to remain in the apparent possession of John Peggs.

13. Upon the 14th Sept. 1877 John Peggs called upon the defendant, who is an auctioneer carrying on business at the City Repository, Barbican, in the City of London, and gave instructions for the sale by auction of the articles for the alleged conversion of which this action was brought, and which were all included either in the agreement for hire or the bill of sale. These instructions were given in the name of Henry Peggs, but the defendant did not know, and had no means of knowing that that was not the real name of the person giving such instructions.

14. The said articles were sent to the defendant's repository by John Peggs, and the defendant advertised them for sale by auction, and inserted them in his catalogue in the usual way, and sold them in the ordinary course of his business as an auctioneer.

15. The defendant (who was in the regular habit of searching the register of bills of sale) had no notice of the existence of any claim to the said property on the part of the plaintiff, nor had the latter any notice or knowledge of the sale or of the intention to hold it until several weeks after it had taken place, except so far as he as one of the public was affected by the public notice given by the advertisements of the sale.

16. Upon the said property being placed by the said John Peggs upon the defendant's premises

for sale, viz., on or about the 14th Sept. 1877, the defendant advanced him 100*l.* on the security of the said property and of the proceeds to be realised by the sale thereof. The making of such advances was not unusual in the conduct of the defendant's business.

17. The said sale realised 392*l.* 19*s.* net. In the due and ordinary course of business, and before he had notice of any claim by the plaintiff, the defendant paid over to the said John Peggs the balance of the amount, deducting expenses and commission.

18. The defendant's place of business, where the said articles were taken for sale and sold, is within the precincts of the City of London, and is, the defendant will contend, at all times a market overt.

19. The above facts having been proved or admitted at the trial, it was submitted on behalf of the defendant that they did not establish an act of conversion as charged in the statement of claim. Thereupon a verdict was entered by consent for the plaintiff, with 250*l.* damages (being the amount due to the plaintiff under the said securities), subject to a special case for the opinion of the court upon the points so submitted.

20. The question for the opinion of the court is whether under the circumstances hereinbefore stated the plaintiff is entitled to recover against the defendant in respect of a conversion by the defendant of the plaintiff's goods. If the court shall be of opinion in the affirmative, then judgment shall be entered for the plaintiff for the amount of the said verdict.

If the court shall be of the contrary opinion, then the said verdict shall be set aside, and judgment entered for the defendant.

The special case came on for argument before Lord Coleridge, C.J., who decided that there had been a conversion by the defendant, and judgment was accordingly entered for the plaintiff.

The defendant appealed.

*J. Brown, Q.C.* and *Edward Clarke* for the appellant.—The facts of this case differ from those in *Hollins v. Fowler* (33 L. T. Rep. N. S. 73; L. Rep. 7 H. of L. Cas. 757), for in that case the appellants, Hollins and others, were brokers, who had contracted in their own names as principals, and the decision proceeded on the ground that the defendants were purchasers and not brokers; but here the defendant is an auctioneer. If an auctioneer is employed to sell goods, and does sell them and hands over the proceeds to the person who employs him, he cannot be guilty of conversion. [BRAMWELL, L.J.—The defendant here receives the goods, sells them, and delivers them to the purchasers, and receives 100*l.* out of the proceeds. Is not that a conversion?] We submit that the true view of this case is that taken of the case of the broker by Brett, L.J. in his judgment in *Fowler v. Hollins* (27 L. T. Rep. N. S. 168; L. Rep. 7 Q. B. 616) and in *Hollins v. Fowler* (*ubi sup.*). Kelly, C.B. in *Fowler v. Hollins* says: "Why should a broker who negotiates a contract between buyer and seller in his character of broker, being the mere medium of communication between the one and the other, and deriving no other benefit from the transaction than his commission, be made liable for the whole value of the goods purchased and sold any more than the packer who packs and ships the goods, or the rail-

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way company that conveys them from the sellers to the purchasers' premises?" The plaintiff himself in this case might have saved all trouble by registering his security. We submit that there is no reason for extending the doctrine of conversion any further than the decisions actually go, and that the defendant ought not to be held liable. They cited also

*Hardman v. Booth*, 1 H. & C. 803; 32 L. J. 105, Ex.;  
*Greenaway v. Fisher*, 1 C. & P. 190;  
*Lee v. Bagn*, 18 C. B. 599;  
*Lancashire Waggon Company v. Fitzhugh*, 6 H. & N. 502; 30 L. J. 231 Ex.;  
*Note to Wilbraham v. Snow*, 2 Wms. Saund. 47.

*Day, Q.C.* and *B. O. B. Lane* for respondents.—It is submitted that what has been done here is clearly a conversion. The defendant has affected to deal with the property in these goods, and therefore has been guilty of conversion. He advanced money upon them, and could sell them to secure his 100l. It is difficult to see what could be conversion if this is not. [They were then stopped by the Court.] In addition to the above-mentioned cases they cited

*Hiorl v. Bott*, 30 L. T. Rep. N. S. 25; L. Rep. 9 Ex. 86;

*Ganly v. Ledwidge*, 10 Ir. Rep. Com. Law, p. 33.

*Brown, Q.C.* in reply.—Demand and refusal when a man is in possession of a chattel is evidence of conversion; but, if he has parted with it, demand and refusal form no evidence of conversion. Here the defendant acts throughout as a mere agent and conduit-pipe, without any notice of the plaintiff's claim, and when he has done that he was engaged to do, and paid the balance over to the person who employed him, he ought not to be held liable. He cited

*Holland v. Russell*, 4 L. T. Rep. N. S. 547; 1 B. & S. 424.

BRAMWELL, L.J.—I think this judgment should be affirmed. When I heard Mr. Brown open this case it seemed to me about as hopeless a case as ever I heard. It no doubt is a very hard case for the defendant, who has acted throughout innocently in the matter; but, setting aside the hardship of the case, the law applicable to it is perfectly clear. Here is Peggs, a man who is not the true owner of these goods, but appearing to act as such, and who has no power whatever to sell, takes them to the defendant, and gets a loan from him upon them. The defendant keeps them, and finally sells them in such a way as to pass the property in them to the buyers, and if that is not a conversion, then I think there can be no such thing. Supposing a man were to come into an auctioneer's yard, holding a horse by the bridle and to say, "I want to sell my horse; if you will find a purchaser I will pay commission." And the auctioneer says: "Here is a man who wants to sell a horse; will anyone buy him?" If he then and there finds him a purchaser, and the seller himself hand over the horse, there could be no act on the part of the auctioneer which could render him liable to an action for conversion. But, looking at this case, there is a clear dealing with the property, an exercising dominion over the chattel, and a delivery of it by the defendant to another person to do what he likes with it. I hope and believe that there is a tendency to make conversion less technical, but in this case it is not technical, but substantial. A plaintiff is entitled to say to a defendant, You have under-

taken to deal with my goods as though you had a right to sell them or deal with them; I am not going to take the trouble to trace each one of them, but I look to you for the value of them. I am of opinion that here there was the clearest act of conversion, and the judgment must be affirmed.

BAGGALLAY, L.J.—I am of the same opinion. I agree with Bramwell, L.J. in his remarks as to the hardship of this case, but as the law now stands the plaintiff is entitled to recover. I approach with diffidence all cases in which I see the words trover and conversion, but the decision in *Hollins v. Fowler* seems to me decisive of this case, and the judgment must be affirmed.

THESIGER, L.J.—I agree that the judgment in this case must be affirmed. The defendant had possession of these goods; he advertised them for sale; he sold them, and transferred the property in them, and therefore from beginning to end he had control over the property; and unless we are prepared to hold contrary to all the definitions of conversion which have been laid down, we must hold that such acts amount to conversion. The principle of these cases is laid down in *Hollins v. Fowler*. There Blackburn, J., at p. 969, says there of the defendants in the action, the Messrs. Hollins: "They knowingly and intentionally assisted in transferring the dominion and property in the goods to Micholls that Micholls might dispose of them as their own, and the plaintiffs never got them back. It is true they did it as brokers for Micholls, and not for any benefit for themselves, but that is not material." Again, Lord Cairns, in the course of his judgment in the same case, says of the defendants: "They exercised a volition in favour of Micholls and Co., the result of which was that they transferred the dominion over and property in the goods to Micholls, that Micholls might dispose of them as their own; and this, I think, within all the authorities, amounted to a conversion." These expressions seem to me exactly applicable to the present case. Taking the judgment of Brett, J. in *Fowler v. Hollins* (L. Rep. 7 Q. B. 630), in the Exchequer Chamber, who certainly went as far as any of the other judges against persons being made liable for conversion, he says, at p. 630, that "the true proposition as to possession and detention and asportation seems to me to be that a possession or detention which is a mere custody or mere asportation, made without reference to the question of the property in goods or chattels, is not a conversion." But clearly this case would not be treated as not amounting to a conversion within that rule. *Hollins v. Fowler* shows the distinction between cases such as the present and the cases of warehousemen, factors, and carriers. In this case there was clearly a conversion, and one in no way protected.

*Judgment affirmed.*

Solicitors for the appellant, *Dillon-Webb, Kelly, and Co.*

Solicitor for respondent, *J. I. Irving.*

Thursday, June 12.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

MIGOTTI v. COLVILLE. (a)

*Sentence of imprisonment—Computation of time—One calendar month—Expiration of sentence.*

*A sentence of one calendar month's imprisonment expires on the day preceding that day which corresponds numerically in the next succeeding month with the day on which the sentence was passed. If there is no such corresponding day in the next month, then the sentence expires on the last day of that month.*

*Where a prisoner was sentenced to one calendar month's imprisonment on the 31st Oct., Held (affirming the decision of Denman, J.), that the month expired on the 30th Nov.*

APPEAL from a decision of Denman, J. giving judgment for the defendant.

The action was to recover damages against the governor of Coldbath Fields Prison for alleged false imprisonment of the plaintiff. At the trial, before Denman, J. and a common jury, the following facts were proved in evidence or admitted.

The plaintiff was convicted by a Metropolitan police magistrate of two different assaults. The convictions took place at 11 a.m. on the 31st Oct., and the commitments were drawn up in accordance with the sentences passed. The plaintiff, for the first assault, was sentenced to be imprisoned for "one calendar month," and for the second assault "for fourteen days, to commence at the expiration of the imprisonment previously adjudged." The prisoner was accordingly taken into the custody of the defendant, who was the governor of Coldbath Fields Prison, during the afternoon of the 31st Oct., and finally released at 9 a.m. on the 14th Dec., having asked to be released on the preceding day. Denman, J. on these facts, asked the jury to assess the damages (which they did at 20s.), and reserved for further consideration the question whether judgment ought to be entered for the plaintiff or defendant. After hearing the arguments of counsel on further consideration, the learned judge directed judgment to be entered for the defendant, with costs.

The plaintiff appealed.

The case in the court below is reported 40 L. T. Rep. N. S. 522.

The plaintiff in person contended that, as his imprisonment must be taken to have commenced at midnight on the 30th Oct., the calendar month expired on the 29th Nov., and that being so, that he ought to have been released on Dec. 13. Otherwise, he said, he would have been imprisoned the whole of November, which was a calendar month, and one day in October, and also for the fourteen days. He submitted that the question of time was one of fact for the jury.

A. L. Smith, for the defendant, was not called upon to argue.

BRAMWELL, L.J.—I am of opinion that this judgment must be affirmed. As Denman, J. said, there is no doubt a plausible argument for the now plaintiff that, according to his opinion, he has been imprisoned during the whole of November and one day in October as constituting one calendar month. The difficulty really arises because the term "calendar month" is not

applicable except as applied to particular months, and that it is inapplicable where the month begins in the middle of a particular calendar month. Then the month is made up of a portion of two calendar months, which may be of unequal lengths, and various consequences seem to follow. It is clear that the only sensible rule which can be laid down is this, that where the imprisonment begins on a day in one month, so many days of the next month must be taken, if there are enough days to do it, as will come up to the date of the day before that on which the imprisonment commenced. That is to say, that, if the day of imprisonment commenced on the 5th of the month, it must go on until the 4th of the next month; if on the 29th until the 28th. That is to say, you must take as many days out of the next month as had passed in the month when the imprisonment began before that imprisonment commenced. If that were not so, see what the consequences would be. The plaintiff says, "I was sent to prison on Oct. 31st. Therefore, I ought to have been let out on Nov. 29th. Otherwise I should have had one calendar month's imprisonment, and one day of another month. The effect of his argument is this, that whereas the imprisonment began on Oct. 30th, it ought to end on the 29th Nov. So ought it if the imprisonment began on the 31st. There is no reason why that should be so. Suppose a man is sentenced to two calendar months' imprisonment, when does he come out? Certainly not until Dec. 30th. Now, if one month ends on Nov. 29th, how do you get the next month ending on the 30th? The only way to make sense of it is to apply the rule I have mentioned. It would never operate to the prejudice of the prisoner. If he was sent to prison in a long month he would get thirty-one days; if in a short one he would get thirty days. If he was sent to prison in February, so much the better for him. If he went to prison on the 29th Jan., according to the rule expressed he would get out on the 28th Feb.; so he would if he went to prison on the 30th Jan. or on the 31st or on the 1st Feb. He would then have the benefit of an imprisonment shortened by the number of the days wanting to make up the days which had elapsed in the month in which he was imprisoned at the time of his imprisonment. As the plaintiff was sent to prison on Oct. 31st, there were thirty days wanting from the next month, and, as a consequence, the month did not expire until the 30th. Then the fourteen days did not begin until the first, and the plaintiff therefore was duly kept in prison until the 14th. I think the judgment should be affirmed.

BRETT, L.J.—The expression one calendar month is a legal and technical phrase to which we must give a legal and technical meaning. It does not, strictly speaking, mean any particular number of days, but one month according to the calendar. We must therefore look to the calendar in calculating it, and not count the days. Now, one month according to the calendar, in my view, is one month from the day of the imprisonment until the corresponding numerical day of the next month less one. In some cases there is no corresponding numerical day in the next month, because it is a shorter month than the one in which the imprisonment begins. There the imprisonment is less than it otherwise would have been, and in favour of the prisoner it must end on the last day of the short month.

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.



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COTTON, L.J.—I am of the same opinion. I think Denman, J. was right in dealing with this point as a matter of law. It was for the judge to say, on the meaning and construction of the sentence, what was "one calendar month." The plaintiff contends that he could not be imprisoned during the whole of one calendar month and one day of another month. The question then is, what is the meaning to be given to the term "one calendar month?" I am of opinion, although difficulties and incongruities no doubt arise, that where there is a sentence of a calendar month's imprisonment not commencing on the first day of the month, you must consider it as expiring at twelve o'clock on the corresponding numerical day of the next month, and, if there are not enough days in the next month, in favour of the prisoner, the sentence will expire on the last day of the month. The consequence is that he never gets a longer imprisonment than the number of the days in the month in which he is to be imprisoned, and sometimes will get a less number of days' imprisonment than the number of days to be found in the calendar month for which he was imprisoned.

*Appeal dismissed.*

Solicitors for plaintiff, *Gold and Son.*

Solicitors for defendant, *Nicholson and Herbert.*

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*Thursday, May 15.*

(Before COCKBURN, C.J., MELLOR and LUSH, JJ.)

REG. v. MILLEDGE AND OTHERS, Justices of Weymouth. (a)

*Justice of the peace—Disqualification—Interest in matter to be adjudicated upon—Justice a member of urban sanitary authority—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 258.*

*The Local Board of Health for the borough of Weymouth instituted a prosecution under the Public Health Act 1875, against the appellants for a nuisance committed by them, and they were convicted on a summons by the justices sitting in petty sessions. Three members of the town council, and as such members of the urban sanitary authority, sat at the trial in their capacity as justices of the peace, and took part in the conviction of the appellants. The appellants moved for a certiorari to quash the conviction on the ground that three of the justices who adjudicated on the summons were members of the local authority that ordered the prosecution, and so disqualified because of their interest in the proceedings; and that therefore the conviction was bad.*

*Held, that the conviction was bad, as those justices who had taken part in the proceedings which led to the prosecution of the appellants were disqualified by their interest in the matter from sitting at the hearing of the summons.*

*THIS was a rule to show cause why a certiorari should not issue to bring up for the purpose of quashing it a conviction made by the justices for the borough of Weymouth sitting in petty sessions.*

(a) Reported by A. H. POTTER, Esq., Barrister-at-Law.

It appeared that there was an alleged nuisance committed by the appellants with reference to certain timber pounds; and a representation with respect to this nuisance was made to the Local Government Board, and they in turn communicated with the local urban sanitary authority of Weymouth, and desired them to abate the nuisance; and that they would approve of any measures undertaken in that behalf. Thereupon a meeting of the town council as the local urban sanitary authority of the borough was convened, and they passed a resolution that an inquiry should be made into the alleged nuisance, and a report made to them. On the receipt of that report they took out a summons against the appellants. Three members of the town council were justices, and sat on the bench when the summons was heard. The section on which the respondents relied was the 258th of the Public Health Act 1875 (38 & 39 Vict. c. 55).

No justice of the peace shall be deemed incapable of acting in cases arising under this Act by reason of his being a member of any local authority, or by reason of his being as one of several ratepayers or as one of any other class of persons liable in common with the others to contribute to or be benefited by any rate or fund, out of which any expenses incurred by such authority are under this Act to be defrayed.

*Pitt Lewis* showed cause.—The three magistrates were really not interested in the matter; they took no part in the discussion at the meeting at which proceedings against the appellants were directed to be taken. They had no animus against the appellants, but were performing a public duty; they could not help themselves; as members of the town council they had to carry out the directions of the Local Government Board. Again, they are not incapacitated from sitting as justices, because the 258th section of the 38 & 39 Vict. c. 55 provides for such a case as this. If the contention of the appellants were to stand, the effect would be that a town councillor who happened to be on the commission of the peace would be obliged to retire from the room whenever such a question as this came up for discussion.

*Channell*, in support of the rule, was not called upon.

COCKBURN, C.J.—In this case it appears that three of the magistrates, who adjudicated upon the summons issued against the appellant, and convicted them, were members of the town council of Weymouth, and in virtue of that office members of the local sanitary authority for that borough, and so parties to the resolution to prosecute the appellants. They therefore assumed the double rôle of prosecutors and judges in their own cause. Mr. Pitt Lewis urged upon us that these gentlemen could not help prosecuting; the answer to that plea is, they were not obliged to sit at the hearing of the case; and there were plenty of magistrates whose services were available for the trial of the case, without having recourse to those who had participated in bringing about the matter on which they were called upon to pass their judgment. If the three gentlemen had not sat or taken any part in the hearing it would have been otherwise. In that case the provisions of the Public Health Act would apply. That enactment certainly does not warrant a person sitting as a judge in a cause in which he is a prosecutor. Although it may be that a man

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sitting as judge in a prosecution which he has ordered and arranged may not consciously feel prejudiced, but may even bring his mind unprejudiced and unbiassed, to consider the case impartially; yet the public inconvenience, questionable policy, and unseemliness of a prosecutor sitting as judge in his own cause, and its opposedness to all our received notions of right and wrong, and of justice and injustice, make us hold that this conviction should be quashed. The gentlemen in question need not have sat on the bench, or the urban sanitary authority might have allowed a private prosecution to have issued, but the latter did not so think fit, and the former did not refrain from sitting; therefore, for the reasons I have adduced, I think this conviction bad, and the rule for a *certiorari* must be made absolute.

MELLOR and LUSH, JJ. concurred.

*Rule absolute.*

Solicitors for the appellants, *Combe and Wainwright*.

Solicitors for the respondents, *F. J. and G. F. Braikenridge*.

### COMMON PLEAS DIVISION.

*Friday, May 23.*

(Before Lord COLERIDGE, C.J., DENMAN and LINDLEY, JJ.)

EMMA SILVER MINING COMPANY v. LEWIS AND SON. (a)

*Company—Promotership—Promotion money, liability to refund—Purchase money, application of—Fiduciary character.*

The plaintiffs, a company formed to purchase and work an American mine, sued the defendants for the return of profits received by the defendants to the use of and as trustees for the plaintiffs. The defendants were metal brokers who had hitherto sold the ore in England at a higher rate of commission than would be paid if the mine passed to an English company, and they received from vendor 5000*l.* in paid-up shares of the company, which he had received in part payment for the mine. The defendants alleged that this was received under an arrangement with the vendor by which they were to be compensated for their decreased commission, and to be remunerated for any assistance they might give in selling the mine. The defendants did in fact introduce the vendor to an intending purchaser, but this purchase went off; and the defendants, having acquiesced in a prospectus which referred to them as willing and able to answer inquiries relative to the mine, did in fact answer such inquiries made by intending shareholders, without disclosing that they had reasons for doubting as to the future prospects of the concern. The arrangements between the vendor and the defendants, and the payment to the latter, were unknown to the company. The jury found that the defendants were promoters, and added that if the question of promotership was left to them, they intended to find for the plaintiffs for the amount of the paid-up shares received by the defendants. Held, that there was evidence of promotership to go to the jury; and that the judge, in abstaining

from explaining to the jury the meaning of the word "promoter," had not misdirected them.

*Persons who get up and form a company have duties towards it before it comes into existence.*

*There may be promoters of a company, even after it is registered and incorporated, other than its directors, so long as it is not in a position to perform the obligations imposed upon it by its creators.*

ACTION by a company for profits received by the defendants to the use of and as trustees for the plaintiffs, tried before Denman, J. at Westminster on the 24th, 25th, 26th, and 27th June 1878. The jury returned a verdict for the plaintiffs, and Denman, J., after further consideration, entered judgment for the plaintiffs accordingly.

The case is reported upon further consideration *ante*, 40 L. T. Rep. N. S. 168, where the facts and evidence are fully set out in the judgment of Denman, J.

A rule having been obtained to enter judgment for the defendants, or for a new trial, on the ground that there was no evidence to go to the jury of promotership, and on the further ground of misdirection.

The *Attorney-General*, *Gorst*, Q.C., *Bowen*, and *Foulkes* showed cause.—Promotership is a question of fact, not of law, and here there was ample evidence of such fact, which was found by the jury. The contention on the other side is that a man can only act as a promoter of the particular company that he has in his mind when he does the act; but the fiduciary relation of promotership does not depend upon privity between the promoter and any particular company:

*Re Barry Railway Company*, L. Rep. 4 Ch. Div. 315, 323.

In this case the defendants co-operated with Park to sell the Emma mine to a company; and their silence with regard to the report of the mine experiment was equivalent to actual co-operation:

*Upton v. Townsend*, 25 L. J. 44, C. P., citing *Co. Litt.* 180 b.

The misdirection complained of is that the judge did not explain the meaning of the word "promoter," but to expect this would in effect be to require him to give a definition of equitable fraud. They also cited

*Bagnall v. Carlton*, 37 L. T. Rep. N. S. 431; L. Rep. 6 Ch. Div. 371;

*New Sombbrero Phosphate Company (Limited)*, v. *Erlanger*, 36 L. T. Rep. N. S. 22; L. Rep. 5 Ch. Div. 73.

Sir H. James, Q.C., *Herschell*, Q.C., and *Henn Collins* in support of rule.—There was no real evidence that the defendants ever acted as promoters. [Lord COLERIDGE, C.J.—Even if not promoters, have they not received 5000*l.* belonging to the company?] The company would have no right to claim it back, if there was no fiduciary relation between them and the defendants. [LINDLEY, J.—Not if the defendants took with notice of a breach of trust.] There was no evidence of a breach of trust. Park was the vendor, entitled to get the best price he could, and certainly not a promoter having a fiduciary relation towards the company within the decision in *Bagnall v. Carlton* (*ubi sup.*) which has been cited on the other side:

*Fos v. Mackreth*, 1 Wh. & T. L. C. 115.

Moreover, the money was received from Park, who had reduced it into possession. As to the misdirection, we do not complain that there was no

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

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definition of the word *promoter*, but that the jury were not assisted in deciding whether in this particular case the defendants acted as promoters. The mere fact that they received money does not make them promoters; there must be something done by them to promote; and here no act of the defendants can be pointed out which contributed towards the existence of the plaintiff company.

*C. Bowen* in reply.

*Our. adv. vult.*

LINDLEY, J. delivered the judgment of the court.—In this case there was abundant evidence to show, and indeed it was in our opinion clearly proved: 1. That the defendants knew that Park came over here to sell the mine to a company to be got up by himself, and such persons as he could induce to assist him. 2. That the defendants were prepared to assist and did assist Park in his endeavours to sell the mine here to a company to be formed for the express purpose of purchasing it. 3. That the defendants had been metal brokers to the former owners of the mine at a commission of  $2\frac{1}{2}$  per cent., and that there was an understanding between the defendants and Park, that he should, if he could, procure them to be appointed the metal brokers of the new company at the usual English commission of 1 per cent. 4. That there was first an understanding; and, secondly, a verbal promise that the defendants should be liberally remunerated by Park for their services and for their loss of commission. 5. That this remuneration was in some shape or other to come out of the purchase money to be paid by the company. 6. That the defendant left Park to fix the price of the mine, to get up the company, and to manage all details with the company, and trusted him to protect their interests. 7. That Park, Grant, and others accordingly procured the plaintiff company to be formed, and procured it to buy the mine for 1,000,000*l.*, of which 500,000*l.* was to be paid in cash, and 500,000*l.* in paid-up shares of the company. 8. That the defendants became metal brokers to the new company on the terms of being paid the usual English commission of 1 per cent., and allowed themselves to be referred to in the prospectus of the plaintiff company for information concerning the mine; and, so far as such reference might induce people to take shares, the defendants themselves assisted in procuring shares to be taken. 9. That the defendants knew more of the mine, and of its doubtful value, and of the grounds for distrusting Silliman's report in its favour, than they chose to disclose; and Park was aware of this and promised the defendants liberal remuneration to insure silence on their part, even when referred to for information. 10. That the defendants when referred to were studiously careful to preserve that silence which was essential, or at least conducive, to floating the company. 11. That, pursuant to the above understanding and verbal promise, Park gave the defendants 250 fully paid-up shares of the company out of the shares given to him by the company for the mine; and Park entered into an agreement with the defendants respecting the disposal of the shares so as not to injure the sale of other shares held by himself and others who had assisted him in forming the company. 12. That all these facts (except the appointment of the defendants to be metal brokers at the usual commission of 1 per cent. and the reference to the de-

fendants for information) were studiously concealed from the plaintiff company. Under these circumstances the jury found the defendants to be promoters of the company, and to be liable to restore to the company the value of the 250 shares obtained by them. It is said that there was no evidence to go to the jury of the defendants being promoters of the company in the proper sense of that expression; that there was no sufficient explanation of the proper meaning of the word given to the jury; and that the defendants are entitled to judgment, or at all events to have a new trial. With respect to the word *promoters*, we are of opinion that it has no very definite meaning. (See *Twycross v. Grant* 36 L. T. Rep. N. S. 469; L. Rep. 2 Ch. P. Div. 469). As used in connection with companies, the term *promoter* involves the idea of exertion for the purpose of getting up and starting a company (or what is called floating it), and also the idea of some duty towards the company imposed by, or arising from the position which the so called promoter assumed towards it. It is now clearly settled that persons who get up and form a company have duties towards it before it comes into existence. (See *Bagnall v. Carlton* 37 L. T. Rep. N. S. 431; L. Rep. 6 Ch. Div. 371; and *per Cairns, C.* in *Erlanger v. New Sombrero Phosphate Company* (2 L. Rep. 3 App. Cas. 1236; 36 L. T. Rep. N. S. 222). Moreover, it is in our opinion an entire mistake to suppose that after a company is registered, its directors are the only persons who are in such a position towards it as to be under fiduciary obligations to it. A person, not a director, may be a promoter of a company which is already incorporated, but the capital of which has not been taken up, and which is not yet in a position to perform the obligations imposed upon it by its creators. (See *Twycross v. Grant, ubi sup.*). The defendants say they owed no duty to this company. But in our opinion this construction cannot be supported. In the first place, the defendants left Park to get up the company upon the understanding that they, as well as he, were to profit by the operation; they were behind him; they were in the position of undisclosed joint adventurers; and in respect of their interest his obligations and theirs are, in our opinion, undistinguishable. The defendants in fact were, partly by assisting Park and partly by leaving him to do the best he could for them as well as himself, in the position of promoters of the company. In the next place the defendants became the metal brokers of the company; and it became their duty not to take from the company for their appointment or services a greater remuneration than the company knew they were getting. The company agreed to pay the usual commission of 1 per cent., and had no idea that the defendants were getting 5000*l.* in addition as a bonus. Whether this bonus was for services to Park in assisting him in getting up the company, or for loss of commission, or partly for one and partly for the other, seems to us immaterial. In any view, the defendants being agents of the mine, obtained a large profit from the company through the instrumentality of Park. This profit was concealed from the company, and cannot be retained by the defendants. Again, the acceptance by the defendants of the reference to them in the company's prospectus, imposed upon the defendants a duty to the company to answer candidly such

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inquiries as might be made by intending applicants for shares. The defendants by this acceptance undertook the duty of assisting to float the company, by answering the inquiries of persons proposing to take shares in it, and they did in fact answer inquiries in such a way as to allay suspicion. Upon these grounds we are of opinion that there was ample evidence to warrant the finding and verdict of the jury; and, in our opinion, an elaborate explanation of the meaning of the word promoter would not have been of any advantage to the defendants, nor calculated to give any real assistance to the jury in drawing proper conclusions from the facts. It has, however, been urged that the company have not rescinded their contract with Park; and that so long as that contract remains unrescinded, the shares given by him to the defendants must be treated as having been his to give, and that the company cannot claim them. But the moment it is proved, as in this case it is, that the 1,000,000*l.* paid by the company, although nominally paid for the mine, was only colourably so, that some portion of that sum, say 5000*l.*, was not for the mine at all, as the company supposed, but was for something very very different, *e.g.*, the remuneration of the Messrs. Lewis, and that the company was, without knowing it, really paying them for (*inter alia*) their acceptance of the office of metal brokers, and for concealing their own misgivings as to the mine; and when it is further proved, as it is, that the shares paid to the defendants were created for the purpose of paying them, and that the company was never informed of this; it follows, in our opinion, that the company can recover from the defendants what they have thus obtained without rescinding its contract with Park. We are aware that in most, if not all, cases of this description, which are to be found in the books, there has been evidence to show how much of the price paid by the company was paid to the real vendor for the property he sold, and how much of the so called purchase-money went into the pockets of the promoters; and we see the difficulty, and indeed the impossibility, of saying in this case how much of the 1,000,000*l.* was paid for the mine itself. Further, we assume that Park as vendor might have asked any price he pleased for the mine, and that the company would have had no right to recover from him or any one else, the price the company paid, or any part of it, simply because the company had made a bad bargain, or because Park had made a large profit by the transaction. We do not in any way rely on the report of the committee of investigation, alleging that nearly 200,000*l.* was paid for promotion money, nor do we attach much importance to the defendants' uncandid answer to the charge made against them in the *Hou.* newspaper. But we do consider it proved beyond a doubt that some part of the 1,000,000*l.*, viz., so much as was paid to the defendants, was not the price of the mine but the price of something very different; and that the defendants knew this perfectly well when they obtained the 250 paid-up shares in question in this action. For the reasons we have given we think that the verdict was right; that judgment ought not to be entered for the defendants; that there ought to be no new trial; and that the rule ought to be discharged with costs.

*Rule discharged.*

Solicitors for the plaintiffs, *Snell and Græshop.*  
Solicitors for the defendants, *Burton, Yeates,*  
and *Hart*, for *Tyrer, Kenion, and Tyrer*, Liverpool.

## EXCHEQUER DIVISION.

May 6, 1878, and Feb. 27, 1879.

(Before KELLY, C.B., POLLOCK and HUDDLESTON, BB.)

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APPEAL FROM INFERIOR COURT.

*Principal and agent—Foreign principal—Contract signed by defendant in his own name without qualification—Words "on behalf of A. B." in the body of contract—Effect of on contract.*

*The defendant, an ironfounder and machinist at Bury, having set up some mill machinery at Roanne, in France, for a French millowner there, was requested by him to engage an overlooker to manage the machinery, and accordingly, on the 7th Dec. 1876, a written agreement was drawn up and signed by the defendant and plaintiff, at Bury, in the following terms: "I hereby agree, on behalf of M. B. P., Roanne, France, to engage Mr. Amos Ogden" (the plaintiff) "overlooker, at the rate of 4*l.* per week, with travelling expenses there and back. The sum of 30*s.* per week to be paid to his wife every fourteen days. (Signed) Robert Hall" (the defendant), "per J. Hall, Amos Ogden." Thereupon the plaintiff proceeded to Roanne, receiving 10*l.* at starting from the defendant, and entered on his duties as overlooker at the mill there, and continued there in that capacity till the middle of Oct. 1877, when, in consequence of a misunderstanding with M. B. P., the French millowner, he left and returned to England. During the plaintiff's stay in France the 30*s.* was paid to his wife every fortnight by the defendant at Bury, and upon his leaving France a sum of 12*l.* was paid to him by the defendant's agent at Roanne to enable him to return to England. The remainder of his wages under the contract, except a balance of some 17*l.*, was regularly paid to him from time to time by the French millowner. For this balance he now sued the defendant.*

*Held (dissentiente Kelly, C.B.) by Huddleston and Pollock, BB., giving judgment for the defendant, that the case was governed by the decision of the Court of Appeal in Gadd v. Houghton (35 L. T. Rep. N. S. 222; L. Rep. 1 Ex. Div. 351; 46 L. J. 71, Ex.), there being no distinction between the words "on account of" in that case, and "on behalf of" in the present one; and that these words being in the body of the contract it was immaterial that the defendant signed the document in his own name without qualification, and he did not thereby render himself personally liable.*

*But contra by Kelly, C.B., there was a difference between the words "on account of" and "on behalf of," and the present case was distinguishable from Gadd v. Houghton, and was similar to and governed by Tanner v. Christian in the Queen's Bench (4 Ell. & B. 591; 24 L. J. 91, Q.B.), and, looking at the terms of the contract and the facts of the case, the defendant was personally liable.*

*The plaintiff in this action sued the defendant in*

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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the Salford Hundred Court for moneys payable to him by the defendant for work and services done and rendered by the plaintiff as the hired servant of the defendant, and otherwise for the defendant, at his request, and for wages due to the plaintiff in respect thereof, and for travelling and other expenses paid and disbursed by the plaintiff during such service, and for money due on accounts stated.

The facts of the case were, that the plaintiff was an overlooker in a mill, and the defendant an ironfounder and machinist at Bury, and that in the latter part of the year 1876 the defendant set up some machinery at a mill at Roanne, in France, for M. Beluze Pottier, and that after it was set up Beluze Pottier requested the defendant to engage some person to act as an overlooker and to manage the machinery for him at his mill at Roanne. Accordingly, on the 7th Dec. 1876, the defendant engaged the plaintiff upon the terms contained in the following agreement :

Hope Foundry, Bury, Dec. 7, 1876.

I hereby agree, on behalf of M. Beluze Pottier, Roanne, Loire, France, to engage Mr. Amos Ogden, overlooker, at the rate of 4*l.* per week, with travelling expenses there and back. The sum of 1*l.* 10*s.* per week to be paid to his wife every fourteen days.

(Signed)

ROBERT HALL,  
Per JOHN HALL.

(Signed) AMOS OGDEN.

The verdict was entered for the plaintiff, leave to move being given. The question was whether the defendant was personally liable.

R. H. Collins having obtained a rule,

Crompton, for the plaintiff, showed cause.—In *Gadd v. Houghton and another*, on appeal from the decision of the Exchequer Division (35 L. T. Rep. N. S. 228; L. Rep. 1 Ex. Div. 375; 4 L. J. 71, Ex.), which will be relied on by the defendant, there were clear words showing that the defendants intended to exclude their personal liability; but in the present case it is submitted that there are no such words, nor anything in the contract to show that the defendant intended to save himself from personal liability. The defendant here signs the contract in his own name without any qualification whatever; and, as was said by Mellish, L.J. in *Gadd v. Houghton*, the question must be decided by interpreting the language used according to the plain and natural meaning and interpretation of the words; and that learned judge in the same case said he agreed with what was said by Lord Campbell in *Parker v. Winlow* (7 E. & B. 942, at p. 947; 27 L. J. 49, Q. B.), and in the note to *Thomson v. Davenport* (2 Sm. L. C. 6th edit. 343, 7th edit. 384), that there must be something very strong on the face of the instrument which a man has signed in his own name as a contracting party to prevent the liability which *prima facie* attaches to him as a personally contracting party from so attaching. The case of *Tanner v. Christian* (4 E. & B. 591; 24 L. J. 91, Q. B.) is very similar to the present case, and is an authority in favour of the present plaintiff, and the judgments of Lord Campbell, C.J., and Wightman and Crompton, J.J. in that case strongly support the present contention in his behalf. Here, as in that case, it is the defendant who engages the plaintiff and also acts afterwards under the contract in paying him money on account, and also in paying the weekly allowance to his wife. In *Paice v. Walker and*

*another* (22 L. T. Rep. N. S. 547; L. Rep. 4 Ex. 173; 39 L. J. 109, Ex.) Kelly, C.B. said, that numerous cases had decided that the use of the words "as agents for" in the body of the contract did not prevent liability attaching to a party who signed the contract as a principal; and his Lordship there referred to *Lennard v. Robinson* (5 Ell. & B. 125; 24 L. J. 275, Q. B.) as one of the cases that had so decided that point. *Lennard v. Robinson*, however, differed from the present case in this, that there, in the body of the instrument (a charter-party), the defendants contracted as principals, but signed the documents "by authority of and as agents for" a foreign principal; yet the court held that they had made themselves liable personally. In another case, also, anterior to that of *Paice v. Walker*, viz. *Deslandes v. Gregory and another* (affirmed on appeal, 2 L. T. Rep. N. S. 634; 2 El. & El. 616; 30 L. J. 38, Q. B.), where a charter-party made in London between the plaintiff, shipowner, and the defendants "as agents" for a foreign principal, merchants and charterers, was signed "for D" (the plaintiff) "owner, H. G. as agent." "for S. F. of Anamaboe, G. Brothers" (the defendants) "as agents," the defendants were held not liable personally as principals on the charter-party, they having contracted in the body of the charter-party as agents, and having signed it "for" the principal and as "agents." The words in the present instrument, "on behalf of," differ materially in their import and meaning from the words "on account of" in *Gadd v. Houghton*, the latter having a well-known definite technical meaning in the commercial world, while it is submitted the former words have not, and there is therefore a clear distinction between that case and the present.

E. Henn Collins for the defendant, *contra*.—The short point really is, what is the meaning of the words "on behalf of" in the present case, and the words "on account of" in *Gadd v. Houghton*. Unless they can be distinguished, which I submit they have not been and cannot be, then *Gadd v. Houghton* is conclusive on the present occasion in the defendant's favour. The words "on behalf of" are not words of description, and are substantially, and to all practical intents and purposes, similar to "on account of," which were held in *Gadd v. Houghton* to import the strongest form of agency, and it is difficult to see what other form of words could be used to show an intention to contract as an agent and not as a principal. I accept every word of the ruling of Kelly, C.B., in *Paice v. Walker*, in which his Lordship held that the words "as agent" were descriptive of the party's position only, and that *ratio decidendi* stands unimpeached by the decision of the Court of Appeal in *Gadd v. Houghton*. The case of *Tanner v. Christian* is open to two remarks, as has been observed by Pollock, B.: first, it is a case of some antiquity, and the courts have since that time viewed these cases differently; and secondly, there were in that case various stipulations in the contract, and one alone, namely, that Christian was to receive the rent as a trustee, was sufficient to make him personally liable. In the present case the whole consideration moving from the plaintiff was to be given in France to the foreign principal. The contract here may be difficult to construe, but certainly there is no ambiguity, either latent or patent in it, and evidence, therefore, is not only

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unnecessary, but inadmissible. I do not say that the court are not to look to the surrounding circumstances, but I contend that the document itself is the controlling matter, and unless there be any ambiguity, the surrounding circumstances are inadmissible. In *Gadd v. Houghton* there was an overriding improbability of any intention to give credit to the foreign principal, yet nevertheless the Court of Appeal attached such force to the words "on account of" that they held that the defendants who had signed the contract were not liable personally, and it is difficult to see how the words in this case "on behalf of" can be got rid of. He referred also to *Armstrong v. Stokes and another* (26 L. T. Rep. N. S. 872; L. Rep. 7 Q. B. Div. 598; and *Southwell and another v. Bowditch* (34 L. T. Rep. N. S. 133; L. Rep. 1 O. P. Div. 100-374; 45 L. J. 374-630, Q. B.), and contended in conclusion that the decision of the Court of Appeal in *Gadd v. Houghton* was directly in point and binding upon the court in this case.

HUDDESTON, B.—The whole question turns upon the way in which the instrument in question, the contract in fact between the parties in this case, is to be construed. It is in the following terms: "I hereby agree, on behalf of Mons. Beluze Pottier, Roanne, Loire, France, to engage Amos Ogden overlooker, at the rate of 4l. per week, with travelling expenses there and back. The sum of 1l. 10s. per week to be paid to his wife every fourteen days," and this is signed, "Robt. Hall, per John Hall." Now, in the notes to the case of *Thomson v. Davenport* (3 Sm. L. Cas., p. 386, 7th edit., by Messrs. Henn Collins and Arbutnot, p. 374, in the 6th edit.), it is said: "In all these cases the question, whether the person actually signing is to be deemed to be contracting personally or as agent only, depends upon the intention of the parties, as discoverable from the contract itself; and it may be laid down as a general rule, that where a person signs a contract in his own name without qualification, he is *primâ facie* to be deemed to be a person contracting personally; and in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal." Now here, the defendant signed this document in his own name without any qualification, and *primâ facie* therefore he "contracted personally." But then comes the question whether or not there are any words in any other portion of the document which show that the defendant, though he signed the instrument without qualification in his own name, "did not intend to bind himself as principal," and we find that at the very commencement of the instrument it is stated that he is entering into the agreement "on behalf of" another person. Now, what is the meaning of these words "on behalf of Mons. Beluze Pottier," &c.? If they are to be considered as words of description merely, as was done with regard to the words "As agent for John Schmidt and Co.," in the case of *Paice v. Walker and another*, on which case the plaintiff's counsel has so strongly relied in the present case, then of course the plaintiff will succeed in establishing his claim against the defendant; but if, instead of being read as mere words of description, they are held to be words indicating the capacity in which the defendant made and signed the contract, namely, that he made it "on behalf

of" or "as agent for" Mons. Beluze Pottier, they would then, in my opinion, be words of the same import as the words "on account of" in the case of *Gadd v. Houghton* in the Court of Appeal. In *Gadd v. Houghton* this court held that the defendants in that case were liable on the ground that, not having qualified their signature to the contract by words showing that they contracted as agents or brokers only for other persons, they must be taken to have contracted personally, and that the case was undistinguishable from that of *Paice v. Walker*; but the Court of Appeal overruled the decision of this court in *Gadd v. Houghton*, and held that the case was not governed by *Paice v. Walker*; that, whatever might be the decision in that case upon the words "as agent for," yet the words "on account of" in *Gadd v. Houghton* were not at all ambiguous, and that it was impossible to make them words of description merely, and that the effect of them at the beginning or in the body of the contract had effect and operation throughout the whole document, including the signature, and that the addition of those words after the signature would not have added anything to what had been previously stated in the body of the instrument. Archibald, J., in his judgment in that case, said, "The usual way in which an agent contracts so as not to render himself personally liable, is by signing 'as agent.' That, however, is not the only way, because, if it is clear from the body of the contract that he contracts only as agent, he would save his liability. No words could be plainer than the words in the body of the contract here, 'on account of Morand and Co.' to show that the defendants contracted only as agents;" and Quain, J. also expressed himself to the same effect. Now, I think that the words "on behalf of" in the body or at the beginning of the instrument of contract here are of the same import and to the same effect as the words "on account of" in *Gadd v. Houghton*, and show that the present defendant was contracting not on his own account and liability, but "as agent" for Mons. Beluze Pottier. I can see no distinction or difference whatever between them, and that being so, the case of *Gadd v. Houghton* in the Court of Appeal is a conclusive authority in favour of the defendant, for whom, therefore, I am of opinion that judgment ought to be entered.

POLLOCK, B.—I am of the same opinion. Looking at the words of the contract in the present case, which are as follows [his Lordship here read the contract as set out in the case], I am certainly of opinion that the case is governed by the decision of the Court of Appeal in *Gadd v. Houghton*. That case was originally tried before me at Liverpool, where I held that the defendants were not liable; and when the case came before this court on a rule for a new trial, the court seemed to think that the case was governed by the decision in *Paice v. Walker*, and that the words "on account of" occurring only in the body of the contract, and the contract itself being signed by the defendants in their own name without qualification, there was nothing to show the *primâ facie* liability of the defendants as having contracted personally; and accordingly my ruling at Nisi Prius was overruled. But when the case came before the Court of Appeal, that court overruled the decision of this court upon that point, and held that the case was not governed

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by *Paice v. Walker*, between which case and that of *Gadd v. Houghton* they established a clear distinction. But then Mr. Crompton, on the part of the present plaintiff, has urged and relied strongly upon the fact of the sum of 1l. 10s. a week being paid to the plaintiff's wife by the defendant—payment which he says was by the terms of the contract expressly agreed to be made to the wife by the defendant—as a circumstance showing or leading to the conclusion that the defendant is the party personally liable on this contract. But, in truth, the contract does not provide for the payment of that sum by the defendant. It states merely that the sum of 1l. 10s. per week is to be paid to the plaintiff's wife every fourteen days, and, although as a matter of fact, and presumably of convenience as between the parties, the defendant did pay this sum to the plaintiff's wife, the payment might very well have been made by the French principal, M. Beluze Pottier, by post-office order, or in various ways other than by the hands of the defendant. I am of opinion, as before mentioned, that the present case is governed by *Gadd v. Houghton* in the Appeal Court, and therefore it is unnecessary to say anything more than that I think our judgment should be in favour of the defendant.

KELLY, C.B.—In this case I have the misfortune to differ in opinion from my two learned brothers who have just preceded me in delivering their judgments. The guiding principle, or rule of law, in this matter is well laid down in the passage from the notes to the case of *Thomson v. Davenport*, in Smith's Leading Cases, which has been so often referred to in the course of the present argument, that a person signing a contract in his own name without qualification is to be deemed to be contracting personally, unless there be something in the document itself which shows that it was not his intention to render himself liable as a principal. Now, here the defendant did sign this contract in his own name, without any qualification whatever, and the question for our consideration is, whether or not there is anything in the contract itself to do away with the *prima facie* presumption of his personal liability. That depends, of course, entirely upon the construction to be put upon the written contract, and whether we can find anything in it that shows conclusively that he had no intention to bind himself personally. The words of the contract are, "I hereby agree on behalf of Mons. Beluze Pottier," and so forth. Now, I can see nothing in those words "on behalf of" that shows the absence of any such intention on the part of the defendant. The authorities and cases on the subject which have been referred to are numerous, and also no doubt somewhat at variance. In *Gadd v. Houghton*, so strongly relied on by the defendant's counsel, and on which, too, my learned brothers mainly base their judgments in the present case, the words are totally different. The words "on account of" which are used in that case have an undoubted, general, well-known, and defined meaning in all matters of trade and commerce, and there is, in my opinion, a manifest difference and distinction between them and the words "on behalf of" in the present case. The case of *Tanner v. Christian* (*ubi sup.*) is, I think, directly in point here. In that case the defendant had, as here, signed the contract in his own name without qualification,

but in the body of the contract it is stated to be made between Christian "for and on the part of" Norris of the first part and the defendant Tanner of the second part; and Lord Campbell in his judgment, after stating that the real question was whether the defendant was intended to be personally liable, and that he had come to the conclusion, on looking at the frame of the agreement as a whole, that he was, goes on to say: "Let us see what is the language employed. It is a memorandum of agreement, between whom? J. A. Christian of the first part. To be sure the words are added 'for and on the part of' Norris; but still Christian is the party; he agrees, though it is still 'for and on the part of' Norris. Then we must go further and see what is to be done." Lord Campbell then goes on to refer to the other parts of the contract in which Christian was to be the acting party in doing certain things under the contract, and he adds: "I think, therefore, that the intention was that he was to carry the contract into effect; and he signs the agreement not by procuration for Norris, but in his own name; so that I think he personally undertakes for its performance." Now, what are the words of the present contract? "I hereby, on behalf of Mons. Beluze Pottier, agree to engage Amos Ogden," &c. Now who actually personally did engage the plaintiff? Why, the defendant. Then, with regard to the money part of the transaction, it was the defendant himself who paid the plaintiff 10l. to start with on his leaving Bury for France in Dec. 1876; nor can we quite overlook the fact that, upon the plaintiff's quitting France in Oct. 1877, it was the defendant's agent there who paid the plaintiff 12l. to enable him to return to England; and, moreover, it is the defendant who pays the thirty shillings every fortnight during the plaintiff's absence to the latter's wife. Though it is not expressly said, in the written agreement, by whom this sum was to be paid, yet, seeing that the defendant was at Bury, and the plaintiff's wife was also at Bury, there can hardly, I think, be the shadow of a doubt that the contract contemplated and intended that this payment should be made, as in fact it was, and as I think it could only be made by the hands of the defendant. Lastly, we find that the defendant signs the contract in his own name, and not, as Lord Campbell puts it in *Tanner v. Christian*, "by procuration" or "as agent for" Beluze Pottier, but in his own name without any qualification. Looking, then, at the authorities that have been cited, and particularly at the judgment of Lord Campbell, C.J. in *Tanner v. Christian*, and finding things to be done by the defendant alone under the contract, and having regard also to the manifest distinction that, in my opinion, exists between the words "on account of" and "on behalf of," which latter words are, I think, in effect, equivalent to, if not identically the same as, the words "on the part of," I am of opinion that this case is distinguishable from, and is not governed by, that of *Gadd v. Houghton* in the Court of Appeal, and that consequently the judgment of the court below in favour of the plaintiff should be affirmed; but, as the majority of the court are of a different opinion, that judgment will be reversed and judgment will be entered for the defendant.

*Judgment for the defendant.*

Solicitor for the plaintiff, J. Stringer, Manchester.



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Solicitors for the defendant, *Clark, Woodcock, and Ryland*, agents for T. A. and J. Grundy and Co., Manchester.

Monday, June 23.

(Before KELLY, C.B. and HAWKINS, J.)

BUCKTON v. HIGGS. (a)

*Costs of action where money paid into court and not accepted by plaintiff in satisfaction—Report of official referee—Order LV., r. 1.*

*Action for damages for breaches of covenant; money paid into court by the defendant without admitting the breaches; plaintiff replies that the money paid into court is not enough to satisfy his claim. Issue joined, and referred to an official referee, who finds in favour of the defendant as to the sufficiency of the money paid in.*

*Held, that the court, in the exercise of the discretion vested in it by Order LV., r. 1, should in such cases allow the plaintiff his costs of action up to the time of payment into court, and to the defendant his costs of the action subsequent to the payment into court.*

*Langridge v. Campbell* (2 Ex. Div. 281) discussed.

Motion by defendant to have the report of an official referee adopted by the court under sect. 56 of the Judicature Act 1873, and for judgment to be entered accordingly, together with judgment for the costs of the action and of the reference to the official referee.

The action was brought on a covenant to keep in good repair contained in a lease under which the defendant held certain premises of the plaintiff.

The plaintiff claimed 500*l.* damages for dilapidations. The defendant traversed the breaches assigned, and, without admitting his liability, paid 150*l.* into court, alleging that it was enough to satisfy the plaintiff's claim. The plaintiff replied that the sum was not sufficient, and thereon issue was joined. The question was thereupon referred to an official referee to inquire and report; and the referee accordingly reported that the sum paid into court by the defendant was enough to satisfy the plaintiff's claim in respect of the breaches alleged.

*Nasmit* for the defendant, in moving the court to adopt the referee's report and that judgment might be entered in accordance with it, asked that judgment might be entered for the defendant for all the costs of the action on the authority of *Langridge v. Campbell* (2 Ex. Div. 281). [KELLY, C.B.—The plaintiff has been obliged to bring this action in order to obtain payment of the sum of 150*l.* The defendant should have paid it before action. In *Langridge v. Campbell* (2 Ex. Div. 281) the costs of the cause were "to abide the event." There were no pleadings in that case, and I expressly limited my decision to cases in which there were no pleadings. Here there are pleadings, and the ordinary course must be followed. HAWKINS, J.—In *Langridge v. Campbell* I decided at chambers that the plaintiff was entitled to have his costs of the action up to the time of payment into court, and the defendant his costs subsequent to that payment, and I have not changed the opinion I then formed.]

A. Powell for the plaintiff.—The court have dis-

cretion to deal with the costs in this case under Order LV., r. 1, and the plaintiff ought at least to be allowed his costs up to the time when the defendant paid the money into court.

By the COURT.—The costs are in the discretion of the court under Order LV., r. 1, and the proper mode of exercising that discretion in such cases is by directing that the plaintiff be allowed his costs of the action up to the time when the money was paid into court, and that the defendant be allowed his costs of the action after that time.

*Order absolute that judgment be entered for defendant in accordance with the report of the official referee, with costs of action from the date of payment into court, and of the reference; the plaintiff to have costs of action up to payment into court.*

Solicitors for plaintiff, *S. W. Johnson and Son*.  
Solicitors for defendant, *Keighley, Shea, and Bevan*.

Wednesday, July 2.

(Before KELLY, C.B. and STEPHEN, J.)

MALTON URBAN SANITARY AUTHORITY (apps.) v. MALTON FARMERS' MANURE AND TRADING COMPANY (resps.). (a)

*Public Health Act 1875—Offensive trades—Nuisance—Injury to health.*

*The Public Health Act 1875 (38 & 39 Vict. c. 56), sect. 114, provides that the urban authority shall direct a complaint to be made before a justice where "any manufactory, building, or place used for any trade, business, process, or manufacture causing effluvia is certified . . . by their medical officer of health . . . to be a nuisance, or injurious to the health of any of the inhabitants of the district," and that "if it appears to the court that the business carried on by the person complained of is a nuisance, or causes any effluvia which is a nuisance or injurious to the health of any of the inhabitants of the district, and unless," &c. . . "the person so offending . . . shall be liable to a penalty," &c.*

*The respondents, whose business had been certified by the appellants' medical officer to be a nuisance, and who were charged under this section in respect of their manufactory of artificial manures, were proved to have caused offensive effluvia, which materially interfered with the comfort and enjoyment of the inhabitants in the streets, and penetrated into some of the houses. By one witness certain cases of nausea and vomiting were attributed to them; while evidence was, on the other hand, given that, though the effluvia might make sick persons worse, they would probably do no permanent injury to health.*

*Held, that the effluvia in question, being proved to interfere with the comfort and enjoyment of the inhabitants, constituted a "nuisance" within the meaning of the 114th section of the Act, and that they were moreover "injurious to health" within the meaning of that section.*

*Per Stephen, J.: It is not necessary, in order to bring a nuisance within this section, to prove injury to health.*

*The case of The Great Western Railway Company v. Bishop* (L. Rep. 7 Q. B. 550 and 41 L. J. N. S. 120, M. C.) considered.

(a) Reported by W. WILLS, Esq., Barrister-at-Law.

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MALTON URBAN SANITARY AUTHORITY v. MALTON FARMERS' MANURE CO.

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CASE stated by justices of the East Riding division of the county of York, under 20 & 21 Vict. c. 43.

A complaint was preferred by the appellants against the respondents, under sect. 114 of the Public Health Act 1875 (38 & 39 Vict. c. 55), charging that the respondents, being the occupiers of a certain manufactory, building, or place for boiling, burning, or crushing bones, or used for a certain trade, business, process, or manufacture, causing effluvia, to wit, the process or manufacture of manures carried on by the respondents, within the appellants' district, did unlawfully carry on the said trade, business, process, or manufacture of manures, and of boiling, burning, or crushing bones, or some or one of such trades, businesses, processes, or manufactures, so as to be a nuisance, or so as to cause an effluvia which was a nuisance, or injurious to the health of the inhabitants of the said district, contrary to the Public Health Act 1875. Upon the hearing the complaint was dismissed, but without costs, subject to the statement of a case for the opinion of the court.

It was proved that the respondents were the occupiers of certain buildings, in which the process or manufacture of artificial manures (including bone manures and the dissolving of bones and coprolites with sulphuric acid, but not the boiling or burning of bones), was extensively carried on, and that during the process of manufacture, or whilst the hot product was being moved after manufacture, or from the storage of material, effluvia were thrown off in large quantities, a considerable portion of which escaped from the buildings, and had been from time to time on certain occasions (but not continuously), according to the direction of the wind, blown or carried into some parts of the town forming the appellants' district; and that numerous complaints had been made of a nuisance arising therefrom to the inhabitants. It was also proved that the medical officer of health for the district had certified to the appellants, under the provisions of the 114th section of the Public Health Act 1875, that the building or place occupied by the respondents, being used for the purposes aforesaid, and for the carrying on of a trade, business, process, or manufacture, causing effluvia, was a nuisance, and injurious to the health of the inhabitants of the district.

The evidence on behalf of the appellants showed that the effluvia was offensive, and had materially interfered with the comfort and enjoyment of the inhabitants in the streets of the town, and at the Malton station of the North-Eastern Railway Company (the works being situate about two hundred yards from the latter place), and that such effluvia penetrated into some of the houses within the said district, causing the inhabitants to close their windows; and in one or two instances nausea and vomiting were attributed to it. The appellants' principal medical witness did not think there was anything in the vapours to make the witness who attributed vomiting to them sick; but the medical officer of health adhered to the statement in his certificate that the works caused a nuisance and an effluvia which was injurious to health. Other medical men, however, also called by the appellants, whilst giving it as their opinion that the effluvia might make sick people worse and cause nausea, yet did not think any permanent injury to health would arise therefrom.

It was contended by the respondents that this

was not a nuisance within the meaning of the Public Health Act 1875, because to be so it must be proved to be injurious to health; and that, as the medical evidence given on behalf of the appellants had failed to prove this, the justices had no summary jurisdiction in this case under the 114th section of the Public Health Act, and they relied on the case of *The Great Western Railway Company v. Bishop* (L. Rep. 7 Q. B. 550; 41 L. J. N. S. 120, M. C.).

It was contended by the appellants that the justices had summary jurisdiction under sect. 114 if the business carried on was a nuisance, or caused effluvia which was a nuisance, and that it was not necessary to prove the same to be injurious to health.

The justices, on the above contention and evidence, without the respondents having called any witnesses, held that, although the appellants had proved a nuisance to exist in the ordinary sense of that word, yet under the provisions of the Public Health Act 1875, and on the authority of the case quoted, it was necessary to prove that the nuisance was moreover injurious to health; and, considering that this was not satisfactorily proved, they dismissed the complaint, but without costs; and at the instance of the appellants stated this case.

If the Court should consider that it was not necessary for the appellants to prove that the nuisance caused by the effluvia was also injurious to the health of the inhabitants of the district; or, considering it necessary, should be of opinion that the appellants sufficiently proved the effluvia to be "injurious to health" within the meaning of the statute, the case was to be remitted to the justices for rehearing. If the Court should be of a contrary opinion, the complaint should stand dismissed, and the decision of the justices be confirmed.

The 114th section of the Public Health Act of 1875 (38 & 39 Vict. c. 55), so far as it is material to this case, is as follows:

Where any candle-house, melting-house, melting-place, or soap house, or any slaughter-house, or any building or place for boiling offal or blood, or for boiling, burning, or crushing bones, or any manufactory, building, or place used for any trade, business, process, or manufacture causing effluvia, is certified to any urban authority by their medical officer of health, or by any two legally qualified medical practitioners, or by any ten inhabitants of the district of such urban authority, to be a nuisance or injurious to the health of any of the inhabitants of the district, such urban authority shall direct complaint to be made before a justice, who may summon the person by or on whose behalf the trade so complained of is carried on to appear before a court of summary jurisdiction.

The court shall inquire into the complaint, and, if it appears to the court that the business carried on by the person complained of is a nuisance, or causes any effluvia which is a nuisance, or is injurious to the health of any of the inhabitants of the district . . . the person so offending shall be liable to a penalty, &c.

*Herschell*, Q.C. for the appellants.—There are two questions to be considered: first, whether on the right construction of the Public Health Act the respondents are liable under it for any nuisance unless it be injurious to health; secondly, whether that only is rightly deemed injurious to health which makes people in good health permanently unwell. The group of sections commencing with the 91st and dealing with nuisances are distinct from the group which deals with offensive trades, the 112th and following. The

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first group deals with matters immediately affecting the health of people, and the word nuisance may well have there a somewhat different meaning to that attached to it in the sections relating to offensive trades, which have a distinct scope and object; and the nature of the matters with which these latter sections deal must regulate the interpretation of the word as used in them. It is clear that the nuisance complained of comes within the scope of these sections, and that the respondents are liable. The case of *The Great Western Railway Company v. Bishop* (L. Rep. 7 Q. B. 550; 41 L. J. N. S. 120, M.C.), which will be cited for the respondents, would be in point if the question arose under the 91st section of the Act; but under the 114th I submit that it is irrelevant. (See *Passsey v. Oxford Local Board*, in the Q. B. Div. reported in the *Times*, 8th May, 1879.) But, further, I say that it cannot be successfully contended that that alone is injurious to health which makes people who are well permanently ill, and that temporary nausea is of no account; effluvia which make sick people worse, as these are proved to do, must be considered injurious to health.

*Cave*, Q.C. for the respondents.—The decision of the magistrates was right on both grounds. The sections in question correspond to those in the Act of 18 & 19 Vict. c. 121, on which the case of *The Great Western Railway Company v. Bishop* (L. Rep. 7 Q. B. 550; 41 L. J. N. S. 120, M.C.) was decided. The word nuisance cannot receive two meanings in the same Act of Parliament, when its collocation and the synonym with which it is coupled are the same. The scope of the Act must determine the limitation and construction to be put on the word. The ordinary power of proceeding by indictment for nuisance is not limited; the summary powers given by the Act are limited. Sects. 112 and 113 deal with the establishment of offensive trades or manufactures in the future; in sect. 114, which deals with those already established, the word "offensive" does not occur, nor does the word "nuisance" stand alone. The case of the railway company against Bishop, which has been cited, was decided in 1872. The framers of this Act, with that decision before them, have deliberately used similar language to that of the former statute. Why, if a different construction were intended, did they not employ different words, or give a different interpretation? Further, I submit that to be injurious to health a thing must be injurious to persons in an ordinary state of health. Everything which injuriously affects the health of an invalid cannot be deemed injurious to health.

KELLY, C.B.—We should be wrong to put such a construction on the statute as would put an undue restriction on traders carrying on useful businesses. But we must be governed by the words of the 114th section on which our decision must turn. Nothing can be clearer than that the statute meant to deal with trades of the same description as that complained of. Now, the words of sect. 114 are, "any of the inhabitants" of the district. The question is, whether this effluvia is a nuisance, or carried on so as to be injurious to the health of any of the inhabitants. It is evident, I think, that it is a nuisance and disagreeable to many of the inhabitants; and I think that it is clear that any effluvia caused by means of this kind that has the effect of making any persons who happen to be sick worse, as this is

proved to do, comes within the terms of this section. The words of the Act are, "a nuisance, or injurious to the health of any of the inhabitants of the district." It is clear that the effluvia in question do seriously affect certain of the inhabitants of the district, and I hold that effluvia having such an effect are injurious to health. The case therefore must go back to the magistrates, with our directions to this effect.

STEPHEN, J.—There are two questions before us. The first is this: Was it necessary for the appellants to prove injury to health? I answer, no. It was sufficient to prove that this manufactory causing effluvia was so conducted as to be a nuisance, whether injurious to health or not. In other words, the question is whether the conjunction "or" is disjunctive or not—whether, that is, the expressions "nuisance" and "injurious to health," which are connected by it, are to be understood as equivalent terms or not. Though it is so interpreted sometimes, that is obviously not its literal meaning, and here it is not, in my opinion, its proper meaning, although by reference to the provisions of 18 & 19 Vict. c. 121, sect. 8, and the case of *The Great Western Railway Company v. Bishop*, which has been cited, it has been attempted to show that it is. The principle is stated in the judgment of Cockburn, C.J. in that case (L. Rep. 7 Q. B. 552): "It is plain that the object was to protect the public health and private health of individuals living in towns, or in the neighbourhood of towns. I think that affords us a guiding principle by which to construe this Act, and that 'nuisance,' the general term used in the Act, must be taken to mean a nuisance affecting public health. We have then to say whether this is a nuisance of that description." Applying that principle here, "nuisance" in sect. 114 must mean any nuisance connected with the carrying on of an offensive trade which diminishes the comfort and enjoyment of life; and disagreeable smells are among the nuisances by these sections held in view and prescribed. I think, moreover, that this section is complete in itself; and this case comes within it, since the obvious effect of the processes described would be to create a bad effluvia, such as it is admitted would be a nuisance at common law. As to the second question, I think that the appellants proved that the nuisance was injurious to health within the fair meaning and construction of the statute. It was proved that it was such that sick persons might suffer from the smells, and I quite agree with the judgment of my lord on this point. It seems almost self-evident that that which makes sick persons worse must interfere with the general standard of health of people who are well. On both questions therefore our opinion is in favour of the appellants.

*Case remitted accordingly.*

Solicitors for the appellants, *Williamson, Hill, and Co.*, agents for *Hugh W. Pearson*, New Malton.

Solicitors for the respondents, *Emmet and Son*, agents for *Arthur H. Jackson*, Malton.

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A. MITCHELL v. THE CITY OF GLASGOW BANK AND LIQUIDATORS.

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**House of Lords.***March 27 and 28, and May 20.*

(Before the LORD CHANCELLOR (Cairns), Lords HATHERLEY, PENZANCE, O'HAGAN, SELBORNE, BLACKBURN, and GORDON.)

**A. MITCHELL v. THE CITY OF GLASGOW BANK AND LIQUIDATORS. (a)**

ON APPEAL FROM THE FIRST DIVISION OF THE COURT OF SESSIONS IN SCOTLAND.

*Companies Act 1862—Trusts (Scotland) Act 1867—Joint-stock company—Winding-up—Resignation of trustee shareholder.*

*In Scotland gratuitous trustees have power, under the 24 & 25 Vict. c. 84, and the 30 & 31 Vict. c. 97, to resign their office in the manner provided by the Acts.*

*M. was one of several trustees who held stock in a joint-stock company with unlimited liability. They were registered on the books of the company as "trustees." The company became insolvent, and a resolution was passed to wind it up voluntarily. In the interval between the stoppage of the company and the commencement of the winding-up M. resigned his trusteeship in the manner prescribed by the Act, but the directors declined to remove his name from the list of shareholders.*

*Held (affirming the judgment of the court below), that his resignation did not divest him of his liability to the creditors of the company, and that the refusal of the directors to remove his name was not a "default" within sect. 35 of the Companies Act 1862 (25 & 26 Vict. c. 89).*

THIS was an appeal from a judgment of the First Division of the Court of Session in Scotland, consisting of the Lord President (Ingليس) Lords DEAS MURE, and SHAND. The facts of the case were these:—The City of Glasgow Bank was established in 1839 as a joint-stock company, and in 1862 it was incorporated under the Companies Act of that year (25 & 26 Vict. c. 89.)

The appellant was a merchant at Glasgow, and he was one of a body of trustees appointed under the trust disposition of the late Mr. Andrew Walters, of Belleville, Dalkeith-road, Edinburgh. The trustor died on the 23rd May 1875, leaving a trust estate of about 75,000*l.*, including 8000*l.* stock in the City of Glasgow Bank, which was afterwards reduced to 3500*l.*, in respect of which the names of the appellant and of his co-trustees were placed upon the list of contributories. The bank having stopped on the 2nd Oct. 1878, the appellant resigned his office of trustee on the 16th of that month, and on the following day he sent a notarially certified copy of the minute of his resignation to the secretary of the company, with a request that his name should be removed from the stock ledger and register of shareholders. On the same day the secretary of the bank returned the copy of the minute, stating that, in the then circumstances, the directors were unable to comply with the appellant's request. Finding that his name was placed on the list of contributories for the amount of the stock forming part of the trust estate, the appellant on the 18th Oct. presented a petition to the Court of Session praying that his name might be removed from the register of

shareholders of the bank and from the list of contributories, or else that he might be placed on the list of contributories in his representative capacity as being liable only to the extent of the trust estate. The Court of Session rejected the prayer of the appellant's petition, and on the 22nd Oct. it was resolved to wind-up the affairs of the bank voluntarily. On investigation of its affairs it was found to be hopelessly insolvent.

The general question of the personal liability of trustees who had stock standing in their names was decided by the House in the case of *Muir v. The Glasgow Bank* (40 L. T. Rep. N. S. 339).

The Lord Advocate (Watson, Q.C.) and Napier Higgins, Q.C. appeared for the appellant, and contended that by the 24 & 25 Vict. c. 84, and the 30 & 31 Vict. c. 97, a gratuitous trustee in Scotland had power to resign his trust at any time with certain formalities, which had been observed in this case. The appellant was, by virtue of his resignation, *ipso facto* divested of the trust estate, which vested in the remaining trustees, without any formal transfer before the commencement of the winding-up. Neither creditors nor shareholders had a right to complain, for it appeared on the register that the appellant was one of several trustees, and as such he had a right to resign at any time.

Kay, Q.C., Benjamin, Q.C., Dawsey, Q.C., and Kinnear (of the Scotch Bar) appeared for the respondents, and argued that the liquidators were justified in not removing the appellant's name from the list of contributories, because his resignation did not operate *ipso facto*, as a divestiture except as regards the remaining trustees; it did not affect his position as a shareholder in the partnership, which stands on a different footing from the trusteeship. In any case it was too late to resign after the bank had stopped:

See the Companies Act 1862, s. 131.

The following cases were cited in the arguments:

*Nation's case*, L. Rep. 3 Eq. 77; 15 L. T. Rep. N. S. 308;

*Allin's case*, L. Rep. 16 Eq. 449;

*Shepherd's case*, L. Rep. 2 Eq. 564; 2 Chan. 16; 14 L. T. Rep. N. S. 788;

*Martin v. Wight*, 3 Court of Session Cases, 2nd series, 485.

The Lord Advocate was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 20.—Their Lordships gave judgment as follows:—

THE LORD CHANCELLOR (Cairns).—My Lords, the general question of the liability of the appellant in this case as a trustee is disposed of by the decision in *Muir's case* (40 L. T. Rep. N. S. 339). The only point to which I have to direct your Lordships' attention is the claim by the appellant under the 35th section of the Joint-Stock Companies Act to have his name removed from the register, upon the ground that before the winding-up of the bank commenced he resigned his office of trustee and intimated his resignation to the bank. The facts are these: The appellant was a trustee and executor of Andrew Walters, deceased, who died in 1875, and on the 16th Oct. 1878, 3500*l.* stock of the bank was standing in the names of the appellant and his co-trustees in the books of the bank. On the 16th Oct. 1878, the appel-

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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lant resigned his office of trustee, under 24 & 25 Vict. c. 84, by a minute entered in the sederunt book of the trust, and signed in the book by himself and the other acting trustees. On the 17th Oct. he caused a certified copy of the minute of resignation to be delivered to the secretary of the bank at its head office, and requested that in pursuance thereof his name should be removed from the register. On the same day the secretary replied, "I am instructed to say that under present circumstances we are unable to comply with your request." The circumstances referred to in this letter were, of course, the insolvency and the stoppage of the bank, and the facts with regard to the stoppage of the bank are these: On the 2nd Oct. it ceased to carry on business and closed its doors. It never resumed business, and it is admitted between the parties that its stoppage was notorious on and after that date throughout the United Kingdom, and that the directors knew at the time of the stoppage that the insolvency of the bank was irretrievable. On the 5th Oct. the directors convened an extraordinary general meeting of the shareholders by advertisement for the 22nd Oct., to consider, and if thought fit to pass, resolutions, under the Companies Act 1862, to wind-up the bank voluntarily by reason of its inability to carry on business. On the 11th Oct. the directors instructed the secretary, by a minute of that date, to reply to all requests for a transfer of shares that the directors did not feel warranted to prepare or register any transfer of the bank stock. On the 16th Oct. a further minute on the same subject was made that counsel concurred in thinking that the directors in the present circumstances were not warranted, and that it would be improper for them to execute or register any transfer. The last meeting of the directors was held in the forenoon of the 18th Oct., and they took no charge of the business of the bank thereafter, and the following morning they were apprehended on a criminal charge. On the 22nd Oct. the resolution was passed for the voluntary winding-up of the bank, and the winding-up under the Act commenced from that day. The name of the appellant having been duly entered upon the register and appearing there at the time of the winding-up, he is clearly liable to be placed on the list of contributories, unless he can show something more than his mere resignation of his trusteeship. His resignation of his trusteeship alone would not terminate his liability to the bank. He ceased to be a trustee, but it remained for him to terminate his liability in respect of the bank by a transfer, or something equivalent to a transfer of his shares. This transfer the bank refused to make, and the appellant has, therefore, to show, under the 35th section, that default has been made or that unnecessary delay has taken place in entering on the register the fact of his having ceased to be a member. The words of the section with regard to delay may be put out of the case. There is no question of delay. The application of the appellant was considered and answered, and the answer was a refusal under the circumstances to remove his name. The real question, therefore, is, was there a default in the directors in not removing his name? In an ordinary partnership there is, of course, no power in a partner to assign over his interest in the partnership and thus to get rid of the liabilities to those who have claims against

the partnership. In the case of a joint-stock company, the shares are made transferable, and the arrangements for effecting a transfer are part of the general powers given to the directors in the management of the concern, the control vested in the directors over the right of transfer being in some companies greater and in others less. I should be very much disposed to hold that the power given to the directors to transfer shares, whether it were a power mainly ministerial or a power attended with any right of investigation or option, was, as was said by my noble and learned friend Lord Selborne, in *Allin's case* (L. Rep. 16 Eq. 449), power intended to be in operation, together with the other clauses of the deed of settlement and while the company was carried on as a going concern, for the purposes of a common agreement, and was not intended to be in operation for the purpose of enabling individuals to escape from liability when the company had ceased to be a going concern, and when the general clauses of the deed were no longer capable of being acted on. But I do not think it is necessary in the present case to lay down a general rule in terms so extensive. The directors of the Glasgow Bank were acting in the management of the business of the company as the agents of the shareholders. Among their other duties was that imposed upon them by the 46th article of the deed, which provided that if it should appear at any time on balancing the books that a sum equal to the whole of the reserve surplus fund and also to one-fourth part of the paid-up capital stock had been lost, a special general meeting should be called, and the company should thereupon be dissolved, unless a majority of two-thirds in value should determine otherwise. The directors had closed their doors and publicly announced the stoppage of business on the 2nd Oct. It would have been competent to any creditor at any time afterwards to have presented a petition to the court for the winding-up of the company, for which petition there were ample materials; and the presentation of the petition would under the Act have been the commencement of the winding-up, after which no valid transfer of a share could have been made. It is impossible to doubt that what prevented an adverse application to wind-up the company was the notice issued by the directors on the 5th Oct. which, in effect, stated to the public that they would call the shareholders together on the 22nd for the purpose of winding-up the company voluntarily, on the ground of its insolvency. There was involved in this notice an appeal to all persons interested to support the directors in the proposal for a voluntary liquidation in preference to an adverse liquidation. Now, if the directors, after taking the step most calculated to disarm those who had a right to proceed adversely against the bank, had used the interval to permit or facilitate arrangements in the constitution of the bank, it appears to me they would have been acting both in opposition to the spirit of the 46th article and in bad faith to those having claims on the company; and that, not only were the directors of the company precluded under the circumstances from assenting to transfers, but the shareholders also, whose agents and representatives the directors were, were precluded from making those transfers. I am therefore of opinion that there was no default under the 35th section in the directors in not

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entering on the register the fact of the appellant having ceased to be a member of the company; that the decision of the Court of Session was right; and that this appeal should be dismissed with costs.

Lords HATHERLEY, PENZANCE, O'HAGAN, SELBORNE, BLACKBURN, and GORDON concurred.

*Judgment appealed from affirmed; appeal dismissed with costs.*

Solicitor for the appellant, *W. A. Loch*, for Campbell and Smith, Edinburgh.

Solicitors for the respondents, *Martin and Leslie*, for Davidson and Syme, Edinburgh.

March 6, 7, 14, and May 5.

(Before the LORD CHANCELLOR (Cairns), Lords HATHERLEY and SELBORNE.)

CHARLTON AND ANOTHER v. THE ATTORNEY-GENERAL. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Succession duty—Power of appointment—Successor—Succession Duty Act 1853 (16 & 17 Vict. c. 51), ss. 2, 4.*

*Where the tenant for life and tenant in tail in remainder of settled estates bar the entail, and resetttle the estates to such uses as they shall jointly appoint, and in exercise of such power create a new power of appointment in the tenant for life and a third person, those persons who become entitled under such second power, on the death of the tenant for life, must be taken to be successors to the first tenant in tail, and are liable to pay succession duty accordingly.*

*S. was tenant for life in possession of certain estates with remainder to W. his eldest son in tail. S. and W. barred the entail and resettled the estates to such uses as they should jointly appoint. S. and W. appointed to such uses as S. and T., his second son should jointly appoint. W. died in the lifetime of S., and after his death S. and T. appointed, subject to the life estate of S., the estate to the use of D., daughter of T. for life, subject to a yearly rent-charge to be paid to A., widow of S.*

*Held (affirming the judgment of the court below), that the case was governed by The Attorney-General v. Floyer (8 H. L. C. 477; 7 L. T. Rep. N. S. 47) and came within sect. 2 of the Succession Duty Act 1853 (16 & 17 Vict. c. 51), and A. and D. were successors to W. as donor of the power of appointment under which they took.*

THE information in this case was filed for the purpose of settling the rate of succession duty which became payable in respect of certain estate in Shropshire on the death of St. John Chiverton Charlton, who, in 1854, was, under the limitations of a settlement, made in 1820, tenant for life in possession of the estates in question, his eldest son William being the first tenant in tail male thereof in remainder expectant. The estates were at the time subject, among other incumbrances, to a jointure rent-charge of 800*l.* a year, limited to the appellant, Anne Charlton, the wife of St. John. In 1854, St. John, the father, and William, the son, joined in executing a disentailing deed, and settled the estates to such uses as they should jointly appoint. By a subsequent deed they jointly appointed the estates in the

event which happened to such uses as they should jointly appoint, and in default to the use that William should, during the joint lives of himself and his father, receive a yearly rent-charge, the estates, subject to that incumbrance, being settled upon the father for life, with remainder in tail male to William and his sons, failing whom they were to be settled to such uses as St. John and his second son Thomas should jointly appoint, with certain limitations over. The eldest son, William, died in 1864 without issue and without the joint power of himself and his father having been exercised. In 1866, the father and the second son, Thomas, executed their power and appointed the estates, subject to the father's life estate, to the use that, after the death of the father, Anne, his widow, should receive a yearly rent-charge for life, and that the estates, thus incumbered, should go to the use of Dora, the daughter of Thomas, for her life. The father died in 1873, leaving his widow surviving him, and his granddaughter Dora came into possession of the estates. In these circumstances the Commissioners of Inland Revenue claimed succession duty at the rate of 1 per cent. on Anne Charlton's jointure rent-charge, as being a succession derived from William, the donor of the joint power created by the settlement of 1854, which was exercised by the re-settlement of 1866, and at the rate of 8 per cent. on the succession of Dora, as a succession derived in a similar manner. The appellant Anne maintained that she was only chargeable with succession duty at the rate of 1 per cent. on one moiety of her rent-charge, as being a succession upon the death of her husband, derived from the second son Thomas as the predecessor under the re-settlement of 1866; and the appellant Dora maintained that she was only liable to pay succession duty at the rate of 1 per cent. on the estates comprised in the re-settlement of 1866, as being a succession upon the death of St. John Charlton, derived by her from him and Thomas as joint predecessors under that re-settlement.

The case was twice argued in the Exchequer Division, and that Court (Kelly, C.B., Amphlett, and Huddleston, BB.), gave judgment for the present appellants, as reported in 34 L. T. Rep. N. S. 503, and 1 Ex. Div. 204.)

On appeal to the Court of Appeal this judgment was reversed by Cockburn, C.J., James, and Brett, L.JJ., Bramwell, L.J. dissenting, as reported in 37 L. T. Rep. N. S. 211, and 2 Ex. Div. 398.

This appeal was then brought to the House of Lords.

The sections of the Succession Duty Act 1853 (16 & 17 Vict. c. 51), upon which the question turned are as follows:—

#### Sect. 2:

Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such

) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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disposition or devolution a "succession"; and the term "successor" shall denote the person so entitled, and the term "predecessor" shall denote settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.

## Sect. 4:

Where any person shall have a general power of appointment, under any disposition of property, taking effect upon the death of any person dying after the time appointed for the commencement of this Act, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled at the time of his exercising such power to the property or interest thereby appointed as a succession derived from the donor of the power; and where any person shall have a limited power of appointment, under a disposition taking effect upon any such death over property, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor.

*H. F. Bristowe, Q.C., G. S. Law, and Spencer Butler* appeared for the appellants, and contended that the succession was derived from St. John Charlton and Thomas, under sect. 4 of the Act, set out above.

The *Attorney-General* (Sir J. Holker, Q.C.) and *W. W. Karslake* (*Gorst*, Q.C. with them), for the respondent, argued that the case was not within sect. 4, and even if it were the duty claimed was payable. The case cannot be distinguished from the cases of

*The Attorney-General v. Lord Braybrooke*, 4 L. T. Rep. N. S. 218; 9 H. L. Cas. 150;

*The Attorney-General v. Floyer*, 7 L. T. Rep. N. S. 47; 9 H. L. Cas. 477;

*The Attorney-General v. Smythe*, 9 H. L. Cas. 497.

In addition to the cases cited in the judgment the following were also referred to in argument:

*The Solicitor-General v. The Law Reversionary Interest Society*, 28 L. T. Rep. N. S. 769; L. Rep. 8 Ex. 283;

*The Attorney-General v. Lord Sefton*, 12 L. T. Rep. N. S. 242; 11 H. L. Cas. 257;

*Re Coope and Allen's Contract*, 35 L. T. Rep. N. S. 890; 4 Ch. Div. 802.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 5.—Their Lordships gave judgment as follows:

The LORD CHANCELLOR (Cairns).—My Lords, the property which is subject to succession duty in this case was disentailed and resettled by deeds of the 22nd and 23rd March 1854, which both sides have taken in their argument as the commencement of the title. At this time St. John Ohiverton Charlton was tenant for life of the property, and his eldest son, St. John William Charlton, was the first tenant in tail male. By the deed of March 22, 1854, the property was settled to such uses as St. John Charlton and William Charlton should appoint; in default to St. John for life, with remainder to William in tail male, with remainder to St. John in fee. By the deed of the 23rd March a settlement was made under the joint power of St. John and William, to such uses as St. John and William should appoint; in default to secure an annuity of 800*l.* to William during the joint lives of himself and St. John; remainder to St. John for life; remainder to William for life; remainder to William's first and other sons in tail male; remainder to such uses as St. John and Thomas, his second son, should appoint; remainder to Thomas for life; remainder to his first and other sons in tail male. By a

re-settlement of the 16th Feb. 1866, at which time William was dead without issue, St. John and Thomas resettled the estate, subject to the life interest of St. John, to such uses as St. John and Thomas should appoint; remainder to secure a rent-charge of 1700*l.* to the appellant Anne, the wife of St. John, for her life, and, subject thereto, to the appellant, Dora Meyrick, for certain interests therein specified. St. John, the tenant for life, died in 1873, and thereupon the succession to the appellants opened; and the question is, from whom do they take the succession, and what is the rate of duty payable? The Court of Appeal has held that they derive their succession from William Charlton, the tenant in tail, stepson of one appellant, and uncle of the other, and it is the correctness of this decision which is now in question. If this question is to be decided by the 2nd section of the Succession Duty Act (16 & 17 Vict. c. 51), I do not think the answer to it can admit of any doubt either on principle or authority. The 2nd section, reading it shortly, enacts that every disposition of property by reason whereof any person shall become beneficially entitled to any property on the death of any person shall be deemed to confer on the person entitled by reason of such disposition a succession; and the term "successor" shall denote the person so entitled, and the term "predecessor" shall denote the settlor or other person from whom the interest of the successor is derived. The appellants undoubtedly became beneficially entitled to property upon the death of St. John Charlton, and they became so entitled by reason of a disposition of the property. What was the disposition of the property? I cannot doubt that it was that contained in the three deeds which have already been mentioned, the 22nd and 23rd March 1854 and the 16th Feb. 1866. It was the first two of these which created the power in St. John and Thomas, and it was the third which exercised the power. Nor should I doubt that in this disposition William Charlton was the settlor. St. John Charlton had throughout nothing but an estate for life, and the first estate of inheritance was in William; and it was out of that estate of inheritance and out of the fee into which it was expanded that the interests given to the appellants came. But I look upon this construction of the 2nd section as to cases coming within it as completely and finally settled by the cases in this House (*Attorney-General v. Lord Braybrooke*, 4 L. T. Rep. N. S. 218; 9 H. of L. Cas. 150; *Attorney-General v. Floyer*, 7 L. T. Rep. N. S. 47; 9 H. of L. Cas. 477; *Attorney-General v. Smythe*, 9 H. of L. Cas. 497), and as no longer open to controversy or argument. The contest, however, of the appellants at your Lordships' bar was not so much founded on the 2nd section as it was directed to show that it was the 4th and not the 2nd section of the Act which applied to the present case, and I observe that in the Court of Appeal much difficulty was felt by some of the learned judges with reference to the 4th section. Bramwell, L.J. thought that the present case was within the very words of the 4th section. The Lord Chief Justice thought that the present case, and also the cases in this House which I have already referred to, all came within the 4th section; but he considered he was bound by the authority of the decisions referred to, however fatally wrong, as he said, he might deem them to be. Brett, L.J., said that if the present



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case is to be treated as coming under sect. 2, then he could see no case to which sect. 4 could apply. There is no doubt that the cases in this House, especially those of *Floyer* and *Smythe*, did determine not only that the construction of the 2nd section was such as I have mentioned, but also that it was the 2nd and not the 4th section which governed the cases. And I agree with what is said by James, L.J., that the only distinction suggested is, that in those cases the donors of the power were the same as the donees of the power, that is the tenant for life and the eldest son; and that in the present case the donees are the tenant for life and the second son, and that this creates no more difference in law than the fact that the names are different does. But the argument that the 4th clause of the statute is applicable to a case like the present appears to me to be founded on an entire misconception of the meaning of the clause. In the first place, I must observe that the words, "where any person shall have a general power of appointment over property he shall, in the event of his making any appointment thereunder, be deemed to be entitled at the time of his exercising such power to the property or interest thereby appointed as a succession derived from the donor of the power," appear to me to point to a general power possessed by one person, enabling him to dispose of the property as an absolute owner, and not to a power given in a family settlement to a father and son where one is intended to be a check upon the other in the exercise of the power. It is true, as was observed in the argument, that words in the singular may be construed as if they were plural, but you must not turn one member of a sentence into the plural and leave the other in the singular. The argument of the appellant requires that you should construe the section thus, "where two persons shall have one general power of appointment," &c. But this would be absurd, for it would make both the donees of the power, in the event of an exercise of it, take a succession and be liable to pay a duty for it, although the name of one might, as I have already said, have been inserted merely as a check, and without the idea of any beneficial interest. The fact is the 4th section appears to have been inserted, although it is not necessary in the present case absolutely to decide its effect, for the purpose of meeting a case that might well occur, and which but for the 4th section would have been left uncovered. Property might be given after a life interest to various persons in succession, but subject to an absolute and general power in A. B. to dispose of the property as he pleased, or to a limited power in A. B. to dispose of the property among certain objects of the power. The power might not up to or at the time of the opening of the succession have been exercised, and it might for some time remain uncertain whether it would ever be exercised. If there was no enactment but the 2nd section, the succession would have to be determined upon the death, and there would, *in hoc statu*, be no means of dealing with the succession, except as a succession in those taking in default of appointment. It is here that the 4th section appears to come into operation. It keeps open the question of a subsequent exercise of the power, and as soon as the power, if a general power, is exercised, it fixes the person exercising the power with the consequences of a succession, as if the absolute

property had come to him; and if it is a limited power, and is exercised, it fixes those who take under it as if they had derived a succession from the person creating the power. So far, therefore, as regards the construction of the 2nd and 4th sections of the Act, it appears to me that the case of the appellants must fail. A further argument was addressed to your Lordships which does not appear to have been used in the courts below—viz., that there was here a transfer of interest within the meaning of the 15th section of the Succession Duty Act. My Lords, as to this, it is sufficient for me to say that the case appears to me to be covered by the decision in the *Attorney-General v. Cecil* (L. Rep. 5 Ex. 263; 23 L. T. Rep. N. S. 20), the grounds of which appear to me to be satisfactory, and to be fatal to the argument of the appellants. I therefore propose to move that the appeal in this case be dismissed with costs.

LORD HATHERLEY.—My Lords, I have in substance nothing to add to what has fallen from my noble and learned friend on the woolsack, in whose opinion upon the case I entirely concur. It has been pointed out that, amongst the numerous cases which have been brought before the courts upon the Succession Duty Act, the two sections which have been chiefly referred to in this case, namely the 2nd and the 4th, have been completely covered by a series of decisions. Sect. 2 has been open to question upon the two branches which it contains. The first branch of it deals with the case of disposition, the second branch with the case of devolution. The question as to how far the origin of a title should be attributed to devolution, and how far to disposition, was fully considered by this House in the case of *Lord Saltoun v. The Lord Advocate* (3 Macq. 659; 3 L. T. Rep. N. S. 40), and again recently in the case of *Lord Zetland v. The Lord Advocate* (3 App. Cas. 505; 38 L. T. Rep. N. S. 297). In that case there was a sort of conjoint action; a disposition created the whole interest, and in that interest as created by the disposition a series of successions occurred, by descent or otherwise, arising out of the original disposition. The question was whether you were to consider the devolution, which had taken place in the course of pursuing the disposition which had been made, as forming a devolution in every sense, so that the interest of the successor was to be calculated upon that ground, or whether you were to consider it a case of disposition within sect. 2 of the Act. In the present case we have to determine whether or not the disposition is to fall within sect. 2 of the Act only, or within a different section altogether, namely the 4th. The only difficulty arising upon that is this: there could be no doubt that if you did not find the 4th section there at all, this would be a disposition under the 2nd section. It is a series of family settlements, one following the other according to the usual course of conveyancing, by which the father and the son, when the son has become tenant in tail in possession, create an interest by which they take a joint power, limiting back the interest of the father usually for life, and also sometimes curtailing the son's interest, but giving a joint power to the two. In regard to dispositions, there seems to have been in the minds of the framers of this Act a notion that it would be necessary to include certain other cases which they do not consider sufficiently included in the

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2nd section. That is the only way in which we can account for the 4th section at all. Then the question would naturally arise, whether that which is done by an exercise of the power, being in every sense of the word a disposition, should fall within the 2nd section or the 4th, having a peculiar construction given to it in the case of such a disposition as we have before us. I take the disposition here to be contained in the series of settlements which we find in the three deeds which have been referred to, under which there was first of all a joint power in William Charlton and St. John Charlton, the estate tail being in William, the eldest son, and afterwards, upon that limitation failing, and the estate tail failing, there was a joint power of appointment by Thomas, the second son, and his father, and limitations over in default of appointment. Now whatever difficulties might have surrounded this case, (and I confess there are difficulties which at first sight are somewhat calculated to embarrass those who have to give an opinion upon the exact construction of the Act), as regards the first question, namely, whether or not this case falls within the 2nd section or the 4th, it appears to me to be covered by the authorities which have been mentioned, namely, *Floyer's* case, *Smythe's* case, and *Lord Braybrooke's* case. No doubt *Floyer's* case was not overlooked in the decision of the subsequent cases. It is referred to in those decisions, and the case seems to have been altogether well considered. If that case be law, which we must hold it to be, as being a decision of this House, then I apprehend the matter is settled; this case falls within the 2nd section, and consequently, according to *Floyer's* case, does not fall within the 4th. My noble and learned friend on the woolsack has given his view of the reasons which may have induced the Legislature to frame that section in order to meet certain cases which might not otherwise have been provided for at all, either by the 2nd, or by any other sections of the Act. I think there is sufficient ground for saying that we are not, on account of any supposed inutility of the 4th section, unless the construction be given which is contended for by the appellants, driven to the necessity of giving it that construction, but that we are in a position in which we can without embarrassment uphold the doctrine which has once been established by this House; and I confess I should feel it scarcely competent in us to reverse that doctrine, which is so established, not by one, but by two or three cases. It appears to me that if there had been such a difficulty as is suggested with reference to the 4th section, the only mode of curing it would have been by a subsequent application to the Legislature. I do not think, however, that any such difficulty arises. It seems to me, for the reasons which have already been urged, and which I will not repeat; that there is good ground for the existence of the 4th section, and that we are not driven to the necessity of applying it to this case. I am content to rest upon the decisions which have well established that this is a case to which sect. 2 is applicable. The consequence is that the appellants cannot succeed.

Lord SELBORNE.—My Lords, in the case of *The Attorney-General v. Lord Braybrooke*, where the succession was taken under a joint appointment by father and son, the judgment of this House

proceeded upon the principle that the appointment was to be read into the deed creating the power, according to the general rule of law applicable to the execution of powers. Lord Cranworth was of the same opinion in the cases of *Smythe* and of *Floyer*; and Martin, B. was of the same opinion in the case of *The Attorney-General v. Cecil*. It is true that in *Floyer's* and *Smythe's* cases Lord Wensleydale, and in *Cecil's* case Kelly, C.B., appear to have founded their judgments on a different principle, which the former (erroneously I think) considered to have been the principle adopted in *Lord Braybrooke's* case, namely, that the interests of the appointees under the joint powers were carved out of the new estate (being in all these cases except one an estate tail) which the eldest son took under the resettlement; and that the disposition to be looked to was that executing, not that creating the power. The single case in which that new estate was not an estate tail was *Lord Braybrooke's*, but there the son had (subject to the joint power) a sole and absolute power of appointment by deed or will, which Lord Wensleydale may perhaps have considered equivalent to the inheritance. Unless a distinction can be founded upon sect. 4 of the Succession Duty Act these cases must govern the present. But the result to which they would lead may possibly admit of some question on account of the differences already mentioned between the views of the judges, in and out of this House, who decided all but one of them. In all these cases the same person who was first tenant in tail under the resettlement had also been first tenant in tail under the old settlement, so that it made no difference whether the successions were under the deed executing, or under that creating the power. In either view they were "carved" or "derived" out of the estate, new or old, of that person who was one of the two joint donees of the power. But in the present case it is otherwise. Here neither of the donees of the joint power had, either before or after the resettlement, an estate of inheritance, or anything equivalent to it. The father, both before and afterwards, was first tenant for life, and retained that estate throughout, unaffected by the exercise of the power. The life estate of the son, and the subsequent remainders, were displaced by the exercise of the power, all which had been derived, under the resettlement, from the prior estate tail of the elder brother by his disposition. It may be that in a case in which one of the appointors has an estate, to be displaced by the appointment, commensurate with, or greater than the interests appointed, the view of Lord Wensleydale and Kelly, C.B., may be valid in law, as it certainly would be reasonable and convenient. But to such a case as the present it seems to be incapable of being applied. It is impossible to describe the interest of the present appellants as, in any true sense, "carved" or "derived" out of the life estate of Thomas, because they would equally have taken effect, by virtue of the joint appointment, though Thomas had died before his father; and in the event which has actually happened of his surviving his father they may endure after his death. No rule is laid down in the Act for such a case, unless it be that found in sect. 4; and, in the absence of any such rule, it seems necessary to fall back, as was done by this

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House in *Lord Braybrooke's* case and by Lord Cranworth and Martin B., in the subsequent cases, upon the general principle of law applicable to the execution of powers. Unless, therefore, the present case can be brought within the first part of sect. 4, the appellants fail. But the later authorities are also really decisive against the application of the first branch of the 4th section to this case. I will assume that Turner, L.J. was right when, connecting the words "taking effect" in the 4th section with "a general power of appointment" as their proper antecedent, he said, "Looking at the context, the words of the section refer to the power coming into operation, and not to the appointment under it taking effect": *Re Lovelace* (4 De G. & J. 340; 28 L. J. 489, Ch.) A power must be held to come into operation either when it is actually executed, or when it is first capable of being executed. If then a joint power, such as that in the present case, were "general," and within the first branch of sect. 4, there would have been no possibility of escape from the conclusion that the successions in *Floyer's* case and in *Ocell's* case were governed by that enactment, because in both those cases the joint power was created, became exercisable, and was executed, after the time appointed for the commencement of the Succession Duty Act. But the decisions of this House and of the Court of Exchequer, in these two cases are absolutely irreconcilable with that conclusion. In the judgment of Lord Cranworth in *Floyer's* case, the 4th section of the Act was not lost sight of. "The circumstances," he said, "of the portions arising under a power can make no difference. Indeed this seems to be expressly provided for by sect. 4 of the Act. The interest created by the power must, on well-known principles, be treated as arising under the deed creating the power." He, therefore, seems to have considered a joint power of this kind as falling under sect. 2, and not under the first branch of sect. 4, the effect of which is the same as if it were left under sect. 2. It is true that the distinction between general and limited powers, in the common language of English law, relates not to conditions affecting the donees of a power, or otherwise antecedent to an appointment, but to the nature of the appointment which may be made under the power, and for that reason, if the present case had been untouched by authority, I might have felt embarrassed by the use of that phraseology in sect. 4 of this Act. I do not think that any stress can safely be laid upon the mere use of the word "person" in the singular number, and I cannot at present adopt the view that the whole section has reference to some rare and peculiar description of uses, in which the power is only exercisable, or has been exercised, after a death on which an appointment may take effect, has actually happened. If, however, the substance of the first branch of the section is regarded, it certainly points to that kind of absolute power which is practically equivalent to property, and may reasonably be treated as property for the purpose of taxation. This is the case with a general power exercisable by a single person in any way which he may think fit, but it is not the case when a power cannot be exercised without the concurrence of two minds, the one donee having, and the other not having, an interest to be displaced by its exercise. Nothing could well be conceived more unreasonable, in a

practical point of view, than to treat a joint power, like that now in question, in a family settlement, as equivalent in substance to joint property in the two donees, and I am convinced that the decisions which have refused to give that effect to sect. 4 are in accordance with the true intention of the Legislature, whatever difficulty there may be in the words "general" and "limited" as they there occur. I have referred, as to this point, to the later authorities only, because in the earlier cases, *The Attorney-General v. Sibthorpe* (3 H. & N. 424; 28 L. J. Ex. 9); *Lord Braybrooke's* case, *Smythe's* case, and *Floyer's* case, the powers "took effect," according to the view taken by Turner, L.J. of the meaning of those words in sect. 4, before the time appointed for the commencement of the Succession Duty Act, and therefore could not be within the first branch of it. If that view is not correct, and if it ought rather to be held that a power "takes effect" when an appointment made under it became effective by coming into possession, the earlier as well as the later authorities would be adverse to the appellants. I think, for these reasons, that the judgment appealed from ought to be affirmed.

*Judgment appealed against affirmed, and appeal dismissed with costs.*

Solicitors for the appellants, *Lane, Hussey, and Hulbert.*

Solicitor for the respondent, *The Solicitor to the Inland Revenue.*

### Judicial Committee of the Privy Council.

March 7, 8, 11, and May 8.

(Present: The Right Hons. Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and Sir ROBERT COLLIER.)

THE ATTORNEY-GENERAL FOR THE ISLE OF MAN v. MYLCHREEST AND OTHERS. (a)

ON APPEAL FROM THE COURT OF EXCHEQUER OF THE ISLE OF MAN.

*Isle of Man—Rights of Crown—Mines and minerals—Clay and sand—Act of Settlement—Customary estate of inheritance.*

*The owners of customary estates of inheritance in the Isle of Man claimed a right from time immemorial to dig clay and sand on their lands from open workings. The Act of Settlement of 1704 reserved to the lords of the Isle "all such mines and minerals, of what kind and nature soever, quarries, and delfs of flagg, slate, or stone, as now are, or at any time heretofore have been invested in" them.*

*Held (affirming the judgment of the Court below), that this reservation could not be relied upon to disprove the existence of the alleged custom, but must be interpreted by continuous subsequent usage, and that the Crown, as lord of the Isle, was not entitled to the clay and sand.*

*The rule of English law with respect to the time of legal memory does not exist in the Isle of Man.*

THIS was an appeal from a decree of the Court of Exchequer of the Isle of Man, by which the court decided that the Crown had not the right, as lord

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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of the manor, claimed by an information filed by the Attorney-General to the clay and sand in the customary estates of inheritance in the Isle, and refused an injunction to restrain the respondents from working, manufacturing, or otherwise dealing with the clay and sand in the said lands, and from removing any part of the same, and dismissed the information with costs.

*Gorst, Q.C.*, the Attorney-General for the Isle of Man (Sir James Gell, Q.C.), and *W. W. Karstlake* for the appellants, and contended that the Crown had a right to mines and minerals of all kinds within the Isle. In the reign of Henry IV. the Crown possessed the whole island, which was then granted to Sir John Stanley, with all rights, which are now revested in the Crown by the Act 5 Geo. 3, c. 26. "Mines and minerals" are reserved to the lord of the manor, and these words include clay and sand. The respondents must produce some grant giving them the rights they claim. There is no evidence of any customary right in the tenants of these lands, and the custom, if proved, would be bad in law. They cited

*The Duke of Portland v. Hill*, L. Rep. 2 Eq. 765;

*Bell v. Wilson*, L. Rep. 1 Ch. 303; 14 L. T. Rep. N. S. 115;

*Heat v. Gill*, L. Rep. 7 Ch. 699; 26 L. T. Rep. N. S. 502;

*Ballacorkish Mining Company v. Dumbell*, L. Rep. 5 P. C. 49; 29 L. T. Rep. N. S. 658;

*Ree v. Sedgley*, 2 B. & Ad. 65;

*Ree v. Brettell*, 3 B. & Ad. 424;

*Rosse v. Wainman*, 14 M. & W. 859;

*Earl of Derby v. Duke of Athol*, 1 Ves. sen. 202;

*Mill v. The Commissioner of the New Forest*, 25 L. J. C. P. 212; and also

*Mills' Ordinances and Statutes of the Isle of Man*;

The Act of Settlement of 1704; and

The Preamble to the Act 5 Geo. 3, c. 26.

*J. Brown, Q.C.*, *Sherwood* (of the Manx Bar), *Roscoe*, and *Drinkwater*, for the respondents, argued that the custom to take sand and clay was proved by the evidence. The Act of Settlement of 1704 reserves to the lord "mines and minerals of what kind and nature soever, quarries and delfs of flagg, slate, or stone," and these words cannot be taken to include clay and sand, which have never been claimed by the lords till very recent times. The clauses in the Act must be construed with reference to the evidence of custom, which is conclusive in favour of the respondents, and the custom itself is good:

*Hammer v. Chance*, 4 De G. & S. 626;

*Marquis of Salisbury v. Gladstone*, 6 H. & N. 123;

3 L. T. Rep. N. S. 21; 9 H. of L. Cas. 692; 4 L. T.

Rep. N. S. 849;

*Darvill v. Roper*, 3 Drew. 294.

The "customary estate of inheritance" was an ancient tenure, not created *de novo* by the Act of 1704, which must be construed with reference to former customs and existing rights.

*Gorst, Q.C.* was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 8. The judgment of their Lordships was delivered by Sir MONTAGUE SMITH:—The questions raised in this appeal are, whether the Crown is entitled to the clay and sand in the customary estates of inheritance in the Isle of Man, and to an injunction to restrain the customary tenants from taking, winning, and working these substances. The information filed by Her Majesty's Attorney-General for the Isle alleges that Her Majesty, in right of her Crown, is seised in her

demesne as of fee of the island, Castle Peel, Lordship, and territory of Man, and that Her Majesty and all former lords of the Isle have been seized of the Manor of Man (commonly called the Lord's Lands), and of "all mines and minerals of what nature and kind soever, and quarries and delfs of flagg, slate, or stone within the said manor," with the right, according to the laws and customs of the Isle and manor, to enter upon the lands, and to search for, work, and win the same, making compensation to the customary owners of the lands for surface damage. It then alleges that the first defendant Mylchreest, the owner of a customary estate called Ballaharra, had (by his guardian) granted a lease or licence to the defendants, Moore and others, to dig clay and sand in this estate for the manufacture of bricks, tiles, and pottery. The information prays that it may be declared that Her Majesty is seised of or entitled to all mines and minerals of what nature or kind soever within the lands called Ballaharra, including clay and sand, and all other substances which can be gotten from underneath the surface of the earth for the purpose of profit, whether the same be gotten by open cutting or by underground working, with the right to enter and work them. It also prays that the lease to Moore and others be set aside, and for an injunction to restrain the defendants from winning and working clay and sand. The answer admits the right of the Crown to certain mines and minerals, and to win and work them, but alleges, with regard to clay and sand, that by the laws and customs of the Isle the owners of customary estates of inheritance in customary tenements of lords' lands have from time immemorial without the licence of Her Majesty or her predecessors, lords of the Isle, as of right dug, raised, and got the clay and sand therein, and have removed and used the clay for manuring their own and other lands and for other purposes, and have converted it into bricks and tiles for sale. The circumstances which immediately preceded the filing of the information are worthy of remark. On the 20th Feb. 1867 the Crown granted a lease of the mines and minerals (except slate and stone) under the estate of Ballaharra to the defendants Moore and others, who, by virtue of it, proceeded to get and work the clay and sand in that tenement. The defendant Mylchreest thereupon (on the 25th June 1867) filed a bill in the Chancery Court of the Isle to restrain these workings, and for an account. An injunction was granted, and subsequently a decree was made against the Crown lessees for payment to Mylchreest of the amount of profit made by the workings. In consequence of this decree the lessees surrendered their lease to the Crown. The Crown did not think fit at that time to contest the claim of the customary tenant, and accepted the surrender. The same persons who had been the Crown lessees then took a lease from the customary tenant, Mylchreest, of the clay and sand in his tenement, and were working under it, when the present information was filed, to which they were made defendants. A considerable body of evidence has been produced by the defendants to prove the custom they have set up. Their Lordships do not think it necessary to go at length into the details of the evidence, for it is all one way, the Crown having given no evidence upon the fact of the usage. It will be sufficient to say that it was shown that the Crown by its lessees and licensees, in ancient

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times and recently, worked metalliferous mines and quarries of stone within the customary tenements, but it was not shown to have ever granted a lease of clay or sand, or a licence to dig for them. There is no trace that the agents of the Crown ever interfered with the customary tenants in taking, using, and selling these substances. Moreover, it was proved that clay had been constantly sold by the customary tenants of Ballaharra to the managers of the Crown mines for use in those mines from the time when the defendant Mylchreest's grandfather was owner of the estate down to the present time. Their Lordships can come to no other conclusion upon this evidence than that the custom has in fact existed during and beyond the period of living memory; and, consequently, that its antiquity and continued existence from a time when it might have had a valid commencement ought, unless the contrary appears, to be presumed. The first answer on the part of the Crown, as their Lordships understood it to be, was that it is to be inferred from the state of the title to the lordship of the Isle and the nature of the customary tenures, that the custom could not have had a legal origin. It was further contended that under the Act of Settlement of the year 1704, for settling and confirming the customary tenures, clay and sand were reserved to the lords, and that the custom was either disproved or displaced by this reservation. It is not necessary to enter at any length upon the early history of the Isle prior to the reign of Henry IV. It will be found in Parr's Abstract of the Laws, Customs, and Ordinances of the Isle of Man, edited by Sir James Gell, the present Attorney-General for the Isle. The grant from Henry IV., and the subsequent state of the title, are set out in the preamble of the Act 5 Geo. 3, c. 26, which was passed for carrying into execution a contract for the sale of the Isle of Man by the Duke and Duchess of Athol to the Crown. The devolution of title is not material to the questions in the appeal. It will only be necessary to refer specifically to some grants in which mention is made of mines, and to a private Act of Parliament in the reign of James I., which prohibited the alienation of the lordship, as some arguments have been built upon these documents. In the original grant from Henry IV. to Sir John Stanley, among the general words, which are very numerous, are "mines of lead and iron." There is no mention of other mines or minerals. In a grant of the seventh year of the reign of James I. the general words include "mines of lead and iron and quarries." The judge in the court below considered that it might be inferred, from the special mention of mines of iron and lead, that other mines and minerals did not pass by these grants from the Crown. It appears to their Lordships that an inference of this kind could not, if there were no proof of custom, be drawn from this limited description. The rest of the language of the grants is quite large enough to carry the full title to the soil of the Isle, including minerals (except perhaps precious minerals), so far as the Crown could grant them. But, on the other hand, the lordship could only be granted subject to the rights which the customary tenants might then have acquired by custom or otherwise in their tenements, and this limited description of mines and minerals is so far material that it would be consistent with the custom set up by the defen-

dants, if it then existed. All the rights which belonged to the Stanley family under various grants have been purchased by and are now vested in the Crown by virtue of the Act of 5 Geo. 3., already referred to, and subsequent statutes. The treaty for sale, recited in the Act of 5 Geo. 3, states that the Duke and Duchess of Athol had agreed to surrender to the Crown the Isle, with all the rights in and over the soil as lords of the manor, "and all mines, minerals, and quarries according to their present rights therein." This language, it is to be observed, is by no means descriptive of unqualified rights. By the Act of 7 Jac. I., already referred to, the Isle was settled upon the sons of William, Earl of Derby, in tail male, and made inalienable by them. It has been contended at the bar, on the part of the Crown, that this prohibition bound not only the heirs in tail, but the heirs general of the earl, and therefore that from the time of this Act no grant or concession of the clay and sand to the tenants could be valid. The question whether the clause against alienation bound the heirs general, to whom the lordship of the Isle ultimately came, was a good deal discussed in the Court of Chancery in the case of the *Bishop of Sodor and Man v. Earl of Derby* (2 Ves. sen. 387). Their Lordships, however, do not feel themselves called upon to consider this nice question; for, assuming that the prohibition be taken to bind the heirs general of the earl, it would not interfere with the view they are disposed to take of the rights of the customary tenants. That the estates of these tenants were originally of a low kind is abundantly clear. Certain ordinances printed in Mills' Collection of the Ancient Ordinances and Statutes of the Isle of Man, which are described as "ordinances, statutes, and customs presented, reputed, and used for laws in the Isle of Man, that were confirmed as well by Sir John Stanley, king and lord of the same land, and his predecessors, as by all barons, deemsters, tenants, inhabitants, and commons of the same land," were referred to on this point. From the first ordinance in this collection, which is without date, and from another dated in 1422, it may be inferred that the tenants then held from year to year, though probably even at that early period with some customary privilege of renewal. Yet, however precarious these tenures may have originally been, they had certainly come to be treated as permanent and alienable holdings before 1583, for in that year an ordinance was passed prohibiting any grant, sale, or exchange of their lands by the tenants without the licence of the lord or his council upon pain of forfeiture—not of the lands—but of a pecuniary fine. An ordinance of 1593 affords distinct evidence that at that time the customary tenures were deemed to be heritable estates. It is a law of limitation, and provides that "if any person shall pretend title to any farm, house, or ground within the Isle, and does not exhibit his bill in writing for the same before the earl, or his lieutenant or principal officer, whereby it may be entered of record within the space of twenty-one years next after he or his ancestors have been dispossessed thereof, then he and his successors to be utterly barred from making any title thereunto." But the antiquity and nature of these customary estates is placed beyond doubt by the Act of Settlement of 1704, by which they are declared to be ancient customary estates of in-

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inheritance, descendible from ancestor to heir, according to the laws and customs of the isle. Having now adverted to the history of the title to the lordship or manor of Man, and of the customary tenures, the question arises whether there is anything in that history from which it is necessarily to be inferred that the custom in question could not have had a legal origin. Their Lordships are of opinion that there is not, and therefore that, unless such an origin is negatived by the Act of Settlement of 1704 to be hereafter adverted to, or other evidence, it ought from the existence of the usage during and beyond living memory to be presumed. The customary tenures, even in the earliest times to which the evidence extends, were not so base as that of copyhold tenants at will, and there seems to be no reason why usages which in this country have been engrafted on holdings at will as legal customs should not equally be engrafted on the tenures in the manor of Man. In considering whether the custom is ancient and immemorial, the question is not incumbered by the arbitrary rule of the English law, which has fixed the reign of Richard I. as the period of legal memory. From the evidence that the custom has existed beyond living memory, it may, their Lordships think, be presumed to have had an origin, if that were necessary to be found, before the grant of Henry IV. to Sir John Stanley, and certainly before the prohibition against alienation in the statute passed in the seventh year of the reign of James I. How much earlier it is unnecessary to inquire. It is sufficient to say that the evidence warrants the presumption that the custom grew up with the consent of former lords of the manor of Man at a time when they were free to give consent. The customary tenures themselves, which are described and declared in the Act of Settlement to be ancient, must have so grown up, and it may be presumed from the existence of the custom, if nothing to the contrary appears, that it grew up with the tenures as one of their customary incidents. Customs of a similar kind claimed by copyhold and customary tenants were established and held to be valid in *Hammer v. Chance* (4 De G. J. & S. 626) and *Marquis of Salisbury v. Gladstone* (6 H. & N. 123; 3 L. T. Rep. N. S. 21; 9 H. of L. Cas. 692; and 4 L. T. Rep. N. S. 849). Their Lordships have now to consider the effect of the saving clause in the Act of Settlement of 1704. It was contended on the part of the Crown that, whatever might be the evidence of usage, this clause involved a negation of the custom or overrode it. The Act was passed by James, Earl of Derby, lord of the isle, and his officers, and twenty-four keyes, representatives of the isle. After declaring and confirming to the tenants their ancient customary estates of inheritance in their tenements, as already stated, it contains the following clause: "Saving always unto James, Earl of Derby, and all other persons who shall hereafter become lords of the isle, all such royalties, regalia, prerogatives, homages, fealties, escheats, forfeitures, seizures, mines and minerals of what kind and nature soever, quarries and delfs of flagg, slate, or stone, franchises, liberties, privileges, and jurisdictions whatsoever as now are or at any time heretofore have been invested in James, Earl of Derby, or in any of his ancestors, lords of the isle." It was contended for the Crown that the word "minerals"

used in the clause comprehended clay and sand. Doubtless the word in its scientific and widest sense may include substances of this nature, and, when unexplained by the context or by the nature and circumstances of the transaction, or by usage (where evidence of usage is admissible), would, in most cases, do so. But the word has also a more limited and popular meaning, which would not embrace such substances, and it may be shown by any of the above-mentioned modes of explanation that, in the particular instrument to be construed, it was employed in this narrower sense. In the case of the *Earl of Rosse v. Wainman* (14 M. & W. 859), the Court of Exchequer held that in an Inclosure Act containing a clause reserving to the lord of the manor all mines and minerals, the latter word was used in its full sense. The court said: "The word minerals, though more frequently applied to substances containing metal, in its proper sense includes all fossil bodies or matters dug out of mines;" and it decided that beds of stone found in the allotments which might be dug by quarrying, belonged to the lord. In coming to this decision the court looked at the whole Act to ascertain its object and intention, and referred to other parts of it in support of its construction of the word. An elaborate inquiry into the various senses in which the word "mineral" might be used was made by Kindersley, V.C. in *Darvill v. Roper* (3 Drew. 294). In certain deeds of partition there occurred an exception of "the mines of lead and coal and other mines or minerals." Scientific witnesses were examined, who, according to the report, agreed in defining minerals to be any crystalline or earthy substance, whether metalliferous or otherwise, existing in or forming part of the earth, and which might be worked by means of a mine or quarry. The learned Vice-Chancellor refused to interpret the word in this sense, and construed it, according to what he considered to be the intention of the parties to be collected from the deeds, to mean such minerals only as are worked by means of mines. He consequently held that quarries of limestone were not within the exception. In this case the Vice-Chancellor sought to discover from the general scope of the deeds the sense in which the parties had used the word. Kindersley, V.C. gave the same construction to the word "minerals" when used in an exception in a modern conveyance of land, and held that freestone did not come within it: (*Bell v. Wilson*, 12 L. T. Rep. N. S. 529.) His opinion on this point was overruled by the Lords Justices, but they at the same time agreed with him in his construction of the power to work the minerals, holding that the grantee could only get the freestone by underground working. The exception in this case contained the word "metals" before minerals, indicating that the latter word was intended to embrace substances other than metals. The deed also contained nothing from which it could be inferred that the word "minerals" was not to have its full meaning. Turner, L.J. said: "Freestone is a mineral, and I can find nothing in the nature or context of this deed to show that it was not intended to be included in the exception:" (*Bell v. Wilson*, L. Rep. 1 Ch. App. 303; 14 L. T. Rep. N. S. 115.) The last decision to which reference need be made is *Heat v. Gill* (L. Rep. 7 Ch. App. 699; 26 L. T. Rep. N. S. 502.) In that case the Duke of Cornwall, as lord of a



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manor, had granted the freehold of a tenement to the copyholder, reserving "all mines and minerals within and under the premises," with power to work them. It was held that a bed of china clay was within the exception. An injunction was, however, at the same time granted to restrain the duke from getting the china clay in such a way as to destroy or seriously injure the surface, though, as the court observed, this was the only way in which it could be got. Mellish, L.J. stated the result of the authorities, in his view, to be "that a reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context, or nature of the transaction to induce the court to give it a more limited meaning." In that case there was nothing in the context, or nature of the transaction, to explain or qualify the word, nor any usage to show in what way the parties had interpreted it. On the contrary, the nature of the transaction, in the view of the Lord Justice, supported the widest construction of the word. He went on to observe that the lord of a manor is beyond all question entitled to the minerals in the most general sense of the word under a copyhold tenement, and that there is nothing the copyhold tenant is entitled to get out of the soil and sell for a profit, adding, however, the important qualification "in the absence of special custom." It was not pretended in that case that any custom existed, and consequently the exception of minerals in its widest sense was consistent with the pre-existing position and rights of the parties (a). In the present case a custom for the tenants to take clay and sand has been shown to exist. It was not therefore, *a priori*, to be expected that anything would be found in an Act passed for declaring and confirming the existing rights of the tenants which should destroy one of those rights. The words "quarries and delfs of flagg, slate, or stone" appear to be used to describe open workings, and the specified substances got by such workings, as distinguished from mines properly so called, and mineral substances usually got by underground works. The word "delfs" probably means open pits or diggings. If the word minerals were intended to be used in its widest signification, it was obviously unnecessary to make specific mention of flagg, slate, and stone. The intention appears to have been to except two classes of things, first, mines, and all substances of whatever kind and nature got by mining, and, secondly, quarries and delfs, not of all substances which might be got by quarrying or open pits, but of those only which are specifically described. It is not disputed that clay and sand are got from open workings. Again, the exception is by way of reference. The language is, "All such mines, minerals, &c., as now are or at any time heretofore have been invested in the said James, Earl of Derby, or in any of his ancestors, lords of the said isle." In the absence of evidence, one way or the other, it might be presumed that Lord Derby and his ancestors, as lords of the manor, had full right to all minerals, and, though in the original grant to Sir John Stanley mines of lead and iron only are mentioned, that alone, as already observed, would not, in the absence of evidence of custom, be sufficient to limit the right. But, however that may be, the exception is not

absolute, but framed by way of reference to antecedent rights. In their Lordships' view, therefore, the reservation in the Act of Settlement cannot be relied on to disprove the existence of the custom, as it might have been if its language had been clear and unambiguous. They further think that the document is of a nature and date which allows of its uncertain language being interpreted by continuous subsequent usage; and if it be competent so to interpret the reservation, the usage in this case demonstrates that it could not have been the intention to employ the word "minerals" in a sense which would include clay and sand. It is scarcely conceivable, if the custom had not existed, or if the Act had really excepted clay and sand, that the customary tenants should have been allowed to commit what, on the hypothesis, would have been innumerable acts of trespass on the property of the Crown without a single instance of hindrance or interruption on the part of its officers. The counsel for the Crown sought to draw an inference against the custom from the omission of any mention of it in the Act of Settlement. But the Act obviously did not describe, or profess to describe, all the rights and customs incident to the customary tenures. A striking instance to show that it did not contain a catalogue of customs, such as the customary tenures of a manor might be expected to give, is found in the information itself, which alleges that by the custom of the isle the Crown may dig and work the minerals, and use the land for winning, dressing, and making them merchantable, and for all necessary mining purposes, including the erection of machinery, and making compensation to the tenants, according to custom, for surface damage. No power to enter and work the minerals is found in the reservation, and these important customs, on which the right of the Crown to work the reserved minerals depends, are not in any way mentioned or referred to in the Act. In a case lately before this board, the custom for the Crown and its lessees to pay the tenants for surface damage done in working mines, properly so called, was admitted to exist, although it is not mentioned in the Act of Settlement: (*Ballaorkish Mining Company v. Dumbell and others* (L. Rep. 5 P. C. 49; 29 L. T. Rep. N.S. 658).) Reference was made by the learned counsel for the Crown to a Supplemental Act passed soon after the Act of Settlement, which, among other things, provided that, notwithstanding the reservation of quarries and delfs of flagg, stone, and slate, the tenants should have free liberty to dig, raise, and dispose of stone and slate on their lands for their own use, and for the improvement of their own and their neighbours' tenements, as had been formerly the custom. It was argued that if there had been a custom to take clay and sand, the tenants would have obtained a similar recognition of it. But the tenants doubtless considered that this custom was not affected by the reservation. It would not have occurred to their minds that the common substances of clay and sand were included in the terms "mines and minerals," whilst stone and slate being specifically mentioned in the reservation, an express declaration was naturally thought to be necessary to restore or confer the right to take and use these substances. For the above reasons their Lordships are of opinion that the custom set up by the defendants has been

(a) See also *Attorney-General v. Tomlins* (5 Ch. Div. 750; 38 L. T. Rep. N. S. 684).



established, and that the Act of Settlement is not opposed to it. The judgment appealed from ought, therefore, to be affirmed, and they will humbly advise Her Majesty accordingly. The respondents will have the costs of this appeal.

Solicitor for the appellant, *T. W. Gorst*, Solicitor to Her Majesty's Commissioners for Woods and Forests.

Solicitors for the respondents, *Griffin and Quayle*; *F. W. Adams*.

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT LINCOLN'S INN.

*Monday, April 7.*

(Before JAMES, BRAMWELL, and BAGGALLAY, L.JJ.)

*HAMMOND v. BEST. (a)*

*Vendor and purchaser—Superfluous lands—Stipulation as to title—Condition precluding inquiry into—Action for return of deposit—Rescission of contract—Forfeiture of deposit.*

In 1877 the plaintiff entered into a written agreement with the defendant to purchase two pieces of freehold land. The contract stipulated that the title should commence with a conveyance of the land to a railway company in 1873, and that the purchaser should assume and admit that everything (if anything were necessary) was done and performed by the company to enable them to sell and effectually convey the said land as surplus land, and should not call for or require production of any evidence to that effect. There was also a condition that, "if the purchaser shall fail to comply with the terms of this agreement, the deposit shall thereupon be forfeited to the vendor."

One of the requisitions on the title required some evidence to be furnished to the purchaser that a waiver of the rights of pre-emption conferred on the prior and adjoining owners by the Lands Clauses Consolidation Act 1854 had been obtained. The vendor having declined to comply with this requisition, the purchaser brought an action for the return of his deposit and for damages for breach of contract. The vendor then gave notice rescinding the contract and forfeiting the deposit.

Pending the action, the vendor obtained a waiver of the rights of pre-emption, and eventually sold the property to an adjoining owner.

Held (reversing the decision of Hall, V.C.), that the purchaser was bound by the contract to accept such title as the vendor had, and that, as the purchaser had insisted on an objection, which by the terms of the contract he was precluded from taking, the vendor was justified in rescinding the contract and retaining the deposit.

This was an appeal by the defendant from a decision of Hall, V.C. The plaintiff entered into a written agreement with the defendant in March 1877 to purchase two pieces of land at Harborne in the county of Stafford. Clause 4 of the contract was as follows:

Inasmuch as the said pieces of land form part of other

land conveyed to the Harborne Railway Company, dated the 22nd day of March 1873, the title shall commence with that conveyance, and the purchaser shall assume and admit everything (if anything were necessary) was done and performed by the company to enable them to sell and effectually convey the said pieces of land as surplus land, and shall not call for or require production of evidence to this effect.

Clause 6 set forth that:

Objections and requisitions in respect of the title, &c., are to be sent within ten days from the date of the delivery of the abstract. . . . And if the purchaser shall insist on any objection or requisition, &c., which the vendor shall be unwilling or unable to remove or comply with, the vendor may, by notice in writing, to be given to the purchasers or their solicitors at any time, and notwithstanding any negotiation or litigation in respect of such objection or requisition, annul the sale, and shall thereupon return to the purchasers their deposit, but without any interest, costs of investigating the title or other compensation or payment.

Clause 8:

If the purchaser shall fail to comply with the terms of this agreement the deposit shall thereupon be forfeited to the vendor.

Requisition 7 on the title was as follows:

Notwithstanding the conditions in the agreement for sale, we think the vendor should furnish some evidence that the surplus land now sold has been duly offered to the prior and adjoining owners in accordance with the provisions of the Lands Clauses Consolidation Act 1845, as otherwise the title is seriously defective.

This requisition the vendor's solicitors declined to comply with, on the ground that the purchaser was precluded by the terms of the contract from raising the question. It appeared, however, that no offer of the lands in question had then been made by the company to the prior or adjoining owners as required by the 128th section of the Act, prior to the sale by them to the vendor.

The solicitors of the purchaser afterwards wrote to the vendor's solicitors to the effect that, unless a waiver of the alleged rights of pre-emption should be obtainable within fourteen days, the purchaser would retire from the contract and require a return of the deposit; and the vendor having declined to comply with such request, or to return the deposit, this action was commenced in July 1877, claiming a return of the deposit and 750*l.* damages for breach of contract. Pending the action, the vendor obtained a waiver of the rights of pre-emption, and sold the land to a third party. The following decision was delivered in the court below:

HALL, V.C.—It appears to me that the plaintiff is entitled to my judgment in this case. The first defence is that the plaintiff is precluded by the terms of the contract from taking the objection to the title. I think that the purchaser is, notwithstanding the condition, entitled to insist on such an objection to title as the present. As to this I would refer only to the decision of Malins, V.C. in *Harnett v. Baker* (32 L. T. Rep. N. S. 382; L. Rep. 20 Eq. 55), in which he reviews the cases of *Spratt v. Jeffery* (10 B. & Cr. 249), *Shepherd v. Keatley* (1 Cr. M. & R. 117), and *Warren v. Richardson* (Younge 1), and to a case before Wood, V.C. of *Darlington v. Hamilton* (24 L. T. Rep. 33; 23 L. J. 1000 Ch.). That is upon the first point, and it is to be observed that the question here arises not upon a stipulation in the contract with reference to the commencement of title, or anything which is to be investigated or objected to in respect of prior title

(a) Reported by E. S. ROCKE, Esq., Barrister-at-Law.

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but to that part of the condition which provides that the purchaser shall "assume and admit that everything (if anything were necessary) was done and performed by the company to enable them to sell and effectually convey the said piece of land as surplus land, and shall not call for or require production of any evidence to this effect, or of the identity." Now, as to that particular stipulation, this is a case in which of course specific performance of the contract is entirely out of the question. Where conditions of this nature came into question in the cases that have been referred to, the case has been one of specific performance or nothing. Here, from the circumstances of the case, specific performance is impossible. The thing is gone, the property is no longer capable of being taken or acquired by the purchaser; the vendor is not in a situation to give it. Somebody else has set up a claim to it, and, by reason of that claim having been put forward, arrangements have been made, under which the vendors are not in a condition to convey to the plaintiff. The plaintiff is here seeking to have his deposit returned with the costs, charges, and expenses which he has been put to as purchaser. It is not now disputed that the purchaser is entitled to the deposit, although at one time the vendor claimed that as having been forfeited under the contract. That now is not really the question, and the whole thing in question in this action is the costs of the action and also, I may add, the costs which are not properly costs of the action, namely, the costs to which the purchaser has been put by investigating the title. That is really the whole thing in dispute. Then the next defence which has been taken is, that the land is in a town, and that whether this is so or not, the declaration of Mr. Blyth disposes of the objection made in respect of that. I shall not go through the cases on that point, which have been cited in the course of argument, but, applying the oral evidence and the evidence of the plan, to the existing state of things, it appears to me the result is that that defence fails, and that this is not land within the town, or building land within the meaning of those two clauses in the Lands Clauses Act relating to surplus lands. The third defence is, that the defendant has a right to forfeit the deposit and rescind, and that he has rescinded. I hold that the defendant was not, under the circumstances, entitled to forfeit the deposit, thinking as I do that the purchaser was not in default; and, as to the rescinding, I hold the condition was not acted on until long after the action was brought, and then not under circumstances on which it could be acted on. In coming to this conclusion, I do not overlook the fact that the condition contains the words "notwithstanding litigation." Having regard to the claim which the defendant had improperly made to retain the deposit, the plaintiff is, I think, entitled not merely to the deposit, but to the costs of the action, and I think the condition as to rescinding should not be held applicable in the defendant's favour in depriving the plaintiff of the costs. Therefore, the plaintiff will have judgment for 200*l.* and the costs of the action, together with his costs and expenses of and consequent on the contract not having been carried out. I may say, with reference to the only other point, namely, whether this is superfluous land or not within the meaning of the Act, that I consider the case is concluded so far as this court is con-

cerned, and also I should apprehend, as far as the Court of Appeal is concerned, by the authorities referred to, and by the decision in the case of *Hooper v. Bournes* (37 L. T. Rep. N. S. 97, 504; L. Rep. 3 Q. B. Div. 258). Whatever weight might be due to Mr. Nalder's criticisms upon that case, and to his reference to the earlier authorities, I consider that it is not open to me to go into or investigate them; but I am prepared to say that so far from it appearing to me that the judgments are open to observation and are not reconcilable with the other authorities, it appears to me that they are not only reconcilable, but that they are founded on good sense; and if I had to decide with the advantage of having the reasoning of the Lords Justices before me, whether in the shape of argument of counsel or otherwise, they would have persuaded me certainly in the same way.

On the appeal by the defendant,

*W. Pearson, Q.C.* and *Nalder*, for the appellant, contended that the vendee had distinct notice that the lands he was buying were surplus lands, and that he was required to admit the title. He was therefore precluded from objecting to the title. The deposit was given as security for the performance of the contract, and the vendee having broken that contract, the vendor was clearly entitled to retain the deposit. The case came within the following authorities:

*Wilmut v. Wilkinson*, 6 B. & C. 506; 5 L. J. Rep. O. S. K. B. 198;  
*Nunn v. Hancock*, 24 L. T. Rep. N. S. 569; L. Rep. 6 Ch. App. 850;  
*Freem v. Wright*, 4 Madd. 364;  
*Duke v. Barnett*, 6 L. T. Rep. N. S. 478; 2 Coll. 377;  
*Hume v. Bentley*, 5 De G. & S. 520;  
*Spratt v. Jeffery*, 10 B. & C. 249; 8 L. J. Rep. O. S. K. B. 114;  
*Warren v. Richardson*, Youngs 1;  
*Hume v. Pocock*, 14 L. T. Rep. N. S. 127, 386; L. Rep. 1 Ch. App. 379;  
*Harnett v. Baker*, 32 L. T. Rep. N. S. 332; L. Rep. 20 Eq. 50.

*Dickinson, Q.C.* and *W. Barber*, for the respondent, contended that the contract must be looked at as a whole, and, viewed in that light, the vendor was not entitled to retain the deposit when it was shown that he could not convey to the vendee. The written agreement did not call upon the vendee to admit the title in every particular, but only to admit a particular fact. The admission was merely an agreement to relieve the vendor from proving his title, and did not preclude the vendee from showing *alibi* that he had no title at all. They referred to

*Darlington v. Hamilton*, 24 L. T. Rep. N. S. 33; 23 L. J. Rep. 1008 Ch.;  
*Waddell v. Woolf*, L. Rep. 9 Q. B. 515;  
*London and Greenwich Railway Company v. Goodchild*, 8 Jur. 455.

*JAMES, L.J.*—It is admitted, very properly, by both parties that the real question is, what is the meaning of this particular stipulation? If it has the particular meaning attributed to it by the appellant, it falls under one class of authorities. The agreement gives distinct notice of the nature of the property, and therefore the vendee has distinct notice that the land he is buying is part of the superfluous lands of a company. The argument of Mr. Dickinson is that all those words in the agreement, "shall assume and admit that everything (if anything were necessary) was done and performed by the company to

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enable them to settle, &c.,” are wholly immaterial and surplusage, and that the whole of the clause is restricted and confined by the latter words, “shall not call for or require the production of any evidence to this effect.” Now, what could have been the meaning of this clause, by which the vendor gets the purchaser to admit something for the purpose of binding him? It is open to a vendor to say, “You know what surplus lands are, but I am not going to have any question about these surplus lands raised, and therefore you must admit that if anything was necessary by the Act to be done by the company, everything has been done.” If a purchaser does agree to admit and assume that everything has been done that ought to have been done, he must admit and assume for all occasions and for all purposes that everything was done by the company to enable them to convey and sell the land as surplus lands; and if he does not now admit it, he has broken his contract, and cannot now say that the vendor has broken his contract. Therefore, he is not entitled to damages, because he entered into the contract with his eyes open. It seems to me that the contract being that he was to take such title as the vendor had, he cannot now complain and object that he is called upon by the other party to admit his title, nor require damages, because he says the company cannot convey the property. But that is a fallacy, because at the time the action was brought, when he refused to complete because he had not accepted the title, there could have been as effectual a legal conveyance to the purchaser by the vendor as there could have been in any other case. Although it may have been open to doubt, it would have been no less a conveyance. If it were otherwise, there could be no valid conveyance of property where there is any outstanding interest. But people do buy and sell subject to such restrictions, and it is very seldom that property is sold without some special stipulation such as this. It is the technical condition which enables a man to convey property to which he has a doubtful title. It appears to me therefore, that the decision of the Vice-Chancellor is wrong, and that his decision should be reversed.

BAGGALLAY, L.J.—I am of the same opinion. A series of decisions have established the distinction between the cases where the vendor stipulates he shall not be called upon to show his title and where he stipulates that no inquiry shall be made into it. The distinction between the two cases is clearly pointed out by Parker, V.C. in *Hume v. Bentley* (*ubi sup.*), and in *Waddell v. Woolf* (*ubi sup.*); all the judges referred to that decision of the Vice-Chancellor as declaring the proper mode in which that distinction is to be drawn. Now, the question here is, under which of the two classes of cases this case falls. [After stating the facts, his Lordship continued:] Here the intended purchaser had full notice that the land is part of the surplus lands of the company, and then, that being the state of the title, the vendor stipulates that no earlier title shall be required; and then he further stipulates that his right and power to sell the land as surplus lands shall not be questioned. That at least is the view I take of that clause in the contract. I can hardly conceive a form of words bringing the case more completely within the second class of cases that have been referred to. If so, the vendee has been insisting upon a

right which he could not insist upon, and therefore is not entitled to any relief.

BRAMWELL, L.J.—I am of the same opinion. I cannot help thinking that the Vice-Chancellor delivered his judgment under a misapprehension; and, with all due respect to him, I really think the construction of the agreement is perfectly plain. The material clause is this. [His Lordship then read the first clause of the agreement, and continued:] Now, that was a clear bargain that the purchaser should admit the right and power of the vendor to convey this land as surplus lands. Mr. Dickinson said he did not admit that, and then I said, “You are breaking your agreement, and how can you complain that the defendant is breaking his agreement?” Mr. Dickinson said, “You must consider the whole contract, and there cannot now be a conveyance.” But the answer to that is, “You assume a case of no title at all?” I think the only way to read that clause is that the vendee is to be content with a formal conveyance of what the vendor has, with such advantages as it may confer upon him. It is a plain condition, warning the vendee that there is something doubtful on the title, and that he must give such a price as he chooses to give in consequence of that doubt. He is told there is a doubt, and, if he thinks there is, he would probably give a less price than he would otherwise have done. Then it is said the vendor cannot have specific performance; but, if he cannot have specific performance, is he not entitled to retain the deposit? Certainly he is, because the deposit is given as security for performance of the agreement, and in this case the vendee has not performed his part of the agreement. Therefore the vendor is entitled to retain the deposit.

*Appeal allowed, with costs.*

Solicitors for appellants, *Faithfull and Owen*.

Solicitors for the respondents, *Taylor, Hoare, and Taylor*, agents for *Horton, Lee, and Lee*, Birmingham.

## SITTINGS AT WESTMINSTER.

*Tuesday, June 17.*

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

AHEARN v. BELLMAN. (a)

APPEAL FROM THE EXCHEQUER DIVISION.

*Landlord and tenant—Notice to quit—Offer of a new tenancy.*

*Defendant was tenant from year to year to the plaintiff. The plaintiff gave defendant six months' notice to quit on the 1st May, and in the same document that contained the notice to quit gave him further notice that if he retained possession after the 1st May the rent would be increased and made payable in advance.*

*Held (per Bramwell and Cotton, L.JJ., Brett, L.J. dissenting), that the notice to quit was a good notice, and was not affected by the fact that it was accompanied by the further notice.*

THIS was an action for the recovery of land, tried before Lopes, J. At the trial it was proved that defendant was tenant to the plaintiff from year to year at the rent of 96*l.*, payable quarterly, and that the plaintiff gave the defendant notice to quit in the terms following:

I hereby give you notice to quit and deliver up possession of the shop, premises, and store room situate

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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and being No. 20, Moss-street, Liverpool, and now held by you as tenant from me, on or before the 1st day of May next, 1878. And I hereby further give you notice that should you retain possession of the premises after the date before mentioned, the annual rental of the premises now held by you from me will be 160*l.*, payable quarterly in advance.

The defendant having refused to give up possession, this action was brought. The learned judge held the notice to be an insufficient notice to quit, and directed judgment to be entered for the defendant.

From this judgment the plaintiff appealed.

*C. Russell*, Q.C. and *T. H. James* for the plaintiff.

*Gully*, Q.C. and *French* for the defendant.

The arguments sufficiently appear in the following judgments:

**BRAMWELL, L.J.**—I am decidedly of opinion that this judgment must be reversed. The question before us is whether this notice is good or bad as a notice to quit. A notice to quit is properly so called because the tenant must quit when the notice expires; it is really a notice to determine the tenancy. If this notice had ended with the first paragraph there could be no question but that it would have been a good notice, but there is added the second paragraph as to the increased rent. Now, I am not sure that this was not meant as a threat, viz., "You will have to pay that amount extra if you do not give up possession;" but, whatever may have been in the mind of the writer, the reasonable construction of it, and the construction which I think the person to whom it was addressed was entitled to put upon it, was that it was an offer of a new tenancy, which he might have accepted, and if he had accepted it then the notice would have had the effect of putting an end to the old tenancy. There is no difference between this case, where the notice to quit and this further notice are contained in one letter, and a case where the notices are contained separately in two letters, and I fail to see how the offer of a new tenancy made the notice to quit bad. It seems to me that it really corroborates it, because there could be no new tenancy until the old tenancy was put an end to. Mr. French admitted that the old tenancy was put an end to, but, finding himself thereupon in a difficulty, he recanted and said that the old tenancy was not put an end to, but still existed subject to variation, namely, that the rent was to be increased and paid in advance. But I do not understand how this could be, for when the variation of the terms of a tenancy are so material as this, the tenancy under such a variation becomes a new tenancy, the terms of which are to be found in the words "the annual rental will be 160*l.*, payable in advance." Moreover, the offer was never accepted; therefore, even supposing Mr. French's argument to be correct, the facts do not bear it out. Therefore, in my opinion, the notice to quit is good, and there is nothing to prevent its operation, and that is in reality the sole question before us. It was asked what would have been the result if the defendant had taken no notice of the offer contained in the second paragraph of the notice. I think that if he had not answered within a reasonable time it would have been merely an instance of an offer made and not accepted; and if the defendant was not bound to exercise his option until the time

came for his leaving under the notice to quit, then he had so much the more time for consideration; but we need not go into any such recondite questions as to at what time he was bound to exercise his option, because no new arrangement was come to, and the old tenancy was clearly determined. Now, with regard to the passage cited from Woodfall (11th edit. p. 311) about notices to quit, that they must be clear and certain in their terms, this is not a peculiarity of notices to quit; it is a truism that applies equally to all notices. As to notices in general, notices with an option may be good. *E.g.*: If I buy goods upon the terms that the vendor upon receiving notice from me is to deliver them by the London and North-Western Railway, and I give him notice to deliver them by this railway, adding that if he will pay me a shilling per ton he may deliver them by some other railway, this would be a good notice to deliver by the London and North-Western, although it gave him an option to deliver by some other company. Now with regard to the case of *Matthews v. Jackson* (1 Dougl. 175), which was relied upon by the defendant, I do not agree that Lord Mansfield's decision in that case is in favour of the defendant here, nor does he decide that the mere offer of a new tenancy would make the notice to quit bad. In that case the notice was in the words "I desire you to quit the possession at Lady-day next, or I shall insist upon double rent." These latter words, Lord Mansfield said, "are an emphatical way of enforcing the notice and showing the tenant that the landlord is in earnest by informing him of the legal consequence if he held over." And he also says, "If the notice had contained the option of a new agreement the ejectment could not have been supported." I agree that the ejectment could not be supported if the notice contained a new offer; the continuing of the tenant in possession would be an acceptance of that offer, and the ejectment could not be supported, and that is what Lord Mansfield meant; but there was in that case no such offer, and therefore all that part of the judgment is *obiter dictum*. I cannot believe that the rule contended for by the defendant can have been acted upon hitherto, indeed it was a pure novelty to myself.

**BARR, L.J.**—I think that this notice was a bad notice to quit, and that the judgment of Lopes, J. was right. The notice being bad could not have the effect of determining the defendant's tenancy and right to possession, and therefore the defendant was entitled to succeed in the action, inasmuch as a plaintiff cannot succeed in ejectment unless he shows a right to immediate possession. There was a tenancy from year to year, to be determined by notice to quit at a certain time. This power in the landlord is a very strong one, and it exists also in the tenant; either party can of his own will by this means put an end to the contract, but the conditions of the power must be strictly fulfilled. In this case the notice was given for the purpose of putting an end to the tenancy, but in my opinion it failed to have this effect, inasmuch as it was not a notice to quit at a time certain. It is said that by the offer of a continuation of the tenancy at a new rent from a certain time, a new tenancy was created and the old one put an end to; but I do not agree with this view. The time when the old tenancy would

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be ended by means of the new one would not be on receipt of the notice by one tenant, but on the acceptance by him of the offer of the new tenancy, which would commence even before the time given in the notice had expired. If the notice was bad at the time it was given, the tenant had a right to disregard it and remain. The contract was still in existence, and he was therefore entitled to possession, and the plaintiff in ejectment cannot succeed. The whole question, therefore, is, was this notice good or bad? It is a notice calling upon the tenant to quit at a certain date, but at the same time a new proposal is made to the tenant, viz., to go out or remain in possession upon certain terms. This is giving the tenant an option to go out or to remain. It was held by Lord Mansfield just one hundred years ago that it was a settled rule of law that if a notice to quit is optional—that is, gives notice to quit or to stay and accept new terms—that is a bad notice; and in the case in *1 Douglas* he said the only way to hold that a notice such as this is good is to hold that it does not give this option. On the case itself I have no doubt this was his meaning. It is admitted that the law has been so understood by all text writers down to the present time. I do not think Woodfall's statement of the law should be passed by as a mere truism. He says that notices to quit must not be uncertain nor optional, which rule does not, in my opinion, apply to notices in general. He cites the authority of Lord Mansfield, and takes the same view of it as I do; and so also say Cole and Adams. For now more than a hundred years this rule has been laid down, and in every text book and by every authority, and is so stated in all the writings to which people go as the source of authority. I think that where, rightly or wrongly, one rule of law has been decided and acted upon for many years, and is a rule which affects the daily or hourly conduct of business or management of property, this court should not now, whatever its opinion may be, decide against the authority of such a rule; and in the present instance it seems to me to be most unjust to decide against a tenant who has merely acted in accordance with what has been commonly held to be the law for so many years.

CORROD, L.J.—I think that the plaintiff in this action is entitled to succeed, and that the judgment of Lopes, J. must therefore be reversed. A yearly tenancy is a tenancy from year to year, until it is determined by due notice. No special form of notice is necessary, but usually the notice to determine the tenancy is given in the form of a notice to quit, the result of such notice being that unless a fresh agreement is entered into the tenant must quit possession. It is said that the notice must be clear and explicit. This is true. If it does not define and state that the landlord will no longer accept the tenant as tenant, then it is bad, as, for instance, if it were in terms, "If you are not satisfied, give up my farm;" that, not being sufficiently positive, would be bad, and so as in the case in *Woodfall*, at p. 317: "Unless you employ a larger number of workmen, I shall determine the tenancy;" that would be insufficient—it binds the landlord to nothing, and he is still entitled to consider the same man as tenant. But in the case before us we have a clear and certain notice to quit, determining the existing tenancy at a definite date.

On the same piece of paper as this notice, in a further paragraph, there is a separate and distinct notice, not to modify the existing tenancy, but distinctly offering a new one, saying, in effect, "if you like to enter into a new treaty with me, you may retain possession on certain terms," and stating those terms. If this offer had been on a separate piece of paper, it clearly would not have vitiated the notice to quit; nor does it here, for it is distinct and separate from the notice, and, though written on the same paper, does not affect it. This being so, I hold the notice to quit is a good one. It is not necessary to consider what would be the effect of an offer of an increased rent generally, but in this case I hold that if the defendant had accepted the plaintiff's offer there would have been a new tenancy. There is no real decision of Lord Mansfield on this point. All that fell from that learned judge is entitled to the highest respect, but I do not think that if he had tried this case he would have decided for the defendant. There is no case in the books deciding that a notice clear and unambiguous in itself would be void because in another part of the document which contains it is found a further notice offering a new tenancy.

*Judgment reversed.*

Solicitors for the plaintiff, *Walker, Son, and Field*, for *Peacock, Cooper, and Gregory*, Liverpool.  
Solicitors for the defendant, *Fildes*, Liverpool.

## HIGH COURT OF JUSTICE.

## CHANCERY DIVISION.

Friday, May 23.

(Before FRY, J.)

*Ex parte* CARTER; *Re* THE GOLD COMPANY LIMITED. (a)

*Company — Voluntary winding-up — Exercise of powers of court in compulsory winding-up — Companies Act 1862, ss. 115, 138, 165 — Form of order.*

*A company being in voluntary liquidation, and a petition for a compulsory winding-up having been dismissed, the Court, on the motion of the petitioner, who alleged misfeasance on the part of certain officers of the company, gave liberty to summon such persons for the purpose of giving information as to the alleged misfeasance, but upon the terms that the costs should be reserved, and should be dealt with as the court should think fit.*

THE Gold Company Limited was registered on the 26th Nov. 1873, with a nominal capital of 100,000*l* in 100,000 shares of 1*l*. each. The 11th clause of the articles of association was as follows:

The directors may allot and issue shares in the present capital, other than the shares mentioned in clause 7 hereof, to such persons, upon such terms, and at such times as they may think fit. If at any time it shall appear to the directors that the capital of the company for the time being subscribed will be sufficient for the purposes of the company, they may allot any shares which then remain unallotted to and among the then shareholders in proportion to the number of shares respectively held by them, and such shares may be so allotted as fully or partially paid-up shares, although no moneys may be received by the company in respect of such shares from any allottee thereof.

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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By an agreement, dated the 31st Dec. 1873, made between the company of the first part, certain persons, therein described as persons who had advanced moneys to or for the benefit of the company, of the second part, and certain persons, therein described as the only existing shareholders of the company, of the third part, after reciting that the moneys placed opposite to the names of the parties of the second part had been properly expended upon the property or otherwise for the legitimate purposes of the company, and that they had agreed to accept as fully paid-up shares, the shares placed opposite their names in the first schedule thereto (amounting to the number of 18,775), it was agreed that such shares should be allotted to them as fully paid-up shares, and that no payment should be required in respect thereof.

By another agreement, dated the 31st Dec. 1873, 2500 shares were agreed to be allotted to William Wareing Aspinall, as fully paid-up shares, as remuneration to him for his trouble in obtaining the incorporation of the company in pursuance of the 6th clause of the articles of association.

By another agreement, dated the 15th Jan. 1874, after reciting the 11th clause of the articles of association, and reciting that on the 12th Jan. the directors, being of opinion that the capital of the company then subscribed would be sufficient for the purposes of the company, resolved that the shares then unallotted should be allotted as fully paid-up shares to the then shareholders of the company in proportion to the shares held by them, and reciting that there were 75,000 unallotted shares, it was agreed that such shares should be so allotted to the shareholders who were the persons named in the schedule.

These three agreements were duly registered with the Registrar of Joint Stock Companies.

On the 9th May 1877 an extraordinary general meeting of the company was held, at which a resolution was passed that in consequence of the company by reason of its liabilities being unable to continue its business, it should be voluntarily wound up, and James Fraser, the secretary, was appointed liquidator.

On the 30th April 1878, on the petition of H. M. Carter, a shareholder, an order was made by Malins, V.C., notwithstanding the voluntary winding-up, for the compulsory winding-up of the company (40 L. T. Rep. N. S. 5).

In Jan. 1879 the Court of Appeal reversed the Vice-Chancellor's order (40 L. T. Rep. N. S. 8).

A motion was now made, on behalf of H. M. Carter, that, pursuant to the 138th section of the Companies Act 1862, and for the purpose of determining, under the 165th section of the same Act or otherwise, whether any past or present director manager or officer of the company, or James Fraser, the late secretary and then the liquidator, was liable or accountable in respect of the manner in which the shares of the company or any part thereof had been allotted or dealt with, all or any of the powers which the court might exercise, if the said company were being wound-up by the court, might be exercised under the direction of the judge, and the conduct of the past or present directors, managers, and officers of the company, and of the liquidator thereof, inquired into and examined, and that all necessary directions might be given, and all necessary persons might be summoned before the judge, and that the applicant might summon any person before the examiner of

the court or a special examiner. . . And that the applicant might be at liberty to use in support of this application any evidence on the files of the court, relating to the matters of the petitions of the applicant and another person.

The evidence in support of and against the applications consisted, in part, of the affidavits of Carter, and of officers of the company; and in Carter's affidavits it was amongst other things alleged that the recitals in the agreement of the 31st Dec. 1873 were untrue, and were knowingly inserted therein with a fraudulent intent, and that, if the powers of the court were exercised, the applicant believed that the parties concerned would be determined to be liable to make good to the company large sums of money.

*Higgins, Q.C. and Oswald* for Carter.—It will be urged against us that this is *res judicata*. On the hearing before the Vice-Chancellor it was argued on behalf of the company, that whatever we could get under a compulsory winding-up could be obtained under the 138th section of the Companies Act 1862. Malins, V.C. was inclined to accede to that, and in the Court of Appeal Baggallay, L.J. said: "If he (Carter) is able to satisfy the Vice-Chancellor by an application under the 138th section of the Act, he may still obtain leave to do that, if any proper case be made for it." We want to know whether the agreements under which shares were allotted were *bonâ fide*. They referred to

The Companies Act 1862, ss. 115 and 165;  
*Re Sir John Moore Gold Mining Company*, 37 L. T. Rep. N. S. 242.

*Pearson, Q.C. and H. C. Deane* for the company.—The matter has already been adjudicated upon in the Court of Appeal; that court had all the facts before it, and refused the applicant relief.

*Fry, J.*—I do not propose to grant any further relief than that asked for by the summons with regard to the alleged misfeasance of the directors in improperly allotting some or all of the 18,775 shares referred to in one of the agreements. The Court of Appeal has held that the allotment of the 7500 shares was part of the constitution of the company, and I cannot go into that question. I shall give liberty to issue a summons to Attenborough, Wilson, Aspinall, Staples, and Fraser to attend before the ordinary examiner of the court, not a special examiner, for the purpose of giving information with respect to the alleged misfeasance. This application is made under the 138th section of the Companies Act 1862, which provides that where a company is to be wound-up voluntarily, any contributory may apply to the court to determine any question arising in the winding-up, or to exercise, in respect of any matter, all or any of the powers which the court might exercise if the company were being wound-up by the court, and the court in the case aforesaid, if satisfied that the determination of such question, or the required exercise of the power, will be just and beneficial, may accede wholly or partially to such application, on such terms, and under such conditions as the court thinks just. The power I am asked to exercise is that given by the 115th section, which gives the court power to summon before it any officer of the company, or any person supposed to be capable of giving information concerning the transactions and the trade dealings of the com-

pany. There has been brought to my attention the agreement of the 31st Dec. 1873, under which certain shares were allotted upon the footing of the recital that moneys amounting to 18,775*l.* had been properly expended upon the property or otherwise for the legitimate purposes of the company. There is before me in the affidavits, in the articles of association of the company, and in the books of the company, evidence about which I desire to say as little as possible, but I only say it satisfies me that there is a question that I think ought fairly and reasonably to be inquired into with regard to the truth of that recital in the agreement, and with regard to the propriety of the allotment of shares made on the footing of the recital. Beyond that I do not desire to express the impression produced on my mind upon the evidence, because I am now merely permitting a step to be taken for the further investigation of that question. It appears to me that in this case it would be "just and beneficial" that I should exercise the power. In coming to the conclusion I do, it is right to bear in mind that I shall have full control over the costs of this application. The applicants' counsel do not object to submit, if necessary, that the costs of the application shall be dealt with in such manner as the court may think fit. I presume that I have the power of doing that, but if not, I should require that submission to be given. That being acceded to, I take the submission of the applicant that the costs shall be dealt with in such manner as the court shall think fit. It will therefore follow, that if this application is unsuccessful in the result, there will be no serious injury to the company. I am not stopping the winding-up, and I shall not be increasing, or certainly not to any extent, the costs of the liquidation. On the other hand, if the applicant should succeed in the contention he has raised, it may result in an increase of the assets of the company. Weighing the whole case, therefore, I think it just and beneficial that I should exercise that power, reserving the whole of the other matters dealt with by this summons till after the information has been obtained from these gentlemen; and therefore there will be that submission of the applicant as to dealing with the question of costs, in such manner as the court shall think fit.

Minutes of order: Liberty to the applicant to summon before the examiner of the court all or any of the following persons, namely, Richard Attenborough, Henry Wilson, Joseph Aspinall, Henry Staples and James Fraser, or any or either of them (and they or any of them are to attend accordingly), for the purpose of giving information and answering questions with respect to the alleged misfeasance of the said persons, or any or either of them, as directors or officers of the company, in improperly allowing, as moneys properly expended for the benefit or purposes of the company, all or any of the sums of money mentioned in the first schedule of the contract of the 31st of Dec. 1873 (under which the 18,775 shares were allotted), or in improperly allotting all or any of the shares mentioned in the same schedule to that contract. All costs of the application reserved together with the whole of the other questions raised by the applicant. Liberty to apply.

Solicitors: for the applicant, *Wild, Barber, and Brown*; for the liquidator, *Stevens and Harries*.

May 12, 13, 14, 15, and 19.

(Before FRY, J.)

THE ATTORNEY-GENERAL v. TOMLINE. (a)

*Sea-bank — Natural barrier — Right of subject owner to destroy — Prerogative of the Crown.*

*There exists in the Crown a prerogative, a right, and a duty to protect the lands of the realm from the inundation of the sea for the benefit of the commonwealth; and such prerogative, right, and duty import a right in a subject who is the owner of land protected from the sea by a natural barrier (which right, though not enforceable against the Crown, is enforceable against a subject who is the owner of land on which such natural barrier exists) to have such barrier preserved from destruction by the owner of land on which it exists. The plaintiff, the principal Secretary of State for War, was seised, in trust for the Crown, of a piece of land on which was erected a martello tower, near the shore of the estuary of a river. The defendant was the owner of the adjoining land and the foreshore, both of which lay between the land of the plaintiff and the estuary. The shore was of a shingly nature, and on the shore and extending above the high-water mark on to the land of the defendant, was a bank of shingle, which formed a natural barrier to the land of the plaintiff against inundation by the sea. Large quantities of shingle had for many years been sold by the defendant and his predecessors in title, and removed from the shore and bank, so that the shingle bank had become so reduced in size that the existence of the land of the plaintiff and the security of the tower had become endangered. In an information and action by the Attorney-General and the plaintiff the court restrained the defendant, by injunction, from digging or removing the shingle from the natural barrier, so as to endanger the land or expose the same to the inroads of the sea.*

*Seemle, that if the case of damage by abstraction of shingle and the flowing of water by the force of the tide ought to have been decided by analogy to the case of abstraction of coal, and the flowing of water by the force of gravity, there would have been no cause of action against the defendant.*

*Observations on Rylands v. Fletcher (19 L. T. Rep. N. S. 220; L. Rep. 3 E. & I. App. 330); Fletcher v. Smith (L. Rep. 2 App. Cas. 781), and the maxims "Sic utere tuo ut alienum non lœdas," and "Aqua currit et debet currere ut currere solebat."*

THE plaintiff, the principal Secretary of State for the War Department was seised in fee simple in trust for Her Majesty of a piece of land, near Felixtowe Ferry in the county of Suffolk, forming the site of and the inclosure surrounding a martello tower (known as the U tower), and, on the east side, immediately adjoining the seashore near the mouth of the river Deben. The defendant was the lord of the manor in which the piece of land was situate and the owner of the foreshore, and the piece of land had been purchased by the Crown from his predecessor in title.

On the foreshore, between the piece of land and the sea, and extending beyond the piece of land towards the north and south, was a bank of shingle which may be here sufficiently described as naturally varying in size according to circum-

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.



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stances of wind and tide, but of an "accumulative" nature if left alone. [See the analysis of the evidence, *post.*] The bank of shingle formed a natural barrier between the plaintiff's land and the sea. The defendant had, from time to time, sold shingle for ballasting ships and other purposes in such large quantities as to materially decrease the size of the bank. In Jan. 1877 a very high tide occurred, and the plaintiff's land was flooded with water.

On the 18th of July 1878 the present information and action was commenced in the Chancery Division by the Attorney-General as informant, and the principal Secretary of State for the War Department as plaintiff. The statement of claim, stated in substance as follows:—That the north-east corner of the land was the point at which the land abutted most closely upon the beach, and that at that point very large quantities of shingle had been lately removed under the defendant's authority; that in consequence of the continued removal of the shingle the north-east corner of the land of the plaintiff was in immediate danger of being flooded by the sea; that if the removal of the shingle was continued in the manner in which it had theretofore been carried on the hole natural barrier of shingle would be destroyed, and the land left exposed to the inroads of the sea and liable to be washed away, and the continued existence of the land as land and the stability of the U tower itself would be greatly endangered; and that the defendant threatened and intended the continued removal of shingle in the same manner as theretofore done; and claimed an injunction "to restrain the defendant, his agents, servants, and work-people, from digging or authorising to be dug or removed any shingle from the natural barrier of shingle protecting from the sea the said land . . . forming the site of and the inclosure surrounding the said U tower, and in such manner as to endanger the said land or expose the same to the inroads of the sea."

The defendant in his statement of defence denied the title of the plaintiff to the land forming the inclosure; and alleged that the shingle and sand had been taken away under the defendant's authority in exercise of his proprietary rights as owner of the foreshore; that the removal of shingle had always been from the beach between the shingle bank and the sea, and never from the bank itself, and that no shingle had been removed from the north-east corner or near it since the 11th Oct. 1877. The remainder of the statement of claim was specifically denied.

Issue having been joined the action was transferred for hearing before Fry, J., and now came on to be heard with witnesses.

The *Attorney-General* (Sir John Holker, Q.C.), the *Solicitor-General* (Sir H. S. Giffard, Q.C.), and *Bigby* for the Crown.

*Cookson*, Q.C. and *H. O. Phear* for the defendant.

The *Attorney-General*.—The shingle bank is the natural boundary of the river. The Crown has a right to be protected by that natural barrier, and the defendant must not use his own property in such a way as to injure the property of the Crown. He has no right to take away the barrier and expose the land inside to the action of the waves. I do not relinquish any argument to be founded upon the prerogative of the Crown, but at present I

put it that the Crown is the landowner. Where there is a natural bank no man has a right by taking away that bank to cause water to flow upon his neighbour's land. If by so taking it away he causes injury to the property of his neighbour he is liable to an action for damages, and to be restrained by injunction. Where a river, not tidal like this, runs inland through a man's property it has a natural bank, and as long as the water remains within the bank—its natural confines—it does no harm. Could a man, through whose property the river flows, say that the bed of the river was his property, that he would cut away the bank and let a large quantity of water through the hole or sluice made in the bank, and let it overflow on to the land of his neighbour? The maxim *Sic utera tuo ut alienum non ladas* applies. The case of *Fletcher v. Smith* (L. Rep. 2 App. Cas. 781) was very like the present case. Lord Penzance there states three propositions. If the weakest of them is correct it will establish my point, because, if the obligation of the defendant when he alters the natural course of the stream and makes an artificial course of that stream to serve in lieu of the natural course is to make the artificial course as capacious and as efficient as the natural course, and he is liable if he does not, *a fortiori* he is liable if he destroys the natural course of the stream, and lets the stream out of its natural course, and does not make any artificial course in lieu of it, and damage is thereby occasioned. It can be proved, if necessary, that the Crown land was owned previously by the predecessors of the defendant, and by them granted to the Crown; and if the owner of land on the bank of a river, or on the margin of a seashore, or of an estuary like this, grants a piece of the land, there is an implied contract or covenant on his part that the land shall have the natural protection it has, and the grantor cannot remove a shingle bank, which is the natural protection of the land, and thereby cause injury to the land. If a man has two houses, one of which is supported by the other, and he grants away one house, he cannot pull down the one retained if the pulling down will cause the other house to fall. In *Hudson v. Tabor* (34 L. T. Rep. N. S. 248; 36 L. T. Rep. N. S. 492; L. Rep. 1 Q. B. Div. 225 *id.*; 2 Q. B. Div. 290) there was an artificial barrier against the sea from beginning to end, and each man built the protection which he thought would keep out the enemy. There was no obligation on the part of the defendant to keep out the common enemy from his neighbour's land, but if the wall had been a natural barrier it would have been different. [Fry, J.—There may be a great difference between the right to remove and the obligation to repair]. Undoubtedly, and it is a nice question whether the defendant, in that case, had the right to remove his wall altogether so as to let in the sea on his neighbour's land.

The plaintiff's evidence was in substance as follows:—

Major Bruce Brine, of the Royal Engineers, said that he had taken measurements and levels of the U tower land in June 1878, which showed that the high-water mark had been moved inland, and that the crest of the shingle bank lay to the landward of the high-water mark. Another map taken in Dec. 1878 showed that the bank was wearing away by the advance of the sea. From the evidence gained on the spot, and from the Admiralty tide-table, he considered that a

gale from the north-north-west would always raise the water in the North Sea two or three feet, and would therefore wash over and wash out the bank. The effect in the north-east course would eventually be to destroy it. Although the beach was an accumulating beach, he thought that any further removal of shingle would endanger the north-east corner. From making trial pits in the beach, he found that the subsoil was almost all sand, which would be liable to be washed out, the stability of the U tower being thereby materially affected. The shingle would be moved when there was a north-north-west wind with a high spring tide. A gale from the north-east in Nov. 1873, had moved the barrier back. He thought a certain amount of withdrawal of shingle would not be injurious.

William Cooper, chief boatman in the charge of the coastguard station, said that he lived in the U tower. He kept a Coastguard Boarding Book, a register of all the vessels arriving in harbour at any time. On the 22nd Aug. 1878 he received an order, in obedience to which he had kept an account of all vessels loading with shingle on the beach. Six vessels were loaded between that date and the 5th May 1879, abreast of the U tower land, and other vessels, as appeared by the book, on other parts of the beach. Other vessels were also loaded before the summer of 1878.

Frederick Thomas Stanhope, a coastguardsman, stationed at Woodbridge Haven, close to the U tower, also spoke to the loading of the vessels. He said that in Jan. 1877 a very high tide occurred which "floated" the U tower land. There was a south-west gale in Nov. 1878 and a high tide, and then a good deal of shingle was washed away.

Francis William Panzera, a resident of Felixstowe Ferry, otherwise Woodbridge Haven, said he had known the beach for ten years, in which time the shingle had very much decreased. Shingle was then loaded from the beach, although not in such large quantities as within the last four or five years. The average tendency for the beach was to increase. The bank increased at the foot and decreased at the top. The beach varied; a northerly wind might wash a good deal of shingle down, but two or three following gales from the opposite direction might wash some of it back. The top of the shingle bank had been out away in hollows by vessels taking cargoes away, and the marks still remained. Some of the marks were above the ordinary high-water mark and were not filled up by the action of the sea. There had been a stoppage of the loading of shingle for some time, and in consequence, there had been an increase in the beach. In the summer of 1873 the loading was almost concentrated for some time in front of the tower land.

Thomas Newcombe, aged sixty-four, said he had lived at Woodbridge Haven nearly all his life, and remembered ships loading there with shingle ever since he was a boy. The vessels loading lately had been much larger. He had to move his boat-house back about 30ft., as in consequence of the shingle having been taken away the sea had sapped the foundation. He also spoke to the loading having taken place under the authority of the defendant's shore-ranger.

Other witnesses spoke to the fact of the shingle having been decreased by the loading; and

Sir John Coode, C.E., said that he had par-

ticularly studied the subject of shingle beaches. He had examined the beach in question and thought that the effect of any continued decrease of the shingle in the neighbourhood of the U tower would jeopardise it, and that the protection now afforded was not sufficiently great. He had noticed the effect on other shingle beaches of the action of waves and removal by the hand of man. Currents had very little to do with the removal of shingle, which was principally due to the action of the wind-wave. This beach appeared to have been altered by the hand of man. The shingle was generated to the north, all along the coast for a considerable distance, brought by northerly winds southwards, and then drawn by the south winds to the coast. The balance of force was from the north, and the German Ocean travelled from the north-east towards the south-west. The removal of shingle from the north of the tower land was very prejudicial to its security, but he could not tell how soon the tower would be actually endangered. That depended entirely upon the relative prevalence of particular winds and seas. The winds creating the highest tides would be the north, west, and north-north-west. A very high tide was occasioned when a heavy north or north-west wind was varied by a sudden change to the south-west. Water would not percolate through a considerable distance of shingle on account of the sand mixed with the shingle. This beach would increase at certain seasons and decrease at others. The shingle was thrown above the highest equinoctial tide-mark by the action of the waves.

*Rigby* (after summing up the evidence).—We do not say that if we had no prerogative we should have the same right that we have now; but there is no doubt about the duty of the Crown as regards *jus publicum* as well as its interest as regards its *jus privatum*. The Queen has the prerogative of defending the coast. If the necessity arose for the public benefit she has a right to ask the interference of any court to assist; if it is argued against us as a matter of law that we have no other rights we fall back on our prerogative right. [*Cookson*.—That is not pleaded, and cannot be now raised.] The courts are not only at liberty, but bound to see that the prerogative of the Crown is attended to. The action is not in any sense brought by the Crown in its character of guardian of the public rights, though the opinion of the court as to the question of law may be very materially influenced by that. In *Crompton v. Lee* (31 L. T. Rep. N. S. 469; L. Rep. 19 Eq. 115) the Vice-Chancellor laid it down that other riparian owners had an undoubted right to the protection of the river banks. The authority of that case was recognised in *Wilson v. Waddell* (35 L. T. Rep. N. S. 639; L. Rep. 2 App. Cas. 95). In *Smith v. Kenrick* (7 C. B. 515) it was pointed out that great difficulties might arise if anyone took away a sea wall. Bayley, J., in *Dickens v. Shaw* (Hall on the Seashore, 2nd edit. app. lx.), assumes that the foreshore is vested in the Crown. The Crown will not interfere if no harm is done, but if you commit a nuisance you may be indicted for it. Bayley, J. means that it is an indictable offence to damage, by the removal of the substance, the sea defences. Although the Crown may part with its interest in the soil, it cannot by charter or by grant vest in the grantee anything which is contrary to the public interest. Assuming that the defendant is the

owner of the foreshore, he must at some time have derived his title under a grant from the Crown. In the *Attorney-General v. Parmeter* (10 Price 378) it was held that when a part of the sea coast, being the property of the Crown and giving *jus privatum* to the King, was granted to a subject for uses, to be enjoyed so as to be detrimental to the *jus publicum* therein, such grant was void as to such parts as were open to such objection if acted upon so as to effect a nuisance by working injury to the public right, or it was a grant which did not divest the Crown or invest the grantees. [Fry, J.—That means that the Crown can alienate its *jus privatum*, but cannot alienate the right which it holds in trust for the public.] It is impossible to vest in the owner of the foreshore the right to interfere with the public use. The whole history of the Commissions of Sewers, founded as they were at common law upon the early prerogatives of the Crown, must be borne in mind, and it may be the prerogative of the Crown that it actually can enforce, as it undoubtedly could at common law, a taxation and rating of all persons whose lands are open to the flowing of the sea for the purpose of keeping up the defence, and, if that is so, it is absurd to suggest that in other places where that is not required, any subject at his own will may take away the natural defence and leave a track of country open to the inroads of the sea.

*Cookson*.—This case is not founded on the prerogative of the Crown. If it had been a very different defence might have been put in by the defendant, and I must ask that the question may be dealt with as one arising between two parties, one of whom is the owner of the land, and the other of whom is the owner of the foreshore. Those who have a tower such as this, built on a piece of land which has nothing between it and the sea but a shifting shingle bank of which I am the owner, must protect that tower against any inroads of the sea by artificial means, and I am entitled, as owner of the shingle, to take that shingle in that legitimate use to which the owner of the foreshore may put the shingle, viz., sell it for profit, load ships with it, and so on, and the persons having property, the stability of which may be endangered by such legitimate taking, must erect a sea-wall to protect their building. [Fry, J.—The owner of the foreshore has a right, then, to cut away the natural defence, and let the water in over the whole country?] No, I do not put it so high as that. There has been a legitimate use for years. It is a question of degree. If it were possible to destroy the whole of the natural boundary that might be another question. The question is reduced to this, whether the taking away of shingle from time to time, though diminishing the natural barrier, can be interfered with by the person behind the barrier. It is a false analogy to say a mineowner may not use his own land so as to damage his neighbour. He may not inflict *injuria*, but he may so use his own land as to inflict *damnum*. I may mine as deep as I like, and I may flood out my neighbour's mine. [Fry, J.—It depends whether you do it in the ordinary course of mining.] I may take out every bit of coal under my land if I do nothing outside the ordinary legitimate course of mining. I am the owner of the foreshore and the shingle, and am entitled to take that shingle, and not the less because it is a natural barrier. The argument as to a mine is

in my favour. *Wilson v. Waddell* establishes that there is no servitude imposed on the owner of the upper mine to preserve the lower mine from the inroad of water. In *Smith v. Kenrick* it is laid down that each of the owners of the adjoining mines may work his own mine as he deems most convenient and beneficial to himself, though the consequences will be that some prejudice will accrue to the owners of the adjoining mine, if such prejudice is not due to negligence or malicious conduct. [Fry, J.—As I understand, the distinction drawn by the Lord Chancellor in *Bylands v. Fletcher* (19 L. T. Rep. N.S. 220; L. Rep. 3 E. & L. App. 330) between a natural and a non-natural user of land, runs through this case. If you use your land in what he called a natural way, you may do it so as to damage your neighbour. If you use it in a non-natural way you may not do that. Then comes the question what is natural and what is non-natural. To work a mine, supposing you do it in the ordinary way, even though it is exhausting the whole of the mineral in it, is a natural user of it. On the other hand, to use your mine so as to make a bore-hole into your neighbour's land is a non-natural user of it. The storage of water in a large receptacle would be a non-natural user of it. The divergence of water so as to flow into your neighbour's mine is a non-natural user.] In *Angus v. Dalton* (38 L. T. Rep. N. S. 510; 40 L. T. Rep. N. S. 605; L. Rep. 4 Q. B. Div. 162) the judgment of the Court of Appeal considers the case of an artificial structure seeking to derive support by prescription from adjacent soil. [Fry, J.—I do not think it is put on the ground of easement.] If not put on that ground we have nothing but proximity, and the plaintiff's case is exactly the same, for the purpose of argument, as if the tower were quite recent. He puts the first removal of shingle since that period. [Fry, J.—It is put as an injury to the land irrespective of the tower. There are two questions; whether you have a right to cut it down so as to injure the tower, and whether the tower or the land will be injured.] The cases of *Dickens v. Shaw* and *Attorney-General v. Parmeter*, are distinguishable from this case, which is an information. Those are cases of merely civil right. Callis is an authority on the subject of sewers, but he was overruled on some points in *Hudson v. Tabor*. [Fry, J.—If it be true that the people have the use of the barrier, that might carry with it the protection of the land which would be submerged. It may be that the defendant is not bound to protect or repair anything on the shore, but he may have no right to vary or diminish the protection in the use of the property. You must keep distinct the obligation to repair and the right to destroy.] All that I find in this part of Callis (Lect. I., tit. Shore, orig. edit. p. 31), is that foreshore in possession of the Crown may be used by subjects for "lading and unloading of ships, and for drying of nets." [Fry, J.—That is only an illustration.] There is no connection between that and the right of the owner of the sea-shore to diminish the natural barrier by removing the shingle. Is there a duty on my part to sacrifice my profits on this shingle to save the plaintiff and informant from having to put a wall round their tower? It is their duty, because it is their interest to keep out the common enemy behind them. If this were a solid, and not a changing bank, something more might be said for

the Crown. The court could not restrain the defendant absolutely. [FRY, J.—Supposing you have done the wrong, I do not think I should be justified in refusing the injunction, because I could not tell you exactly how far you might go without inflicting the wrong.] The reasoning of Cockburn, C.J., in *Hudson v. Tabor*, is far from conclusive, and the case in the 37 Liber Assizorum, pt. 10, cited by him, is no authority for the proposition that the owner of a wall fronting the sea or a tidal river is liable at common law to repair. The Court of Appeal, in *Hudson v. Tabor*, held that there was no sufficient evidence to establish a prescriptive liability on the part of the defendant to maintain the sea-wall for the protection of the adjoining landowners, and that by the common law, apart from prescription, no such liability was cast on the defendant as a frontager. [FRY, J.—They laid down the view that in the case of prerogative a person might be called upon to construct a sea-wall, and I am not sure that does not carry with it the right to prevent his destroying the existing walls. If the Crown has a right to call upon a man to construct a sea-wall, it may have the right to prevent him from destroying the necessary barrier.] The statute 15 Geo. 2, c. 36, was passed for the protection of bent and starr growing upon sandhills bounding the sea in certain places. If I may pull up bent or starr, am I prohibited from making a reasonable use of my property in other ways? He also cited

*West Cumberland Iron and Steel Company v. Kenyon*, L. Rep. 6 Ch. Div. 773; on app. 40 L. T. Rep. N. S. 708.

The defendant's evidence was in substance as follows:

George Carr, the defendant's shore ranger, said that he had known the tower land for about ten years. His duty was to sell shingle to any captain that might come. The shingle was used for ballast, and, he believed, for concrete. It was also used for drainage purposes. The width of the shingle at the north-east corner of the tower land, just before the tide of Jan. 1877, was about seven yards, and after the tide about seven feet only. About fourteen feet was swept away. The south winds were the more prevalent. A great deal more shingle had been taken away of late years than formerly.

Gardner William Frost said, that, under the direction of Carr, he collected the money for shingle. The tide in Jan. 1877 was only an ordinary high tide. The highest tide was in 1878 when some shingle was washed away. The *Christiana* loaded at the north-east end of the tower land in Oct. 1877. She was three tides loading. The price of shingle was a shilling for every ten tons. The witness produced a book showing the sums received from the sale of shingle.

Witnesses were called as to the loading of vessels with shingle, the effect of the tides, and the state of the shore at different periods.

Mr. Wilfred Airey, C.E., agreed with Sir John Ooode as to the general effect of winds on the beach. The highest tide was caused, however, by a shift from the south-west to the north. That naturally followed from the circling direction of the winds. As the circle advanced up the coast it first blew the water up the English Channel towards and past the Straits of Dover, and then, as the cyclone or circular wind passed

over the northerly part of the circle, went on to the north-east, and drove the water down to north-east, and the two jammed together and formed a very high tide, which was destructive if there was a heavy wind blowing at the same time. He attributed the piling up of the shingle mainly to the operation of sharp tides and currents in the shallows near the beach. He had seen a depth of six feet of shingle out away from the beach in a single tide. He put down groins to repair the beach, and in a very short time they were piled up with six or eight feet of shingle. The beach would never have been formed if it had not been an accumulating beach. He thought it was in a healthy, self-supporting, and self-renewing state. There was no sign of insecurity of the tower or land. The shingle would keep out the mere dash of the surf to a considerable extent. Shingle was only a barrier so long as the sea allowed it to be such. The taking of it away would cause only a temporary inundation. The restoration of shingle taken from the top of the bank would be more difficult than that of the shingle taken from the bottom. If a hole were dug in the bank, that would expose the land to inundation until restored by the accumulative power, which would operate quickly.

*Phear* for the defendant.—The right of the Crown is to provide or see to the maintenance of the wall at the rateable expense of all the persons interested. The Crown cannot throw the burden upon one person more than on another. If any share of the defendant's enjoyment of his property is withdrawn for the benefit of his neighbour a greater burden is imposed upon him than upon any one else. The Crown cannot interfere with the defendant's enjoyment of his property for the benefit of the rest of the public without making him compensation. The Crown is a trustee for the public. Its enjoyment is for the public benefit. It is a breach of trust by the Crown to dispose of public property to the prejudice of the rights of the public. The Crown cannot make a grant which will derogate from these rights. [FRY, J.—An expression has been used, which seems to me not an improper one, a "public trust" in the Crown. This cannot be enforced against the Crown by any proceedings in court, but is nevertheless recognised by the Crown in its proceedings. What the Crown holds for a public trust it cannot alienate.] There is a distinction between the public rights which can be interfered with by grant from the Crown, and those which cannot, but they are all public rights. [FRY, J.—Is it not a public right to have England saved from inundation?] It is distinctly a private right. The *jus publicum* seems to be a right which any person has in respect of his membership of the public. Every individual of the public has a right of way as such. [FRY, J.—Lord Coke, in the case of *The Isle of Ely* (10 Co. Rep. 141a), puts that as a parallel case. "The King ought of right to save and defend his realm as well against the sea as against the enemies, that it should not be drowned or wasted, and also to provide that his subjects have their passage through the realm by bridges and highways in safety." Does not that show that the rights which are correlative to the obligations are small, and that the right of highway is clearly a public right? Is not a right to defence equally a public right?] Only so far as the members of the public are prejudiced by a destruction of the wall, not so far as individuals are concerned with respect to any private rela-

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tion they may have to that wall as owners of the property. [FRY, J.—In *Blundell v. Catterall* (5 B. & Ald. 304) Best, J. held that there was a right of action on the *jus publicum*.] That cannot go to the case of an individual who is complaining in respect of his private property. In *Rylands v. Fletcher* the principle is laid down that, as regards two cotermious owners, the one may make any natural proper user of his property and the other cannot complain. [FRY, J.—The difficulty I have is as to what is a natural user. It is not the only natural user of your land to cultivate potatoes or corn. You may dig out coal. I do not know why storing water is a non-natural user.] Suppose there was a high tide last night, and a large amount of shingle was thrown up, I may take it away, and I may remove the increment of the shingle as it comes up. At least I may do anything short of interfering with the permanent physical conformation of the place. The shingle washed up last night may be taken away this morning, or, if I liked, next year, or at any time, unless a statute of limitations comes in with respect to it.

*Rigby* in reply.—Our ground is, that a sea bank or a river bank, being the natural defence of the land adjacent to and in the neighbourhood of the river, is not so entirely the soil of the owner that he can deal with it precisely as he likes, carry it away, and so let down the river or the sea upon his neighbours. *Fletcher v. Smith* is an authority in our favour. [FRY, J.—That case seems to have proceeded upon the distinction of natural user. In this case the manner of using this bank has been to dig it up. Is it not the same as digging out the coal? What difference does it make that the water in one case comes from the estuary, and in another case from underground? There is a great difference between water percolating underground and water restrained within a defined channel. *Fletcher v. Smith* seems conclusive on the point as to whether the owner of land has a right to the banks of a stream. In *Smith v. Kenrick*, Maule, J. says: "Take the case of trees, the removal of which might be injurious to the adjacent land by admitting therein a saline deposit, would an action lie for that?" Clearly not. [FRY, J.—Every one must put up his own defence against the atmosphere. The passage cited has been observed upon in the case of *Ball v. Herbert* (3 T. R. 253.) The taking of the shingle is a non-natural user. [FRY, J.—How would you use it? You cannot sow it, or plough it; you can dig it.] The first natural necessary use is to keep out the sea. Anything inconsistent with that is a non-natural user. [FRY, J.—Is it a non-natural user when you simply withdraw the opposing matter?] Cutting away the banks is the offence committed, according to *Fletcher v. Smith*. As to the question of prerogative, all landed property is presumed by law to have been granted by the Crown. The duty of the Crown with regard to coast defences cannot co-exist with the right now claimed by the defendant.

FRY, J.—Her Majesty is in possession of a quadrangular piece of land, occupied by a martello tower, near the estuary of the river Deben, and the informant, Her Majesty's Secretary of State for the War Department, as plaintiff, seeks an injunction to restrain the defendant from removing shingle from the natural barrier of shingle protecting from the sea the piece of land which I have mentioned.

Two questions require decision. Has the existence of the piece of land, which Her Majesty so possesses, been imperilled by the acts of the defendant? And, if so, has Her Majesty, or the Secretary of State for War, a right of action against the defendant in respect of the danger which has so accrued to the land? The river Deben enters the German Ocean in a direction nearly from north to south; and along the western shore of the mouth of the estuary there is a bank of shingle, which protects the land lying to the west of it from the operation and action of the sea. That land is a somewhat low tract of land, protected, as I have already pointed out, on the east by the shore and the bank of shingle; on the west it is protected apparently by an earth wall; in like manner on the north it is protected by an earth wall; and on the south it is protected by a continuation of the bank of shingle. The piece of land of which Her Majesty is possessed does not run quite parallel with the shore of the river, but inclines somewhat toward the east as it approaches the north, and therefore the north-east corner of the square piece of land is the nearer of the two corners, and the nearest point of the whole piece of land to the river Deben. On that ground, and also because the sandhills or banks which lie at the back of the shingle are somewhat depressed at the north-eastern corner, that portion of land is the most of all exposed to the operation of the sea. The surrounding land, including the sea-coast, and the shingle bank—which I must observe, is no part of the seashore, because it is above the ordinary high-water mark—is in the possession and admitted to be the property of the defendant, Col. Tomline. The shore along the estuary of the river Deben is what has been called an "accumulating" beach; that is to say, if left alone, the tendency of the forces of nature is to heap up shingle upon that beach to such an extent that, if a small portion of shingle be taken away or a hole be made in the shingle bank, there will be a tendency to repair that hole and to restore the bank to its former condition. That general accumulating operation of nature upon the bank is subject to variations and actions in the opposite direction. When the wind blows from the north or north-east, the tide of the water will often abstract shingle from the bank. On the other hand, when the winds are from the south or south-west, the tendency to heap up shingle on the bank is greatly increased; and, as the result, the shore and bank itself are liable to certain variations from time to time in accordance with the operations of the wind and the waves. It is quite possible, although this is not strictly in evidence with regard to this shore, that this piece of land is subject to periodical changes—periods rather of increment and decrement with regard to the shingle. That has been shown to be a common phenomenon with regard to such beaches; but it has not been shown, however, to exist in the present case. Whether it does exist or does not exist I cannot tell. It results from what I have said that there is a certain power of restoration and recovery in the beach itself in respect of any wound or injury that may be inflicted on the bank; but, at the same time, it is the common case of the plaintiff and the defendant that it is possible to abstract so much shingle from a given point as to occasion to the land behind that point, danger—at any rate temporary danger; that is,

danger until the restoring operations of the natural forces which are at work shall so far have operated as to heal the wound which has been so caused. It has been said by the witnesses on both sides that the question of danger or no danger to the land behind turns upon the equation between the deposit and the abstraction of shingle from the beach. I have then to inquire whether, in this case, there has been inflicted upon the bank of shingle which runs along this estuary of the river Deben a wound or injury or excavation which has caused danger to the land of which Her Majesty is possessed. For many years past, as long as the recollection of the oldest witness goes, it has been the practice of the owners of this shore and of this bank to sell shingle from it, and vessels of increasing magnitude have been in the habit of going to the shore, and there receiving loads of shingle from the bank. It appears that for the last four or five years this process of digging shingle from the bank has been greatly on the increase, and according to the evidence before me, during the last few years, it has been going on at a rate of from 9000 to 11,000 tons per annum. Directing my attention specially to the bank at the north-eastern corner of the inclosure of the martello tower, I am satisfied that some ten years ago the bank of shingle at that point was very much thicker and very much larger than it is now, and that, during the year 1876, the operations of digging the shingle were mainly, if not entirely, concentrated upon the land in front of that tower, and that they went on then to a very great extent—sometimes two vessels at a time being occupied in taking in shingle from that portion of the bank. In Jan. 1877 a very high tide occurred, and then, for the first time, so far as is known to any of the witnesses who have been before me, or who have spoken to the point, water came over part of the shore on to the north-eastern part of this land, and there accumulated to a considerable but not to a dangerous extent, and the effect of that high tide was further this, that something like two-thirds of the bank of shingle which had previously existed was taken away. I am saying that from the evidence of Mr. Carr, who is one of the defendant's witnesses. About 14ft. out of the 27ft., which he estimated was the width of the bank, was then abstracted. That result, I think, was probably due to the concentrated workings of the shingle which had taken place in the previous summer. From the summer of 1876 down to the month of Oct. 1877 I have no distinct evidence of what was going on on this part of the shore, but I find that in Oct. 1877 a vessel called the *Christiana* took in about 100 tons at that point, the north-eastern corner of the martello tower land, including that vessel, I find that from Oct. 1877 down to June 1878, 500 tons of shingle, or very nearly 500 tons, were abstracted from the beach in front of the martello tower. On the 25th June 1878 I have the result of the survey made for the Crown by Major Brine, and at that time I find the bank had so far receded as to leave the north-eastern corner-stone of the inclosure upon the precise crest of the bank—a position which, it appears to me, it had not occupied before, or for some time, not a very long time, before that, and which, I concluded, resulted from the excavation of the bank to which I have referred. It was shortly after that, in the fol-

lowing month, that this action was begun. I have had the history of the relation between the crest of the bank and the corner-stone carried down, because, in December, I find that the retrogressive operation had still proceeded, and that the crest had passed within the stone, although, no doubt, to a very small extent; and that in March of the present year it was nearly, if not exactly, in the same position. It appears to me further that the process of accumulation had meanwhile gone on on the lower part of the bank where it most naturally and most easily occurs, but that it had not taken place on the upper part of the bank, which, being above the ordinary action of the waters of the tide, is only operated upon either by, as has been stated, the pressure below, which forces the stones into the bank, and so forces the upper stones to a higher level than they previously occupied, or by the operation of the water casting stones, as they are known to do, to a distance beyond that to which they themselves reach. The result is, that I come to the conclusion that the wound which had been inflicted upon this bank in the summer of 1876 had not been healed in March 1879, but, on the contrary, during that interval of time the effect of the wound had progressed, and there was an actual diminution of the land within the inclosure, consequent upon the wound inflicted in the summer of 1876. Having come to that conclusion, I hold that the informant and the plaintiff have made out their case, and shown that the removal of the shingle has created danger to the land, and that, if similar acts are committed in time to come, the danger to the land will increase. I therefore further come to the conclusion that this action is not, as has been said, a mere action *quia timet*, but that it is an action against an act which has been done, which has produced a slight, though ascertainable, injury to the land of Her Majesty; and, inasmuch as the defendant asserts the right to do in time to come what he has done in time past, the action is one which can be and must be sustained, if the act which the defendant has committed creates any rights in Her Majesty. In this case Her Majesty is not suing in respect of any prerogative directly. She is claiming the same relief as one of her subjects might claim if he were possessed of the piece of land in question; but, of course, so far as Her Majesty's prerogative throws any light upon the right of the subject, the prerogative must be considered, but no further. The case has been argued before me, in the first instance, almost exclusively upon the authority of the case of *Fletcher v. Smith*, which it is said determines that the act of the defendant created a right in Her Majesty. Before adverting to that case in detail, I must refer to two earlier cases. The case of *Smith v. Kenrick* determines that he who abstracts a mineral from his own land, and thereby permits water which would not previously flow underground to his neighbour, thenceforth to flow underground to his neighbour, does no wrong. He may take away intervening coal without creating any liability on himself; but if his neighbour desires to protect himself from the water which will so flow upon him, he must do it by his own barrier. The case of *Baird v. Williamson* (9 L. T. Rep. N. S. 412; 15 C. B. N. S. 376) showed the distinction between permitting water to flow on to your neighbour's land by abstracting your own mineral and causing water to flow, and raising



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THE ATTORNEY-GENERAL v. TOMLINE.

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it from a lower stratum from which it might have flowed in a different direction to a higher one and so making it flow on to your neighbour's land. Whereas in the one case this permitting the water to flow is not actionable, the causing the water to flow by pumping it against the force of gravity is actionable. A very remarkable distinction has therefore been drawn between the two cases. In the case of *Fletcher v. Smith* the question arose in this way: There was a watercourse which flowed through the defendant's land. There were hollows in that land, and in those hollows water came from two sources, from the heavens above and from the diversion of the water. When the case came before the Court of Exchequer Chamber, the court said that, if the water came into those hollows by reason of the diversion of the stream, then the case with regard to the water was within the doctrine of *Baird v. Williamson* as to the water pumped out, and accordingly they sent the matter back for further trial. Now, if I am to follow *Baird v. Williamson*, the question will turn upon whether the abstraction of the sea bank in this case is analogous to the abstraction of the coal in the first instance in *Baird v. Williamson*, and, if so, the mere flowing of the water there by the force of gravity in the mine, or by the force of the attraction of the sun or moon, or whatever may be the cause of the tide, in this case will not be actionable. If it is analogous to pumping the water up against gravitation, of course it would be actionable. It appears to me, I confess, that, if it is to be determined by the analogy in *Baird v. Williamson*, I should be bound to hold that taking shingle away is analogous to taking coal away; and therefore the case of *Smith v. Fletcher*, in the Exchequer Chamber, throws no clear light, in my judgment, upon the case. That case went to the House of Lords, and Lord Penzance, who delivered the principal judgment in the case, says this in stating the facts: "At the threshold of the inquiry as to the defendant's liability to the plaintiff, lies the question—what obligations did the defendants incur when they diverted the natural water-course?" His Lordship assumes that an obligation was created by the diversion of the natural waters, but what the ground of that obligation was, and what its extent was, and to what cases it applied, I do not know. That which would be important for me to know was assumed in that case. Of course, if the case before me were like *Fletcher v. Smith* in its circumstances, I should know that the principle, whatever it was, must apply; but seeing that it is not, and not knowing the generality of the obligation that was assumed, I feel that very little light is thrown on the present case by the decision of the House of Lords. Another principle which governs some cases has been referred to, and invoked in this case; that is, the distinction between the natural and the non-natural user of land; because, undoubtedly, cases have touched upon this, that, whereas the natural user of the land so as to be an injury to your neighbour is not actionable, the non-natural user of the land, creating an injury to your neighbour, is actionable. That principle was laid down in *Rylands v. Fletcher*. There are certain cases which have been determined, which show that those particular instances are not cases of the natural user of the land. For instance, it has been determined, as I take it, in *Baird v. William-*

*son*, that pumping up water from a lower stratum, so as to let it flow down the channels existing in a higher stratum, is not the natural user of your land; and therefore, if you injure your neighbour by it, it is actionable. Again, if in the course of mining operations you make a horse-hole at the bottom of your mine, not for legitimate and ordinary purposes of mining, but for the purpose of throwing your water on to your neighbour's land, that is a non-natural user of the land, and is actionable because of that. Again, if you bring water upon land which has previously not been covered by it, and store it up in a reservoir, and do not take sufficient precaution to prevent the water escaping from the reservoir, and it escapes and injures your neighbour's land, that is actionable, because it is a non-natural user of the land (*Rylands v. Fletcher*). And lastly, the diverting a stream, which flows through your land, into hollows, so that it flows into them, and thereby, flowing down the hollows, injures your neighbour, is a non-natural user of the land, and is actionable. Those cases illustrate, no doubt, what is non-natural user. But when I apply them to the present case, they afford very little light. Is the abstraction of this bank analogous to taking coal? If so, it is a natural user. Is it analogous to diverting a stream actively? If so, it is a non-natural user. I confess it appears to me that of the two it is more like the abstraction of the coal, and that, if I had to determine this question upon the distinction between natural and non-natural user, I must have regard to the evidence, which has shown that from the memory of the oldest witness down to the present time this bank has been used for the purpose of supplying shingle to ships, partly, it appears, for the purpose of ballast, and partly for the purpose of making cement. There is no other known use to which the bank can be put, except that, of course, of protecting the land, and therefore it is a natural user of the land. There is one other observation that I desire to make before I part with this case. It is laid down by an American writer of great eminence, Chancellor Kent, in his Commentaries (sect. 2, 7), that *Aqua currit et debet currere ut currere solent* is the language of the law. If that maxim were supported by any authority, it would no doubt lead to this conclusion, that whoever interferes with the natural flow of any water to the injury of anyone would do it at his own risk, and would be liable to an action. I am not aware of any such authority of the English law—none has been cited to me—which shows me that I can rely upon that maxim in its generality. If the matter, therefore, rested simply upon analogy to the cases I have referred to, I should feel that the case was one of great difficulty. But it appears to me that there is further matter to be considered which does throw great light upon this case. There is, in my judgment, a prerogative and a duty in the Crown which appears inconsistent with the alleged right of the defendant, and imports such a right in a private person as the Crown now insists upon, that prerogative and duty being the obligation, and, with it, the right to protect the land from the inundation of the water for the benefit, not of one person in particular, but for the benefit of the commonwealth, of the whole community, is interested in the protection and preservation of that land, alike from foreign enemies, and from the water



which surrounds our island. The statute of 6 Hen. 6, c. 5, which is the earliest statute relating to commissioners of sewers, contains the form of commission to be issued; and that contains this passage: "Nos pro eo quod ratione dignitatis nostre regie ad providendum salvationi regni nostri Angliæ circumquaque sumus astricti"—a distinct assumption, therefore, of the obligation of the Crown to protect the kingdom of England on every side from the inundation of the water, because that is the preamble which leads to the direction of a commission of certain persons to protect particular portions of lands from the access of water. A similar form of commission was given in the more recent statute of 23 Hen. 8, c. 5. There the recital is: "For that by reason of our dignity and prerogative royal we be bound to provide for the safety and preservation of our realm of England, willing that speedy remedy be had in the premises." The same form is to be found in Fitz-Herbert's *Natura Brevium* (113a), and that writer makes upon it this observation: "It is intended that the King, of right, ought to keep and defend his kingdom as well against the sea as against enemies, that it be not drowned or wasted, and to provide remedy for the same." In the case of *The Isle of Ely* (10 Co. Rep. 141a) it is said: "It is to be known that by the common law before the statute of 6 Hen. 6, c. 5, the King ought of right to save and defend his realm, as well against the sea as against the enemies, that it should not be drowned or wasted, and also to provide that his subjects have their passage through the realm by bridges or highways in safety, and therefore, if the sea walls be broken, or the sewers or gutters are not secured, that the fresh waters cannot have their direct course, the King ought to grant a commission to inquire and to hear and determine these defaults." The same doctrine was recognised in the case of *Henley v. The Mayor of Lyme* (5 Bing. 109), where the court said, "The King, by his prerogative, as will be found in every book upon the prerogative of the Crown, is bound to take care to guard and to protect the shores and lands adjoining the sea from being overflowed by the sea. He is to discharge that duty as it was discharged before the statute of Henry VIII., by issuing commissions and making ordinances, which we find he certainly was in the habit of making before the statute of Henry VIII." Lastly, in the case of *Hudson v. Tabor*, when, before the Court of Appeal, the existence of the prerogative was referred to, the court said: "The King has probably, from the very earliest times, had a right as part of the prerogative to defend the realm against waste of the sea, and to order the construction of defences at the expense generally of those who are to be benefited by them. The various statutes of sewers beginning with the statute of 6 Hen. 6, c. 5, do but regulate the exercise of the prerogative in this respect, and prescribe the forms of commission for the ordering and execution of the necessary works, which forms have from time to time been varied." I come therefore to the conclusion, as I have already said, that there exists in the Crown this prerogative right and duty—a duty of course to its subjects, which the law must take cognisance of, although the law does not enforce it. Now, if this prerogative and right exist in the Crown, it seems to me impossible to suppose that the subject can have a right to do that which the

defendant claims to do. It is absurd that the subject should be at liberty to destroy that which the Crown is bound to protect. There are, I should observe, traces in the old books of such a right—some public right in the banks of the sea. Lord Hale (De Portibus Maris, c. 7) quotes from Bracton a passage in which he lays down this doctrine, *Bigarum etiam usus publicus est de jure gentium sicut spatium fluminis*. It is quite true that that passage has been commented upon, and certainly disapproved of, as expressing the existing law with regard to rivers, in the case of *Ball v. Herbert* (3 T. R. 261). There, Lord Kenyon, in delivering judgment, made this observation: "Some of the passages in Lord Hale which seem to favour the common law right are rather applicable to the banks of the sea and to ports." Rather Lord Kenyon meant, the banks of the sea than the banks of the river, in respect of which the case then before him was. Callis, in the passage which has been quoted more than once in the course of this discussion (Lect. i. 55), asserts that the public had *necessarius usus* in the banks of the river and sea. I do not rely upon either of those authorities as being conclusive with regard to the rights of the public. It seems to me not unimportant as showing that our earlier writers considered that the bank of the sea was not absolutely private property, free from all public use, in the same way as other private land might be. It remains for me to observe that there is no conflict whatever between the conclusion at which I have arrived, and the decision in the case of *Hudson v. Tabor*. It may well be that there is the greatest distinction between a liability to repair an artificial bank and the right to destroy a natural protection, and I find nothing in the judgment in that case which bears upon or conflicts with the conclusion at which I arrive. I hold, therefore, that there is in the Crown the prerogative to which I have referred, and that there is, on the part of the Crown, the duty to which I have referred, and that it is the right of every one of Her Majesty's subjects to have that duty performed, though, of course, that right is not one which the courts can enforce; and that consequently there is a liability in every person possessed of a sea bank, and an obligation to do nothing which shall be inconsistent with the protection of the land of the country from the inroads of the sea. That right, it appears to me, the defendant has violated, and I must grant the injunction which is prayed. The question which I have just determined appears to me to be one of unusual difficulty, and I have arrived at the conclusion which I have expressed after considerable hesitation and doubt. I need not say, after the conclusion that I have arrived at, that I must make defendant pay the costs of the action.

Solicitor for the plaintiff and informant, W. Tindal Perkins, agent for *The Solicitor to the Treasury*.

Solicitor for the defendant, W. F. Stokes.

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BIRMINGHAM CANAL COMPANY v. CARTWRIGHT.

[CHAN. DIV.]

March 22 and April 1.

(Before FRY, J.)

**BIRMINGHAM CANAL COMPANY v. CARTWRIGHT. (a)**

*Rule against perpetuities—Covenant to give unlimited right of pre-emption of land—Parol offer—Canal company—Power to acquire mines—Express purchase—Railways Clauses Consolidation Act 1845 (8 Vict. c. 20), s. 77.*

*A. conveyed the surface of certain land to B. in fee, and covenanted for himself, his heirs, executors, administrators, and assigns, with B., his heirs, and assigns, that if he should at any time thereafter sell or agree to sell to any person the mines and minerals lying under the lands adjoining the land thereby conveyed, that A., his heirs and assigns should and would at the same time offer to B., his heirs, or assigns, the mines and minerals lying under the land then conveyed, and give him and them the refusal of the same for the space of one calendar month from the time such offer should be made at the same price per acre as A., his heirs, or assigns should have agreed to sell the adjoining mines and minerals. And if B., his heirs or assigns, should accept such offer, and within one calendar month agree to purchase the mines and minerals so offered to him, then A., his heirs or assigns, would convey the mines and minerals under the land thereby conveyed to B., his heirs or assigns.*

*Held, that the covenant was not obnoxious to the rule against perpetuities.*

*Gilbertson v. Richards (4 H. & N. 277; 5 H. & N. 453) followed.*

*Held, also, that the assigns of the purchaser could enforce the covenant against the devisees of the purchaser.*

*Held, also, that the offer must be in writing, and that the non-acceptance of a parol offer within a month did not affect the rights of assigns of the purchaser under the covenant.*

*A canal company was empowered by its original special Act to construct certain works, but it was provided that nothing in the Act should be construed to give the company any mines under the land purchased under the provisions of the Act, unless they were expressly purchased under the special provisions contained in the Act. A subsequent special Act empowered the company to construct additional works, and incorporated the Railways Clauses Consolidation Act 1845. It also provided that these works should be considered as a part of the original undertaking of the company, and, subject to the provisions therein contained, be treated as if the same had been originally part thereof.*

*Held, that the company had power to make an express purchase of the mines under the land purchased for the construction of the works authorised by the second Act, by virtue of sect. 77 of the Railways Clauses Consolidation Act 1845.*

**THIS** was an action to enforce specific performance of a covenant, contained in the conveyance of certain land, to give the plaintiffs' predecessors in title a right of pre-emption of certain mines and minerals.

By a deed dated the 3rd Sept. 1856, James Offley conveyed certain land at Rumour Hill, at Cannock, in the county of Stafford, consisting of 2a. 3r. 16p., to John Simpson Rutter in fee.

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

Offley reserved to himself all mines and minerals lying under the piece of land, with a power to work them, subject, however, to the following provisions for pre-emption in favour of Rutter:

And, further, the said James Offley doth hereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree to, and with the said John Simpson Rutter, his heirs and assigns in manner following—that is to say, that in case the said James Offley, his heirs, or assigns, shall at any time hereafter sell or agree to sell to any person or persons whomsoever the mines and minerals lying and being in and under the lands of the said James Offley, adjoining to the said piece of land hereby conveyed, he, the said James Offley, his heirs, or assigns, shall and will at the same time offer to the said John Simpson Rutter, his heirs or assigns, the mines and minerals lying and being in and under the said piece of land hereby conveyed, or intended so to be, and give him and them the refusal of the same for the space of one calendar month from the time such offer shall be made, at the same price per acre as the said James Offley, his heirs or assigns, shall have agreed to sell his said adjoining mines and minerals. And if the said John Simpson Rutter, his heirs or assigns, shall accept such offer, and within such one calendar month agree to purchase the said mines and minerals so offered to him at the price at which they shall be so offered, he, the said James Offley, his heirs or assigns, shall, at the expense in all things of the said John Simpson Rutter, his heirs or assigns, convey and assure to the said John Simpson Rutter, his heirs or assigns, the said mines and minerals, under the said piece of land hereby conveyed.

By an indenture dated the 27th May 1861, Rutter conveyed the land which he had purchased of Offley, together with the right of pre-emption which he had acquired under the deed of the 3rd Sept. 1856, to the plaintiff company, "their successors and assigns, for ever, by virtue of and according to the true intent and meaning of the several Acts of Parliament, powers, and authorities now enabling the said company in this behalf."

The company was authorised and empowered by Act of Parliament to purchase and hold lands for the purposes of their undertaking, and this land was required for those purposes. A part of the canal was constructed on it, under the powers conferred on the company by an Act passed in 1855, called Church Bridge Locks.

In 1869 Offley died, and by his will, dated the 23rd Jan. 1867, he devised all his lands and hereditaments at Cannock, including the mines and minerals under the piece of land comprised in the deed of the 3rd Sept. 1856, to his daughter, the defendant, Jane Cartwright, the wife of the defendant, J. B. Cartwright, and Thomas Heatley, upon trust for sale, and he appointed the same persons his executors.

On the 18th April 1877 Offley's devisees entered into an agreement with the defendant Godson for the sale to him of the land adjoining the land comprised in the deed of the 3rd Sept. 1856, and also the mines and minerals under the Church Bridge Locks. This agreement was made expressly subject to the powers of the company to purchase the mines under the locks.

On the 9th May 1877 Mr. Thomas, the clerk of the plaintiff company, at the request of the devisees, had an interview with Mr. Hawksford, their solicitor.

In the course of conversation at that interview, Mr. Hawksford stated that Offley's devisees had agreed to sell the mines and minerals under the lands adjoining the piece of land comprised in the conveyance to Rutter, of the 3rd Sept. 1856, to the defendant Godson, at the rate of about 15s.

per acre, and he wished to know whether the plaintiffs would purchase the mines and minerals under the said piece of land at 150l. per acre.

No written offer was made to the company, but on the 25th May Thomas communicated what Hawksford had said to a board meeting of the company, and it was accepted in terms by a letter of the 12th June following.

On the 13th June the defendants' solicitors replied by the following letter:

Not having received the canal company's answer to our offer of the mines at Cannock within a calendar month, as mentioned in the deed of the 3rd Sept. 1856, we finally settled and approved the draft conveyance of the property to Mr. Godson, and returned the same to his solicitors on Monday last. Under such circumstances we conceive the matter is now beyond our control.

The writ was issued in this action on the 12th July 1877. On the 20th of that month the defendants, Cartwright and Heatley, executed a conveyance to the defendant Godson of the lands adjoining the piece comprised in the deed of the 3rd Sept. 1856. The conveyance was expressed to be "subject to the powers of the Birmingham Canal Company to purchase the mines under their canal and towing path."

By their statement of claim the plaintiffs asked that the defendants might be ordered to specifically perform the covenant by Offley, contained in the deed of the 3rd Sept. 1856, to give to Rutter, his heirs and assigns, the right of pre-emption of the mines and minerals under the piece of land contained in that deed.

The defendants, Cartwright and Heatley, by their statement of defence, said that they entered into the contract with Godson on the 18th April 1877, and that it was made expressly subject to the plaintiffs' powers to purchase the same. They contended that the plaintiffs had lost their right to purchase by not accepting the offer made to them on the 9th May 1877, within the calendar month mentioned in the deed of Sept. 1856. They also said that they had executed the conveyance to Godson before they had any notice of the action.

The defendant Godson, by his statement of defence, said that he had no notice of the deed of the 3rd Sept. 1856, express or implied, or of any claim of the company thereunder. He also contended that if the company had any right of pre-emption they had lost it by not accepting the offer within the calendar month.

The Birmingham Canal Company was incorporated by an Act passed in 1835 (5 Will. 4, c. 34). By this Act several companies were amalgamated, and a new company formed, and this company was empowered to purchase and hold lands, tenements, and hereditaments for the purposes or under the provisions of the Act.

#### Sect. 54 provided

That nothing in this Act contained shall extend or be construed to extend to give to the said company any mines of coal, ironstone, limestone, or fire clay below the thick coal under any land already taken or purchased by the said hereby dissolved company, or the said previous companies, or any of them, or to be taken or purchased by the said company under the provisions of this Act, unless the same have been already specifically and distinctly purchased and paid for by the said companies or any of them, or shall be expressly purchased and paid for by the said company under the special provision hereinafter contained; but all such mines of coal, ironstone, limestone, and fire clay below the thick coal, shall (except in such cases as aforesaid) be deemed to be excepted out of every such purchase respectively.

Sect. 93 provided that no mines should be worked within twelve yards of the company's canals or works without the consent of the company.

#### Sect. 95 provided that:

When and so often as any proprietor, lessee, or tenant of any mine of coal, ironstone, limestone, or other minerals lying under the said present or future canals, towing paths, or other works within the distance hereinbefore limited shall be desirous of working the same (he being in respect of his estate or otherwise entitled to do so) then and in every such case such proprietor, lessee, or tenant shall give notice in writing under his hand of such intention to the clerk for the time being of the said company at least one calendar month before he shall begin to work such mine, and upon the receipt of such notice it shall be lawful for the said company to contract or agree with any such proprietor, lessee, or tenant for the purchase of and to purchase accordingly any such mine or part thereof of the getting or working of which may appear to the said company likely to prejudice the said canal, towing paths, reservoirs, or other works, and such proprietor, lessee, or tenant as aforesaid is hereby empowered to sell and convey the same accordingly.

#### Sect. 252 provided that:

In all cases wherein it may be necessary for any person to serve any summons, demand, or notice, or any writ or other proceeding at law, in equity, or otherwise upon the said company service thereof respectively on the clerk of the said company, or by leaving the same at the head office of the said company in Birmingham . . . shall be deemed good and sufficient service of the same reply on the said company.

In 1840 another Act was passed (3 Vict. c. 24), which conferred further powers on the company, and sect. 53 explained that sect. 54 of the Act of 1835 was not intended to give to the company the thick coal and the minerals lying above it, under the lands mentioned in that section, and it was enacted that the section apply to all coal, ironstone, or limestone whatever under any land mentioned in it.

In 1855 another Act was passed (18 & 19 Vict. c. 121), by which the company were authorised to make and maintain additional canals and works.

Sect. 2 incorporated the Lands Clauses Consolidation Act 1845 with the Act.

#### Sect. 17:

The company may, in addition to the lands authorised to be compulsorily taken by them under the powers of this Act, contract with any owner willing to sell the same for the purchase of any lands adjoining or near to any of the canals by this Act authorised not exceeding in the whole ten acres, for certain extraordinary purposes therein mentioned.

#### Sect. 18:

The clauses of the Railways Clauses Consolidation Act 1845 with respect to the temporary occupation of lands near the railway during the construction thereof, and also the clauses of that Act numbered 52, 53, 54, 55, 56, 57, and 58 relating to the substitution of other roads for roads interfered with and the restoration of roads interfered with, and also the clauses thereof with respect to mines under or near the railway, and also clause number 27 of the Waterworks Clauses Act 1847 shall be incorporated with this Act, and shall extend and be applicable to the canals and works by this Act authorised; and in construing those clauses in connection with this Act the expression "the railway" and "the waterworks" shall mean the canals and works by this Act authorised.

#### Sect. 21:

The owner of any mines, minerals, lands, or works of the company at his request may from time to time with such consent as hereinafter mentioned make and maintain any branch, canal, or tramway with all necessary wharfs, works, and conveniences from such mines, minerals, lands, and works to communicate with any

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BIRMINGHAM CANAL COMPANY v. CARTWRIGHT.

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of the canals or tramways of the company now existing or authorised or hereafter to be made . . . provided always that no such branch, canal, or tramway, works, or conveniences shall be made in or through any lands without the consent of the owner and occupier thereof . . . and the lands in or through which any such branch canal or tramway works or conveniences are intended to be made shall for the purposes of this enactment be deemed lands by this Act authorised to be purchased by agreement for the purposes of this Act.

## Sect. 27 :

Every branch canal or tramway work or convenience purchased or made by the company shall be vested in the company as part of the undertaking of the company to all intents and purposes.

## Sect. 31 :

The canals and works by this Act authorised shall be considered as part of the undertaking of the company, and subject to the provisions of this Act shall for all purposes be treated and dealt with as if the same had originally been part thereof.

The Church Bridge Locks were constructed by the company under the powers conferred by sect. 21 of the Act of 1855.

*North, Q.C. and Speed for the company.*—No offer has been made to the company by Offley's devisees within the terms of the covenant. No offer was made which the court could recognise. The offer ought to have been in writing, as it related to land. Godson is a purchaser, with notice of the covenant, and is bound by it. The deed of the 3rd Sept. 1856 was stated in the abstract of title sent to him. The contract was made expressly subject to the rights of the plaintiffs, and the action was commenced before the conveyance was executed. [FRY, J.—May not a question arise whether the covenant is obnoxious to the rule against perpetuities?] The covenant does not prevent the parties dealing with the property, and prospective covenants as to the use of land have been enforced in a great many cases, and it has never been said that they violate the rule against perpetuities :

*Western v. Macdermott*, 15 L. T. Rep. N. S. 641 ; L. Rep. 2 Ch. 72.

If a parol offer were sufficient under the covenant, such an offer made to Thomas would not have bound the company, as it could only be bound by writing :

## Sect. 252 of the Act of 1835.

The company had a statutory power to purchase mines. The Church Bridge Locks were constructed under the powers of the Act of 1855, which is not controlled by the Act of 1835. The Act of 1855 incorporates the Railways Clauses Consolidation Act 1845, and sect. 77 of that Act gives power to purchase mines if they are expressly purchased.

*Kekewich, Q.C. and Hornell for the devisees.*—We have two defences: first, that the company has no power to purchase these mines and enforce the covenant; secondly, that, if they have, the offer was made to them, and they did not accept it in time. With regard to the first, sect. 54 of the Act of 1835 shows that, and no such power is given by sect. 77 of the Railways Clauses Consolidation Act of 1845. The words "expressly purchased" must mean expressly purchased under the power of the company's special Act. By the Act of 1835 the company cannot purchase mines, and there is no such express power in the Act of 1855. This is not a purchase of land and the mines under it, but a purchase of mines separately.

Such a case does not come within sect. 77. There is nothing to show that these mines are required by the company for the purposes of their Act. The plaintiffs accepted our parol offer to sell in writing, and they cannot now say it was not a valid one. But they did not accept it within one calendar month, and their acceptance was therefore too late.

*Cookson, Q.C. and Whitehorne for the defendant Godson.*—Sect. 54 of the Act of 1835 shows that the company have no power to purchase mines, and sect. 31 of the Act of 1855 shows that the works authorised by that Act are to be considered as a part of the original undertaking of the company. The statutory powers of a company must be construed strictly :

*Stourbridge Canal Company v. Wheeley*, 2 Barn. & Ad. 272 ;

*Scales v. Pickering*, 4 Bing. 448.

The plaintiffs' statement of claim shows that an offer has been made, and the covenant exhausted. The relief claimed is therefore inconsistent. [FRY, J.—I should give leave to amend if necessary, for the facts stated might lead to alternative relief.] A verbal offer is sufficient :

*Dickinson v. Dodds*, 34 L. T. Rep. N. S. 607 ; L. Rep. 2 Ch. Div. 463.

The covenant is within the rule against perpetuities, and cannot be enforced :

*Attorney-General v. The Cordwainers' Company*, 2 M. & K. 534 ;

*Ware v. Polhill*, 11 Ves. 257 ;

*Stocker v. Dean*, 16 Beav. 161 ;

*Highgate Archway Company v. Jeakes*, 24 L. T. Rep.

N. S. 567 ; L. Rep. 12 Eq. 9 ;

*Lewis on Perpetuities*, p. 479 ;

*Sugden on Powers*, 8th ed., p. 849.

[FRY, J. referred to *Ferrand v. Wilson* (4 H. 344).] The plaintiffs may rely on *Gilbertson v. Richards* (4 H. & N. 277 ; 5 H. & N. 453), but that case is inconsistent with other cases, and the judgment was not mainly founded on this point. The words of the covenant are peculiar, and assigns cannot be bound by it, or claim any benefit under it. It is a collateral covenant, and relates to a different inheritance from that which was conveyed, and comes within the exception in *Spencer's case* (5 Rep. 16, a). In *Western v. Macdermott* (15 L. T. Rep. N. S. 641 ; L. Rep. 2 Ch. Ap. 72) both parties were interested in the same estate. In some cases it is possible to devide the power :

*Lantsbery v. Collier*, 2 K. & J. 709.

The covenant does not run with the land. It cannot be enforced against Godson ; he is not selling the adjoining property.

*Speed in reply.*—The judgment of the Court of Exchequer in *Gilbertson v. Richards* is in my favour on the question of the rule against perpetuities. *Stocker v. Dean* turned on the words of the covenant. *Highgate Archway Company v. Jeakes* turned upon the construction of an Act of Parliament. *Lantsbery v. Collier* does not apply to this case. *Tulk v. Moxhay* (2 Ph. 774) ; *Lutker v. Dennis* (37 L. T. Rep. N. S. 827 ; L. Rep. 7 Ch. Div. 227) and that class of cases do not apply, as this objection was not raised. *De Mattos v. Gibson* (4 De G. & J. 276, 282) shows a contract of this nature will be enforced.

FRY, J. stated the facts and continued:—On that short statement of facts a variety of questions have been argued before me, and they

require separate consideration. In the first place, the question has arisen whether the canal company have any power to take these mines at all. It appears that the lands in question were required for the purpose of a cutting or lock called the Church Bridge Locks, which was in fact a piece of water joining the Cannock Extension Canal of the plaintiff company with the canal of another company, known as the Staffordshire and Worcestershire Canal Company. Now, the first question which arises on the Act of 1855 is this: Has it been proved to me that the Church Bridge Locks are constructed under the power of the 21st section? [His Lordship then reviewed the evidence on this point, and continued:] It has been proved to me that these locks were made under the powers of that section. Having come to this conclusion, the next question which arises is this: Whether the company had power to acquire the mines and minerals under the Church Bridge Locks by express contract? It appears to me that they had, because it is provided that any land through which the branch canal or works which may be made under the 21st section shall for the purpose of the enactment be deemed to be land by the Act of 1855 authorised to be purchased by agreement for the purpose of that Act. In other words, lands taken under the 21st section are to come under the same category as lands taken under the 17th section, and to be taken for the purpose of the 17th section. But where lands are taken under the 17th section the provisions of the Railways Clauses Consolidation Act with regard to the mines and minerals apply, and therefore I must inquire what are the provisions of that Act with regard to mines. The provision which is material is the 77th section, which provides that the company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them (except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the works), unless the same shall have been expressly purchased; "and all such mines (excepting as aforesaid) shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby." That appears to me to be a very plain and clear clause. You may buy the mines, but you must buy them expressly, and they must be expressly conveyed to you; and if they are not, the deed does not operate upon them. Nor do I think that the clear effect of that clause can be cut down by the subsequent section (78) of the same Act, which gives a particular power to the railway company in the event of the owner of the mines intending to work them within certain proximity to their canal or railway. I think therefore, according to the construction of the Act of 1855, the company have the power expressly to buy mines. But then it is said, however that may be, taking the Act of 1855 alone, that is not so when regard is had to the previous Acts of Parliament which regulate the constitution of this company, and especially having regard to the Act of 1855, to which I have already referred. [His Lordship here read sect. 54 of the Act of 1835, and sect. 53 of the Act of 1840.] But sect. 54 is distinct; it only provides that nothing in that Act contained shall give the mines, and only precludes the mines passing, except in the manner pointed out in the

Act in respect of land taken under the provisions of that Act. It does not lay down a general rule for the operations of the company, or a general immutable principle of the constitution of the company: it only provides what is to happen in respect of the lands taken under the provisions of that Act. The lands taken under the Act of 1855 therefore appear to me not to be in any way affected by the clauses of the Act of 1835. I come, therefore, to the conclusion that the company have the power expressly to purchase mines. The next question which arises is this. Upon the terms of the covenant giving the rights of pre-emption, whether or not that right of pre-emption is obnoxious to the rule against perpetuities? For this purpose it is enough for me to repeat that the covenant is one in which Offley for himself, his heirs, executors, administrators, and assigns, agrees with Rutter, his heirs and assigns, that in case Offley, his heirs and assigns, shall at any time thereafter sell or agree to sell to any person the adjoining mines, then he will offer the mines under the land sold and conveyed by the deed of 1856 to Rutter and his assigns. Now, in my opinion, that clause is not in any way open to the objection which has been urged against it. I think that wherever a contingent right or interest is presently vested in A. and his heirs, although the right may not arise until the happening of some contingency which contingency may not take effect within the period defined by the rule against perpetuities, such right or interest is not obnoxious to that rule. The rule aims at preventing the suspension of dealing with property, the alienation of land, or other property. But where there is a present right of that sort, although its exercise may be dependent upon a future contingency, and the right is vested in an ascertained person or persons, there the person or persons concurring with the person who is subject to the right can make a perfectly good title. The total interest in the land, so to speak, is divided between the covenantor and covenantee; and the covenantor and covenantee can together at any time alienate the land absolutely. I think the decision in the case of *Gilberston v. Richards* is a distinct authority in favour of that conclusion. There a rent was to arise at any time thereafter when the mortgagees should enter, and the Court of Exchequer said that was not in any way a violation of the rule against perpetuities. "It is quite true," they said, "that no rent can be lawfully created which violates the law against remoteness, and therefore a rent could not be granted to the son of an unborn son. But it seems to be an error to call this rent a perpetuity in an illegal sense. It is vested in Thomas Billings and his heirs. He or his heirs may sell it, or realise it at their pleasure. A rent in fee simple may be granted to a man and his heirs to continue for ever. Why, therefore, may not one be granted to commence at any time, however remote? It is only a part of the estate in fee simple of the rent." And though the Court of Exchequer Chamber did not deliver their judgment mainly upon that question, they nevertheless referred to it in a manner which sufficiently indicated their opinion upon the point. "There may," they said, "be considerable doubt arising on the point raised by counsel whether the rule as to perpetuities applies in a case like the present, where the party who or whose heirs are to take is ascertained, and who

can dispose of and realise or alienate the estate either at common law, or at all events since the passing of the 8 & 9 Vict. c. 106, s. 6." The next question I have to determine is this: It is said in this case that the plaintiffs came too late, that a valid offer was made on the 9th May, and that not having been accepted until the 12th June, the calendar month, which is the time during which the acceptance must be made to the offer, had expired. It renders it, therefore, very material to consider what the nature of the offer and acceptance was to be. [His Lordship here referred to the covenant.] Upon the whole I think that according to the true construction of that covenant the offer ought to have been in writing, and for this reason, that the purport of the covenant appears to me to be a contract that a contract should be made, and that the contract so to be made should be one that should be capable of being enforced. I think that is the good sense of the thing, having regard to the scope and general meaning of that covenant, and I find particular words which corroborate the conclusion I have come to. I find it is stipulated that Rutter should, by accepting the offer, enter into an agreement. I think that it must be an agreement which would be capable of being enforced against him, and that could only be enforced against him if it was in writing. I think therefore there is that which indicates that it was intended that Rutter should sign a written acceptance. But if Rutter was to accept in writing, it seems to me to be reasonable to require that the offer to be made to him should be in writing, and if so the offer made by Offley's representatives to the company ought to have been made in writing. But even if I am wrong in that, it seems to me that the offer never was made in such a manner as that Offley's representatives can say that at the expiration of one month the right of the company had gone. What happened was this. [His Lordship here discussed the evidence on this point, and continued:] I am bound to say it does not appear to me that there was an offer upon which Mr. Offley's devisees can say that the month began to run. Before the month could run—even if the offer could be made by parol—it must be an unconditional, unqualified, and perfectly plain offer. Then there is a further question, which also would be material to consider if that conclusion were wrong, namely, whether this offer made to Thomas in this way was one made to the company. Now, it was evident that Thomas had no express authority to receive this offer, and I am bound to say I have great difficulty in seeing that, as a mere clerk of the company, he had implied authority to receive it. If the offer had been addressed to the clerk of the company, at the office of the company, it would have been another thing; but to say that he had authority to receive that offer, so that from the date of his reception of it, and not from the date of his communication of it to the managing body of the company, whether committee or board of directors, time began to run, seems to me to be a proposition that it is difficult to make out in this case. I think there has been no offer made in accordance with the covenant, and the result is that the company are entitled to have the benefit of that covenant. The question has been raised as to the rate at which the plaintiffs must pay for the land. The case

has been opened to me and argued by the plaintiffs on the ground of covenant, and not on the ground of there having been a contract under the covenant, and I think it has been rightly put in that manner. The result is, that it appears to me there is nothing whatever binding the purchasers or the devisees of Offley to the 150l. per acre mentioned by Hawksford to Thomas. I am of opinion that the company are entitled to the benefit of the covenant, and to purchase the mines under the land comprised in the deed of the 3rd Sept. 1856, at the same price per acre as that at which the mines under the adjoining land have been sold by the devisees to Godson. There must be an inquiry what that price was, and on payment of that price the defendants must convey the mines in question to the company. The defendants must pay the costs of the action.

Solicitors for the plaintiffs, *Tucker and Lake, for Wragge, Evans, and Holliday*, Birmingham.

Solicitors for the devisees, *Saunders, Hawksford, and Bennett*, for *Hawksford and Owen*, Wolverhampton.

Solicitors for the defendant Godson, *Wilkins, Blyth, and Fanshawe*, for *Arthur Wright*, Oldbury.

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### DIVORCE BUSINESS.

*Tuesday, June 17.*

(Before the Right Hon. the PRESIDENT.)

LEEZE v. LEEZE. (a)

*Solicitor and client—Money paid to solicitor on account of alimony ordered by Court—Lien for costs—Rule 94.*

*A solicitor has no lien for costs upon moneys received by him on behalf of his client solely on account of alimony.*

THIS was an application by a wife petitioner in a suit for dissolution to compel her former solicitors to refund a sum of money which had been paid to them as her solicitors by way of alimony, under an order of the court bearing date the 29th Jan. 1877.

The sum so paid amounted to 100l.

On the 28th Feb. 1879 a decree nisi was pronounced in the suit.

Subsequently on the 5th May 1879 a new solicitor was appointed on behalf of the petitioner by order of the court.

At the time the change of solicitors was effected there remained in the hands of the petitioner's late solicitor a balance, out of the above sum of 100l., of 31l. 10s. on which he claimed a lien in respect of costs, but which it was now sought to compel him to pay over as having been received solely on account of alimony.

*Man* appeared on behalf of the applicant.

*Hodson* for the solicitor.—They cited

*Ex parte Bremner*; *Bremner v. Bremner and Brett*, 15 L. T. Rep. N. S. 297; L. Rep. 1 P. & D. 254; 36 L. J. 11, P. & M.;

*Re Keane*, L. Rep. 12 Eq. 115.

The PRESIDENT (Sir James Hannen).—The 94th rule provides that the alimony ordered to be paid to the wife shall be paid to her or "to some person or persons to be nominated in writing by her, and approved by the court as trustee or trustees on her behalf." The rule is intended for the protec-

(a) Reported by L. D. POWLES, Esq., Barrister-at-Law.

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tion of the wife by securing to her, during the progress of the suit as well as afterwards, the funds which are ordered to be paid by the husband for her support. The present case is distinguishable from *Ex parte Bremner*, because there the petitioner had nominated her solicitor to receive the alimony payable to her, whereas in the present case she has not done so, neither is there anything to show that she has ever acquiesced in his receiving it in prejudice of her right. The money was received by him expressly on account of alimony. Receiving it as such, it was his duty to hand it over to the petitioner; and, if it was his intention to assert the right of lien which he now claims, he should have brought it distinctly under the notice of his client. The balance of the sum received by him on behalf of the petitioner must be handed over to her.

*Order accordingly.*

Solicitor for the petitioner, Hyatt.

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT LINCOLN'S INN.

*Thursday, June 19.*

(Before JAMES, BAGGALLAY, and THESIGER, L.JJ.)

*Ex parte GAMES; Re BAMFORD. (a)*

*Debtor and creditor—Mortgage of all grantor's property, present and future—Licence to seize—13 Eliz. c. 5.*

*A bond fide assignment of the whole of a debtor's property, present and future, by way of mortgage to secure an existing debt and future advances to a certain amount, is not void as against the creditors of the grantor under the 13 Eliz. c. 5, as necessarily tending to defeat or delay them.*

*Decision of Bacon, C.J. reversed.*

This was an appeal from a decision of the Chief Judge in Bankruptcy.

By a bill of sale, dated the 27th Nov. 1874, Samuel Bamford, a farmer, in consideration of a past debt of 249l., assigned to William Games "all and every the household goods and furniture, stock-in-trade, plate, linen, books, china, and other household effects whatsoever, horses, saddles, harness, and other accoutrements, and also all the implements of husbandry, crops of corn and grain, and live and dead stock, the lease of Cilwhibart farm, and all interest in the said lease and farm which the said Samuel Bamford now hath or may hereafter have in the said farm; and also all other goods, chattels, and effects now being, or which shall hereafter be in, upon, or about the messuage or dwelling-house called Cilwhibart, now occupied by the said Samuel Bamford, and the outbuildings and lands belonging thereto, and all the book debts and other debts owing to the said Samuel Bamford, and all other the personal estate whatsoever of or to which the said Samuel Bamford is now and from time to time, and at all times hereafter (during the continuance of this security), shall be possessed of or entitled to," to secure the repayment of the 249l. and further advances, not exceeding, with the sum already

advanced, 300l. And it was agreed and declared that after default in payment it should be lawful for Games to recover the debts, and quietly to receive and take into possession and hold and enjoy all the assigned premises, and also "to seize and take possession of any household goods and furniture, stock-in-trade, and other goods, chattels, and effects which may or shall from time to time be substituted in lieu of the said household goods and furniture, stock-in-trade, goods, chattels, and effects, or any part thereof, or which shall for the time be found in or about the messuage or dwelling-house and premises . . . or which may at any time hereafter during the continuance of this present security be in the occupation of the said Samuel Bamford, either in the lifetime or after the decease of the said Samuel Bamford," with power to sell, &c.

Further advances amounting to nearly 50l. were afterwards made.

On the 3rd Nov. 1878 possession was taken under the bill of sale, and the property comprised in it was advertised for sale on the 19th Dec.

On the 14th Dec. 1878 Bamford filed a liquidation petition, and the trustee in the liquidation soon afterwards obtained an interim injunction restraining Games from selling.

On a motion by the trustee to have the injunction made absolute, the County Court judge held that Games was entitled to the goods which belonged to the debtor on the 27th Nov. 1874, but that all property since acquired by him belonged to the trustee.

On appeal by Games from the latter part of this order, the Chief Judge held that the bill of sale, so far as it purported to comprise within the security after-acquired property of the debtor, was invalid, and he dismissed the appeal with costs.

From this decision Games again appealed.

*E. O. Willis and Maclean* for the appellant.—The deed was *bond fide* executed for our benefit, and though it would, if there had been an act of bankruptcy, be void under the bankrupt law, it is not void under the 13th Eliz. c. 5, there being no evidence of any intention to defeat creditors:

*Allon v. Harrison*, 21 L. T. Rep. N. S. 282; L. Rep. 4 Ch. 623;

*Holroyd v. Marshall*, 10 H. of L. Cas. 191;

*Allen v. Bonnett*, 21 L. T. Rep. N. S. 578; L. Rep. 5 Ch. 577.

*Winslow, Q.C.* (with him *Bigham*) for the respondent.—We say that an assignment by a debtor of the whole of his property, present and future, to one creditor must of necessity be made with intent to delay or defraud creditors within the 13 Eliz. c. 5. He referred to

*Freeman v. Pope*, 23 L. T. Rep. N. S. 208; L. Rep. 5 Ch. 538;

*Twine's case*, 3 Co. 81;

*Ex parte Bolland; Re Clinch*, 29 L. T. Rep. N. S. 543; L. Rep. 17 Eq. 115;

*Graham v. Chapman*, 12 C. B. 85;

*Spencer v. Slater*, 39 L. T. Rep. N. S. 424; L. Rep. 4 Q. B. Div. 13;

*Holmes v. Penney*, 3 K. & J. 90.

Without calling for a reply,

JAMES, L.J. said:—I am unable to agree with the Chief Judge. There was a *bond fide* debt of 249l. due to the gentleman who took the security, and the amount for which the deed was to be a security was limited to 300l. I cannot see any evidence of an intent to defeat or delay creditors.

(a) Reported by H. FRAZ, Esq., Barrister-at-Law.



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It was intended that the grantor should remain in possession of the property comprised in the deed, and should carry on his business, substituting new chattels for those which he sold in the ordinary course of business, and that the mortgagee's security should continue on the substituted chattels. Of course the deed could not prevent the grantor from applying any moneys which he received in paying his creditors. The transaction was nothing more or less than a preference of this particular creditor, and such a transaction is only void under the bankruptcy law, which does not apply in the present case, because the deed was executed several years before the bankruptcy of the grantor.

BAGGALLAY, L.J.—I am of the same opinion.

THESIGER, L.J.—I am also of the same opinion. Two points have been raised: first, the point taken before the County Court judge, that though the deed was in itself valid, it did not confer a right to the after-acquired property, but that point must be given up, because it is covered by *Holroyd v. Marshall (ubi sup.)*; and the point taken before the Chief Judge, that the deed was void under the 13 Eliz. c. 5, as being made with intent to defeat creditors. The deed was no doubt an act of bankruptcy, and might have been set aside on that ground, if any creditor had availed himself of it in time. But no creditor did so, and the time for making use of the deed as an act of bankruptcy has passed. No consequence can result from an act of which creditors might have taken advantage if they had come in time, but of which they did not take advantage. This was decided in *Allen v. Bonnet (ubi sup.)*. In the words of Giffard, L.J. in that case: "If a given transaction of this description cannot be treated as a ground for adjudication, it cannot be treated as having the consequences of an act of bankruptcy in any sense or for any purpose." Then, was the deed void under the 13 Eliz. c. 5? In determining that question, it is immaterial that the deed assigned the whole of the debtor's property, present and future. As the same learned judge (Giffard, L.J.) says in *Alton v. Harrison (ubi sup.)*: "I have no hesitation in saying that it makes no difference in regard to the statute of Elizabeth whether the deed deals with the whole or only a part of the grantor's property. If the deed is *bonâ fide*—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth." Here there was a good consideration for the deed, namely, a past debt, which, though not good under the Bankruptcy Act, is good under the 13 Eliz. c. 5. I am therefore of opinion that the transaction was perfectly *bonâ fide*, and that there was no intent to defeat creditors.

*Appeal accordingly allowed with costs.*

Solicitor for the appellant, *J. H. Wrentmore.*

Solicitors for the respondent, *Bell, Brodrick, and Gray.*

Thursday, July 17.

(Before JAMES, BRETT, and COTTON, L.JJ.)

*Ex parte JONES; Re GRISSELL. (a)*

*Bankruptcy—Married woman—Separate estate—Debt contracted during coverture—Debtor's summons—Bankruptcy Act 1869, ss. 6, 7.*

*A married woman cannot be made a bankrupt in respect of a debt or obligation contracted by her after her marriage, although she has property settled to her separate use.*

THIS was an appeal from a decision of Mr. Registrar Brougham, sitting as Chief Judge in Bankruptcy.

The facts of the case were briefly as follows:

On the 8th Jan. 1879 Charles Edmund Grissell entered into a contract with Frederick Jones, an auctioneer, for the purchase of a house at Lancaster Gate for 10,500*l.* Jones required a deposit of 500*l.* to be made, and Mrs. Grissell, who under a settlement executed on her marriage with Charles Edmund Grissell was entitled to certain property for her separate use, was induced to sign a cheque for 500*l.* on her own bankers, and to hand it to Jones.

Payment of the cheque was, by Mrs. Grissell's directions, refused when it was presented to the bankers.

Thereupon Jones issued a debtor's summons against Mrs. Grissell for 500*l.*

Mrs. Grissell resisted the summons on the ground that, being a married woman, she was not subject to the bankruptcy law.

The registrar adopted that view, and dismissed the summons.

From this decision Jones appealed.

WINSLOW, Q.C. and CRISPE for the appellant.—It has never been decided whether a married woman who has separate property can be made a bankrupt under the Bankruptcy Act 1869; but in *Ex parte Holland, Re Hensage* (30 L. T. Rep. N. S. 106; L. Rep. 9 Ch. 307), Mellish, L.J. expressed an opinion rather in favour of our contention. "I am not," said he, "quite satisfied that if the lady (whom it was sought to make bankrupt in that case) had been shown to have separate property, it might not have made a difference, because, by the 1st section of the Act (the Married Women's Property Act 1870), a married woman may be a trader; and it appears to me that, if a married woman became a trader, and had trade assets, it would be analogous to cases under the custom of the City of London, under which it was not unusual for a married woman to be made a bankrupt. And I should be sorry to say that there is no way of making a married woman's separate property liable except in equity; for instance, such property as she might have acquired as a trader. But I think the Act only makes her liable in respect of her separate property, and I do not see how she can be made a bankrupt unless she has been shown to have separate property." [BRETT, L.J.—The Lord Justice adds, "It is not necessary to decide the other question now, but I do not wish to prejudice the question when it shall arise." Are you not trying to make his words prejudice the question?] The 1st section of the Married Women's Property Act 1870 makes the separate earnings of married women their separate pro-

(c) Reported by H. PAZ, Esq., Barrister-at-Law

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perty, and we say that the effect of that is to render them liable to be made bankrupt as married women trading under the custom of the City of London were under the old law. As Mr. Cooke says in his *Bankrupt Laws* (p. 36), "Every reason that induces the courts of law to make a *feme covert* personally liable for her contracts, equally operates to make her subject to bankruptcy; and it would be the height of cruelty to determine that a woman should be taken in execution for her debts, and at the same time preclude her from that benefit which the Legislature affords to honest and industrious traders, sinking under the pressure of undeserved misfortune." In many cases under the old law a married woman could be made bankrupt:

*La Vie v. Philips*, 1 Wm. Bl. 570;  
*Ex parte Meor and wife*, 2 Bro. C. C. 266;  
*Ex parte Franks*, 7 Bing. 762.

By the Bankruptcy Act 1861, s. 69, the distinction between trader and non-trader as respects liability to be made bankrupt was abolished. [BRETT, L.J.—But one must still be a debtor, and a married woman cannot be sued as a debtor.] Under the Judicature Act a married woman can be sued. Order XVI., r. 8, of the Rules of Court 1875 provides that married women may sue and defend any action by their guardians appointed for that purpose; therefore they may be sued. They also referred to

*Day v. Freund*, 35 L. T. Rep. N. S. 551.

*De Gen, Q.C. and Beale*, for the respondents, were not called upon.

JAMES, L.J.—I am of opinion that this appeal cannot be maintained. Before modern legislation, it is admitted that the law was clearly established, and that it was correctly laid down by Mr. Cooke in his "Treatise on the Bankrupt Laws" (p. 47) thus: "It seems now to be decided that, although the husband and wife live separate by deed, and the wife has a separate maintenance, yet that she cannot become legally responsible for contracts which she may enter into, as if she were sole and unmarried; and that, therefore, she cannot be sued as a *feme sole* while the relationship of marriage subsists between them, and while she and her husband are living in the kingdom. And if this is the case, it follows that no commission can be supported against her under such circumstances." That was the state of the law when Mr. Cooke's work was published. When was the law altered? Can a woman be sued as a *feme sole* because she has separate property? The Married Women's Property Act 1870 makes no provision for suing a married woman except for debts contracted by her before marriage. If she is not liable to be sued as a *feme sole*, that is, in what used to be called a common law action, she is not liable to be sued as a debtor at all. The liability in equity is to have her separate estate taken from her for the benefit of the person with whom she has contracted on the faith of it. It is a special equitable remedy arising out of a special equitable right. She is not a debtor in any sense of the word, and, not being a debtor, the whole foundation of the case fails. A debtor's summons is a summons against a debtor. She is not a debtor, and there is, therefore, no legal authority to issue a debtor's summons against her, and no

proceedings in bankruptcy founded upon it can be effectually taken.

BRETT, L.J.—It seems to me that under the old Bankruptcy Acts no person could be made a bankrupt who was not both a debtor and a trader within the meaning of the Acts, and no person was a debtor within the meaning of the Acts unless a remedy could be had against him as upon and for a debt. As a general rule, a married woman could not be either a debtor or a trader; but there were some exceptions to that rule—for instance, married women carrying on trade in the city of London by the custom of London, who could be both traders and debtors, and therefore such married women were within the Bankruptcy Acts. So, too, the wife of a convict could trade and become a debtor. It is said that under the present Bankruptcy Act a person not a trader may be made bankrupt. True; but if the appellant's case is to prevail, the argument must go this length, that since the passing of the Bankruptcy Act 1869 any married woman may be made a bankrupt. That Act has removed the condition of trading, but the other condition remains precisely as before. It is still necessary that the person who is to be made a bankrupt should be a debtor, that is, a person who can be sued as upon and for a debt. A married woman cannot be sued as upon and for a debt, either in a court of equity or in a court of law. The peculiar remedy in a court of equity is only against her separate property so long as it exists, but that is not a remedy against her as upon and for a debt. I think, therefore, that no married woman, because she has separate property, can be sued as a debtor, or be made a bankrupt.

CORROD, L.J.—I think the Judicature Acts have nothing to do with this case, nor has the Married Women's Property Act 1870 either. The question is whether this lady is a debtor within the meaning of the Bankruptcy Act 1869. The Judicature Acts have given no new rights against married women, but have only made a difference in the mode in which they may be sued. A debtor must be liable to all the consequences of a judgment against him personally, but that is not the position of a married woman. Formerly a court of equity, and now all the divisions of the High Court, would compel the satisfaction of an engagement out of her separate property. But the principle, as it was expressed by James, L.J. in the case of *The London Chartered Bank of Australia v. Lemprière* (29 L. T. Rep. N. S. 186; L. Rep. 4 P. C. 597), is that the married woman intends to contract so as to make her separate property the debtor. It is not the woman as a woman who becomes liable, but her engagement has made that part of her property which is settled to her separate use the debtor and liable to satisfy her engagements. She herself is not a debtor within the meaning of the Bankruptcy Act, and therefore she cannot be made a bankrupt.

*Appeal accordingly dismissed, with costs.*

Solicitor for the appellant, *J. Girdlestone*.  
 Solicitor for the respondent, *S. B. Booth*.

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Ex parte MORIER; Re WILLIS.

[CT. OF APP.]

Thursday, July 17.

(Before JAMES, BRETT, and COTTON, L.JJ.)

Ex parte MORIER; Re WILLIS. (a)

**Bankruptcy—Proof—Equitable set-off—Mutual credit—Bankruptcy Act 1869, sect. 39.**

At the time of the stoppage of a bank there was standing to the credit of the joint account of a brother and sister, as executors of the will of their late father, a sum of 1404*l.*, and the brother's own current account with the bank was overdrawn to the extent of 1206*l.* The brother was sole residuary legatee under the will. Securities had been set apart to answer the legacies bequeathed by the will, and all the debts and funeral and testamentary expenses had been paid, except a small sum for taxes on the testator's house and a solicitor's bill of costs. The brother claimed to set off the balance due to the bank from his own account against the balance due from the bank on the joint account:

Held, that the set-off could not be allowed, for that the rule of equitable set-off or mutual credit could not apply unless the brother was so much the person solely beneficially interested in the balance standing to the credit of the joint account that a court of equity, without any terms or any further inquiry, would have obliged the sister to transfer that balance into her brother's name alone.

THIS was an appeal from a decision of Mr. Registrar Pepys, sitting as Chief Judge in Bankruptcy.

The facts of the case were briefly as follows:

At the time of the stoppage of Willis, Percival, and Co., bankers, R. Morier had overdrawn his current account with them to the extent of 1206*l.* 2*s.* 3*d.*

At the same time there was standing in the bank to the credit of the joint account of R. Morier and his sister, as executors of the will of their father, who had died in July 1877, a sum of 1404*l.* 5*s.* 6*d.*

R. Morier was the sole residuary legatee under the will.

The testator's debts, with one exception, and funeral and testamentary expenses had all been paid at the date of the stoppage of the bank, and securities had been set apart to answer certain legacies and annuities bequeathed by the will. The debt unpaid was a sum of 10*l.* for taxes in respect of the testator's house up to Lady-day 1878, and a sum of 50*l.* for costs was due to the solicitors of the executors in relation to the estate.

Subject to these debts of 60*l.* and to the sufficiency of the securities set apart to answer the legacies and annuities, the balance standing to the joint account of R. Morier and his sister was in equity the sole property of R. Morier.

Under these circumstances he claimed to set off the 1206*l.* 2*s.* 3*d.* due from him to the bankers against the 1404*l.* 5*s.* 6*d.* due from them on the joint account, and to prove in the liquidation of the bankers for the balance of 198*l.* 3*s.* 3*d.*

The Registrar held that the set-off could not be allowed, but that Morier must pay the 1206*l.* 2*s.* 3*d.* to the trustee in the liquidation, and that he and his sister must prove in the liquidation for the 1404*l.* 5*s.* 6*d.*

From this decision Morier appealed.

De Gez, Q.C. and Finlay Knight, for the appellant.—*Bailey v. Finch* (25 L. T. Rep. N. S. 871;

(c) Reported by H. PRAT, Esq., Barrister-at-Law.

L. Rep. 7 Q. B. 34) is strongly in favour of our contention that we are entitled to a set-off. There the defendant had one account with the bank in his own name, and had overdrawn it at the time when the bank stopped payment; and he had another account in his own name "as executor of the late Mrs. A," under whose will he was sole residuary legatee; and, though there were certain bequests which he had not yet provided for, it was held that he was entitled to set off the balance standing to his credit upon the executorship account against the claim of the bank in respect of his overdraft. [JAMES, L.J.—In that case there was a legal set-off unless a countervailing equity could be established; here there is no legal set-off, and the onus is on you to set up an equity.] In *Cochrane v. Green* (3 L. T. Rep. N. S. 475; 9 C. B. N. S. 448) it was held that where A. has a money demand against B., and B. (though a trustee) has a money demand against A., which but for the intervention of the trust would have constituted a good legal set-off against A.'s demand, the latter may be pleaded by way of equitable set-off. *Bailey v. Johnson* (24 L. T. Rep. N. S. 711; L. Rep. 6 Ex. 279) is a strong authority in our favour. There the defendant, having been adjudicated bankrupt on a debtor's summons issued by a banking firm, a trustee was appointed, who realised the estate and paid the proceeds into the bank of the banking firm, in pursuance of a resolution of creditors. The banking firm were afterwards adjudicated bankrupts, the sum paid in by the trustee then standing to his credit in their books. Afterwards the order adjudicating the defendant bankrupt was reversed on appeal, and no order was made under the 81st section of the Bankruptcy Act 1869 as to his property; and in an action brought by the trustee in the bankruptcy of the banking firm against the defendant to recover the amount of his debt to them, it was held that the defendant was entitled to set off the amount so paid into the bank by the trustee in his bankruptcy, either as an equitable set-off or as a mutual credit; and that decision was affirmed on appeal: (27 L. T. Rep. N. S. 714; L. Rep. 7 Ex. 263.)

Winslow, Q.C. and Romer, for the respondent, were not called upon.

JAMES, L.J.—This may be a hard case, but of course we must deal with it only on general principles. In this case there were two accounts, one of which was an account of A., and the other was the account of A. and B. It is said that A. and B. were executors, and that A. was the residuary legatee of the whole of the fund. The fund had never been liquidated so as to become a trust fund. There never had been—what Mr. De Gez said there had been—anything approaching to a liquidation. There never was anything like or approaching to a settlement of accounts, so that we could say that at any particular moment the fund standing in the bank to the credit of A. and B. had become by the conduct of the parties, A. and B., the trust moneys of A., so as to make it clear that they were trustees. Unless it could be made out that they were clearly trustees of this fund, it seems to me that there is not an equitable set-off because the amount is due in *autre droit*, and where it is due in *autre droit* the only exception that equity has introduced into the principle of a legal set-off is where the money is really and truly the pro-

perty of the one, though in the name of the other; not that the result of the accounts, if taken, would show that the ultimate balance would be his property, but that it is nothing but what we used to call in the Privy Council a *bon ami* account—that is to say, a fund put by one man into the name of another merely for his own convenience. I have referred more than once in illustration of this principle to the case of *Jones v. Moscop* (3 Hare, 568). There, by great good luck, the plaintiff was enabled to obtain an equitable set-off. The plaintiff in that case was a bond debtor of a man of the name of John Reed. John Reed died intestate, leaving his only son his sole next of kin. That son afterwards became insolvent and died, and the assignee in insolvency took out administration *de bonis non* to the father, and then sued upon the bond. It so happened that the bond debtor was a creditor of the son upon a distinct account, having paid a sum of money for which he was surety. Then he filed a bill to have the debt due from the son set off against the bond on which the assignee was suing him as the legal personal representative of the father. He had the great good luck to succeed in obtaining that set-off, but upon this ground, that the answer contained a distinct admission to this effect, that the assignee says “that he believes the money due upon the bond was part of the net residue of his estate, and that the same became legally and equitably the absolute property of Richard Reed, his son, and that he (the son) became entitled to recover the moneys due thereon for his own use and benefit. The defendant admits that he accepted the office of assignee, and that thereby the estate and effects of Richard Reed (the son) became vested in him, and, among other things, the equitable and beneficial ownership in the bond.” Now, upon that the learned judge says (3 Hare, 574): “A very slight variation in the answer from its present shape might have concluded the case, as against the plaintiff, on this motion. But if the effect of the answer be that before the 30th Jan. 1839, the date of the vestry order, Richard Reed, as administrator and next of kin of John Reed, had become beneficial owner of the bond, there is no technical reason founded in the origin of his claim why the court should not treat the bond as his.” That was because there was a clear admission that the whole thing had become legally and equitably the absolute property of Richard Reed, the son, and that he had become the beneficial owner, and it was that beneficial ownership which had become vested in the assignee in insolvency. If there had been any variation it would have become his absolutely. There was another thing in that case to which I may as well draw attention, and it is this: there was a difficulty arising in that case, because in a subsequent part of the answer the defendant says that “he believes certain of the debts of John still remain undischarged, and that there are sufficient assets to pay the debts, exclusive of the bond, and he submits that he is not bound to set forth what debts are unpaid. After the suggestion that the debts of John Reed had not been fully paid, I felt a difficulty (continues Wigram, V.C.) in treating the money due upon the bond otherwise than as the assets of John Reed; but the admission in the answer is most distinct—that the bond itself is part of the beneficial estate of Richard Reed, and that the defendant obtained letters of administration empowering him to

recover it, not as part of the estate of John, but as part of the estate of the insolvent. I think that that admission relieves the case of all difficulty with regard to the fact of the debts being due in different rights.” It is quite clear to me that, if there had not been that distinct admission that some of the debts were unpaid, the Vice-Chancellor would have been able to say, “The surplus belongs to him, and I will treat it in that way.” That seems to me to be the principle upon which we must proceed in this case. If there were anything to show that the sister had joined the brother in acknowledging (either in words or in substance) that the money in the bank was part of the net residue belonging to him, then this case would have been brought within the ordinary principle which applies to the case of a debt due from a man and a debt due to the trustee of that man by his creditor. That seems to me to make a distinction between this case and those under which Mr. De Gex has suggested that he would be entitled to the net balance, whatever it may be. The net balance must be ascertained, so as to make it a trust fund before those cases can become applicable. The only other case with which it is important to deal is that of *Bailey v. Finch* (*ubi sup.*). It was a case in the Queen’s Bench. There all the learned judges start with this, which of course distinguishes that case from the present—that in point of law there was no debt except upon taking the two accounts together. The mere fact of their being put and on different pages would be no more than if it had gone over from one page to another page of the ledger of the bank. It was a mere matter of account, just as if, as I suggested during the argument, a man kept a farm account, a colliery account, and a house account, each separately for his own convenience, in order to ascertain how the moneys came in and how they have been applied. In *Bailey v. Finch* the judges start with that, and they arrive at the conclusion that, there being that legal right (not an equitable set-off), there being a legal debt in respect of the balance of those items on both sides, there was no notice of any sufficient equity to countervail that legal right. It is not necessary to consider exactly how that would have been if there had been any claim made by some persons having claims against the estate. However, what I have stated is the *ratio decidendi* in that case, and that is all that it is necessary for us to deal with. But in the present case it is quite clear, though no doubt the sister acted to assist her brother in getting as much as they could out of what they lost through the bank’s failure, that this was their position. They were in the position of joint creditors of the bank, having a joint asset in the bank, and having joint liabilities to discharge in respect of which that joint asset was liable. For the brother and sister had incurred debts as executors; there was a debt due to the solicitor, and there was a debt due for rent, rates, and taxes in respect of a leasehold house upon which the two were liable, and they had this joint credit to draw upon for the purpose of meeting those joint liabilities. It appears to me that we cannot take an account of the estate, and say that upon taking such account there would be a large sum due to the residuary legatee, and that that fact converts that which was a debt due from the bank to the two into a debt due from the bank to the two as trustees for

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the one. That is a proceeding which never has been taken in these case of equitable set-off, which is itself an invention and deduction of the courts of equity. An equitable set-off was always confined to cases where there was a plain and distinct admission, or distinct evidence of its being a simple liquidated and ascertained trust, and never applied to cases where the account of the two would result upon a final settlement of all the accounts between them in a balance in favour of the one. That seems to me to be the distinction between the cases, and I think accounts have never yet been taken to see how much of a fund standing in a bank in the names of two persons would ultimately turn out to be the property of the one so as to enable that one to have a set-off as against the bank. It may be a hard case, but I do not think we can dissent from the decision of the registrar without introducing an altogether new principle, which might be attended with great inconvenience; but at all events it would be introducing a new principle, for which there is no ground either in principle or in authority.

BRETT, L.J.—I am of the same opinion, and for the same reasons.

COTTON, L.J.—I have arrived at the same conclusion. Of course we must not adapt our decisions to the exigencies of cases unless we find there is some rule or principle to enable us to do so. The question we have to decide is whether there can be an equitable set-off as between the two accounts kept with the bank, one in the name of Mr. Morier and the other in the name of Mr. Morier and his sister, who are co-executors. Of course it is perfectly clear that there can be no set-off at law. Mr. De Gex says that we must look to the equitable rights, and no doubt, if he could establish that the name of Miss Morier is there simply as joint trustee with her brother and for her brother, then it would be to all intents and purposes in equity her brother's property, and he would be right in saying there ought to be a set-off. But what is it? This is really part of the estate of the testator of whom they were joint executors. It was, as I understand, either wholly or in part, a sum standing to the credit of the testator, and transferred to them as executors as part of his estate, and, if it was, clearly transferred to them for the purpose of the administration as an executorship account—that is to say, an account which was liable to pay all the debts and liabilities and all other payments, such as legacies, and also to make provision for the annuities and for all expenses which executors must incur in the administration of the estate. In my opinion we cannot hold that this at the time of the bankruptcy was no longer executorship money, but was money held by the two as trustees for Mr. Morier, unless we can see that that has been done which enables us to say that this was liquidated and ascertained to be a clear net residue which Mr. Morier was entitled to have carried over to him absolutely without any further accounts being taken or anything further being done. I asked to look at the agreement between the parties, to see what they had really done, whether there had been any agreement or declaration by Miss Morier that after the provision that had been made the whole of the balance of the estate was the clear residue belonging to her brother. But that is not there. There was some agreement as to how certain things were to be provided for, and there was

an arrangement as to change of investment, and an agreement by the brother to indemnify the sister, but nothing like the taking of an account so as to satisfactorily ascertain that this sum no longer was to be held by them in their joint names as an executorship account, but to be held by them in their joint names as a simple trust fund to which Mr. Morier was entitled as the absolute sole beneficial owner. Therefore, looking to that, I am of opinion that, there being no set-off at law, the property is so situated in equity that there can be no set-off at equity either. There are only two cases which were very much pressed upon us by Mr. De Gex. *Bailey v. Johnson* (*ubi sup.*) was one where the bankruptcy had been annulled, and a set-off was allowed as between the money which had been paid in by the trustee before the bankruptcy was annulled and the account of the person who was adjudicated bankrupt. But then that was certainly decided by the Exchequer Chamber on the ground that, under the Act of Parliament, on the annulling of the bankruptcy, the property reverted to the person who had been declared bankrupt from that time, and became his from the time it was paid into the bank, and therefore it was a case of set-off. In the other case—*Bailey v. Finch*—I think it really unnecessary to express any opinion whether the court, in dealing with the matter, correctly applied the equitable principles to the circumstances of the case; but what they did decide was this: they had to deal with the legal right of set-off because both the accounts were the accounts of one person, and at law there was a set-off, but it was attempted to prevent that from having effect from the fact that one of those accounts was opened in the name of the customer as executor. The principle upon which the judges decided that case was this. There was a legal right to set-off; but was there a sufficient equitable ground for preventing the legal right of set-off being carried into effect? As I understand it, the principle of that decision (whether right or wrong) was not that this fund was a trust fund by the nature of the accounts, or that the bank had notice of that, but that they had notice that it was an account against which claims were likely to be made, and that if claims had at the time of the bankruptcy been made against them, that would have prevented the legal right of set-off from arising, but that, as it was not shown that there were any equitable claims as against this fund, the legal right of set-off could not be interfered with. That is the *ratio decidendi*, as I understand it. It is unnecessary to say how one would have decided such a case, or whether it was a correct application of the law, for it in no way touches this case. The question we have to deal with is whether, when there is no legal right of set-off, it can be said that the fund in the name of the two so absolutely belongs to one of them that we must treat it as his property, and require the balance to be struck between the two accounts.

BRETT, L.J.—The account standing in the names of the brother and sister could not have been brought within the rule of equitable set-off or mutual credit unless Morier was so much the person solely beneficially interested that a court of equity, without any terms or any further inquiry, would have obliged the sister to transfer the account into her brother's name alone.

JAMES, L.J.—The appeal will be dismissed with

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costs. I think what Brett, L.J. has said expresses in a few words the whole of what we have been saying. He has expressed it very nearly in the language of a code.

Solicitors for the appellants, *Bridges, Sawtell, and Co.*

Solicitors for the respondent, *Lawrance, Plews, and Baker.*

### SITTINGS AT WESTMINSTER.

May 1 and 2.

(Before BRAMWELL, BAGGALLAY, and THESIGER, L.JJ.)

MYERS v. DEFRIES; SIDMONS v. LAWRENCE. (a)

*Practice—Costs—Order that successful party shall not recover costs—Jurisdiction of Divisional Court—Order LV.*

*A Divisional Court has power under Order LV. to make an order depriving a party, who has been successful in a case tried by a jury, of costs, although no application was made to the judge at the trial.*

In *Siddons v. Lawrence* the action was for malicious prosecution, and was tried before Cleasby, B., with a jury, at Oakham on the 19th March 1878, when a verdict was found for the plaintiff with one farthing damages. The plaintiff applied for a certificate to entitle him to costs, which the learned judge refused to grant. No application as to costs was made by the defendant. No further proceeding was taken by either party until after the decision by the House of Lords in the case of *Garnett v. Bradley* (39 L. T. Rep. N. S. 261; L. Rep. 3 App. Cas. 944), on the 6th June 1878. On the 22nd June 1878 the plaintiff delivered his bill of costs for taxation, which was adjourned to enable the defendant to consult counsel. On the 3rd July 1878 the plaintiff's costs were taxed at 67l. 19s. 2d. On the 6th July 1878 a summons was taken out before Cleasby, B., to stay execution, which was heard before Lindley, J., in the absence of Cleasby, B., on circuit, on the 23rd July 1878, when the learned judge stayed execution for twenty-eight days, the defendant undertaking to apply, within fourteen days, for an order to deprive the plaintiff of costs. On the 23rd July 1878 the defendant, in pursuance of that undertaking, gave notice of motion for an order, under Order LV. of the Judicature Act 1875, that the plaintiff should bear and pay his own costs of the action. That motion came on to be heard before Mellor and Manisty, JJ. and Pollock, B., on the 2nd Dec. 1878, when it was objected that the court had no power to entertain the application, and that the application was too late. The Court took time to consider, and on the 21st Dec. judgment was delivered by Manisty, J., who said that the court were of opinion that neither of the objections could be sustained, and ordered the case to stand for further consideration on the merits. From this decision (which is reported L. Rep. 4 Q. B. Div. 95, 100) the plaintiff appealed. The same point, as to the power of a divisional court to entertain an application to deprive a plaintiff, who had obtained a verdict at the trial, of costs, was raised in *Myers v. Defries*, in which case the plaintiff, who had recovered one farthing damages for a libel, appealed from the order of Kelly, C.B. and Huddleston, B. depriving him of costs. The two appeals were heard together.

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

*Murphy, Q.C. and W. H. Clay* for the plaintiff in *Myers v. Defries*, and *W. Graham* for the plaintiff in *Siddons v. Lawrence*.—By Order LV., costs are in the discretion of the court, "provided that where any action or issue is tried by a jury the costs shall follow the event, unless upon application made at the trial for good cause shown the judge before whom such action or issue is tried, or the court, shall otherwise order." It is clear that the words "upon application made at the trial, for good cause shown," apply to the court, as well as to the judge, and the result is, that in all cases the unsuccessful party must apply at the trial, if he wishes to deprive the successful party of costs, and the only jurisdiction which the order gives to the court in the matter is by way of appeal from the judge, who has refused or acceded to an application made at the trial. Also the court cannot deal with the question of costs, unless "for good cause shown." The order gives no power to deprive a plaintiff of costs after judgment. But even if the court ever had jurisdiction in such cases as these, that jurisdiction is taken away by sect. 17 of the Appellate Jurisdiction Act 1876 (39 & 40 Vict. c. 59), and Order LVII.a, r. 1, which contains provisions as to what matters are to be dealt with by a single judge, and what by a divisional court. *Kynaston v. Mackinder* (37 L. T. Rep. N. S. 390; 47 L. J. 76, Q. B., C. P., and Ex. Div.) was also cited.

*Gates, Q.C. and Edward Pollock* for the defendant in *Myers v. Defries*, and *O. A. Cripps* for the defendant in *Siddons v. Lawrence*.—The Divisional Court had jurisdiction in these cases: *Baker v. Oakes* (35 L. T. Rep. N. S. 832; L. Rep. 2 Q. B. Div. 171), per Cockburn, O.J., and Brett, L.J.; *General Steam Navigation Company v. London and Edinburgh Shipping Company* (36 L. T. Rep. N. S. 743; L. Rep. 2 Ex. Div. 467), per Huddleston, B. The jurisdiction given by Order LV. to the court is original; it cannot be appellate, for by sect. 49 of the Judicature Act of 1873 (36 & 37 Vict. c. 66) there is no appeal from orders as to costs except by leave. Order LV. means that the party ultimately successful shall recover costs (see the judgment of Lord Blackburn in *Garnett v. Bradley*, 39 L. T. Rep. N. S. at p. 265; L. Rep. 3 App. Cas. at pp. 964, 965). Therefore "the event" means final judgment, not the verdict, and it cannot have been intended that there should be no power of dealing with costs except upon application made at the trial, for in many cases the event would not be known at the trial.

*Murphy, Q.C.* in reply.—There is no judicial authority against the appellants' contention. The opinions relied on by the other side were extrajudicial, for the present point did not arise in the cases referred to. Moreover, *Baker v. Oakes* was not argued for the respondent.

BRAMWELL, L.J.—I am of opinion that these appeals ought to be dismissed. The question turns on the words in Order LV., "or the court shall otherwise order." Now, do those words mean that the court may otherwise order on appeal from the judge, as Mr. Murphy says they mean? Another meaning is, that the court has independent jurisdiction to make an order depriving a successful party of costs. I am of opinion that the latter is the correct view, and that it was necessary that those words should be put in; for what can the words of the order mean? They cannot mean that the costs are to follow the event of the ver-

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dict, for possibly the only question on which the verdict is given is a single issue, and the verdict may be for one party, and judgment may be given for the other. Therefore, if the costs were to follow the event of the verdict, the most unjust consequences might take place. I think the order must mean this, that the costs of the cause shall follow the event of the cause, unless an order is made to the contrary. If this is so, it seems impossible but that the court shall have power to deal with the question of costs. The event of the cause may not be known to the judge at the trial; a particular issue only may be sent down for trial, and then the judge would not know in whose favour the judgment in the cause would be entered. There is also another possible condition of circumstances; suppose something were presented to the court which was not in evidence before the judge at the trial, and they were to say that it would be a good cause for depriving a successful party of his costs. For instance, if an action were brought against a newspaper for libel, and forty shillings damages were recovered; then suppose it were shown to the court that for the same libel the same man had already sued some other person, and had recovered substantial damages, and had cleared his character (I do not wish to decide this, but I am supposing that in such a case the court would deprive the plaintiff of his costs if they had power to do so), what is to be done if the contention on behalf of the appellants is correct? Suppose it is not the fault of the parties that matters were not brought forward at the trial which would have a material bearing on the question of costs. The judge may not know all at the time of the trial, and new materials may be brought before the court afterwards. Looking at all these circumstances, I think it is impossible to say that the court cannot have jurisdiction. There are two classes of cases: first, where the event of the cause is not known to the judge at the trial; and secondly, where the event is known to the judge at the trial, but collateral circumstances are afterwards brought to the knowledge of the court, showing a reason why the costs should not follow the event in the ordinary way. It seems to me, therefore, that these words "or the court" are necessary for the purpose of carrying out the intention of the order. I do not think it could have been intended by the Legislature that the court should make an order as to costs on materials which the judge at the trial could have acted upon if he had thought fit. I think the words were put in for another purpose, that is to give the court an independent power of dealing with the question of costs; but, being in, they are there comprehending the case where the judge has had full materials before him at the time of the trial, and it seems, therefore, that they give practically a power of appeal from the judge. I agree that no court ought to do otherwise than consider that there is a *prima facie* right to costs in favour of the party who is successful in the event. There is by Order LV. a general discretion over costs, but as a general rule costs are to follow the event where a jury try the cause and give a verdict; then comes a renewal of the discretion, subject to this, that the court should not "otherwise order" unless there was something to induce them to overrule the presumption in favour of the successful party's right to recover costs. The words are there, and they are there for a purpose, and on

the construction of Order LV., I am of opinion that the court has power to deal with costs in the way that has been done in these two cases. As to the Appellate Jurisdiction Act, I can see nothing in it to prohibit the court from dealing with costs, and this rather corroborates the general opinion at which I have arrived.

BAGGALLAY, L.J.—Thesiger, L.J. agrees with the opinion expressed by Bramwell, L.J., and therefore, although I have entertained doubts on the question, which are not removed, as there is so great a concurrence of opinion, I cannot dissent from the judgment of the court.

THESIGER, L.J.—In each of these two appeals a divisional court has held that they had original jurisdiction as to costs, and has exercised it. In my opinion the courts had jurisdiction, and had a discretion with which we have no power to interfere. The question turns on Order LV., and I confess that the construction of that order appeared not to be free from doubt. I have had doubts during the argument, but they are cleared up now, and I concur with Bramwell, L.J. The rule begins by making an alteration in common law causes as to costs, by the words "the costs of and incident to all proceedings in the High Court shall be in the discretion of the court;" that is the general rule, and sect. 49 of the Judicature Act of 1873, by which "no order made by the High Court of Justice or any judge thereof . . . as to costs only, which by law are left to the discretion of the court, shall be subject to any appeal, except by leave." &c.; therefore, *prima facie*, costs are in the discretion of the court, and there is no appeal. But there are exceptions, which are introduced by the words which follow. The first exception relates to the rules of equity, by which trustees, mortgagees, and others had a right to costs under certain circumstances, and those rights are preserved. The next exception refers to the Common Law Divisions of the High Court of Justice, and provides that "where any action or issue is tried by a jury the costs shall follow the event, unless upon application made at the trial, for good cause shown, the judge before whom such action or issue is tried, or the court, shall otherwise order." In the first place, it is contended that this proviso does not constitute two tribunals, each of which has primary original jurisdiction as to costs, but that it gives power to the judge and an appeal to the court. I think this view is not maintainable, but that on the construction of the order it cannot mean anything but that there are to be two tribunals with alternative primary original jurisdiction. The other construction would involve inserting after the words "or the court" the words "by way of appeal." But the appellants then argue that both the judge and the court are bound by the conditions which are inserted in the order by the words "upon application made at the trial, for good cause shown." It is said that these words are applicable to the court as well as to the judge. In my opinion that contention is not maintainable. I admit that the words can apply to both limbs of the sentence, and may apply more grammatically to both, but if you leave out the words "the judge, &c."—so as to read it "unless upon application made at the trial, for good cause shown . . . the court shall otherwise order"—it makes absurdity. I think it means either the judge before whom the action or issue is tried, on application made at the trial



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for good cause shown, or the court. Then it is said for the appellants that the court only is to have jurisdiction where the court has seisin of the case, and is the tribunal where the event is determined. I cannot agree with that contention; it involves the insertion of words to that effect in the order, and they have put them in when dealing with the judge, but where the order speaks of the court there are no such words. It therefore appears to me that, while the Legislature has provided an exception to the general rule as to costs in cases of trial by jury, they give a discretion of some kind to the judge, but they leave the general rule untouched as to the court. I think there is a discretion with which no court can interfere, if we look at sect. 49 of the Judicature Act of 1873. That is my view on the construction of Order LV., and it is confirmed by authority. In *Baker v. Oakes* it is true this was not the point for decision, but Cockburn, C.J. and Brett, L.J. both expressed an opinion in favour of the view which I have adopted. In *The General Steam Navigation Company v. The London and Edinburgh Shipping Company* the point was raised, but not decided. Huddleston, B. gave an opinion, but Kelly, C.B. gave no opinion; but in a later case (unreported) he gave an opinion in accordance with our view, and three other judges have given judgment to the same effect (L. Rep. 4 Q. B. Div. 95). Then, as to the Appellate Jurisdiction Act, sect. 17, I think the Legislature did not mean to bind the court by a hard and fast rule, but that it is only a direction, and, for the reasons given by Bramwell, L.J., I think that section does not assist the appellants. Lastly, in *Siddons v. Lawrence* it is said that where the costs had been taxed, and after the allocatur, and when judgment had been signed, the plaintiff cannot be deprived of costs. That may be a good reason for not interfering, but, if the discretion of the court is absolute, we cannot interfere with the exercise of that discretion.

*Judgment affirmed in both cases, with costs.*

Solicitors for plaintiff in *Myers v. Defries, G. S. and H. Brandon*.

Solicitor for defendant, *John Hands*.

Solicitors for plaintiff in *Siddons v. Lawrence, Beaumont and Warren for Atter and Brown, Peterborough*.

Solicitors for defendant, *P. B. T. Toynbee for Toynbee, Larken, and Toynbee, Lincoln*.

May 17 and 29.

(Before BRAMWELL, BAGGALLAY, and THESIGER, L.JJ.)

REDONDO v. CHAYTOR AND ANOTHER. (a)

APPEAL FROM THE COMMON PLEAS DIVISION.

*Practice—Security for costs—Plaintiff temporarily resident in England.*

*A plaintiff, who is a foreigner, domiciled abroad, and has come to England for the purpose of bringing the action, and intends to leave England as soon as the action is decided, cannot be compelled to give security for costs.*

THE action was brought by the plaintiff, who was a foreigner, against the defendants, as executors of a person named John Foster, to recover certain arrears of an annuity, which were alleged to have been due from the testator to the plaintiff. The

statement of claim alleged that Mr. Foster entered into an agreement with the plaintiff, by which it was provided that, in consideration of the plaintiff going abroad, and continuing to reside abroad, Mr. Foster was to pay her an annuity as long as she lived. The statement of claim further alleged that the plaintiff had resided abroad since the making of the agreement, until she came to this country, temporarily, for the purpose of the present action. From the affidavits which were filed, the court came to the conclusion that the plaintiff was in this country *bond fide* for the purpose of carrying on the action, but only temporarily, and intended to go abroad again when the action was decided. On the application of the defendants, Lindley, J. made an order at chambers that the plaintiff should give security for costs.

This order was rescinded by the Common Pleas Division, and the defendants appealed.

May 17.—Fullarton, for the defendants, referred to

*Goodwin v. Archer*, 2 P. Wms. 452;  
*Adderley v. Smith*, 1 Dickens, 355;  
*Duke de Montellano v. Christin*, 5 M. & S. 508;  
*Ainslie v. Sims*, 17 Beav. 57;  
*Pray v. Edie*, 1 T. Rep. 267;  
*Ciragno v. Hassan*, 6 Taunt. 20;  
*Jacobs v. Stevenson*, 1 B. & P. 96;  
*Anon.* 8 Taunt. 737;  
*Oliva v. Johnson*, 5 B. & A. 908;  
*Naylor v. Josephs*, 10 J. B. Moore, 522;  
*Dowling v. Harman*, 6 M. & W. 131;  
*Tambisco v. Pacifico*, 7 Ex. 816; 21 L. J. 276, Ex.;  
*St. Leger v. Di Nuovo*, 2 Scott N. B. 587;  
*Cambottie v. Inngate*, 1 W. R. 538;  
*Swinburn v. Carter*, 22 L. T. Rep. O. S. 123, 2 W. R. 80;  
*Swansy v. Swansy*, 4 K. & J. 237;  
*Rasburn v. Andrew*, 30 L. T. Rep. N. S. 15; L. Rep. 9 Q. B. 118;  
*Westenberg v. Mortimore*, 32 L. T. Rep. N. S. 402; L. Rep. 10 C. P. 438.

Lumley Smith, for the plaintiff, in addition to the above authorities, referred to

*Drummond v. Tillinghist*, 16 Q. B. 740;  
*Gurney v. Key*, 3 Dowl. P. C. 559.

Fullarton, in reply, cited

*Calvert v. Day*, 2 Y. & C. Ex. 217.

*Our adv. vult.*

May 27.—The following judgments were delivered.

THESIGER, L.J.—I have been asked to deliver judgment first, although there is no difference in the result at which the members of the court have arrived. The case comes before us as an appeal by the defendant from an order of a divisional court, rescinding an order of Lindley, J., by which the plaintiff had been directed to give security for costs. The action is brought against the executors of a person named Foster, to recover certain arrears of an annuity alleged to be payable to the plaintiff under an agreement, by which Mr. Foster, in consideration of the plaintiff going and residing abroad, agreed to pay her an annuity for as long as she might live. The statement of claim alleges that the plaintiff has resided abroad since the making of the agreement, until she came temporarily to this country for the purpose of the present action; and it is out of the statement of claim, and on the affidavits which have been filed, that the question of security for costs arises. It is sufficient to say that, in my opinion, the true inference to be drawn from the facts is that the plaintiff is *bond fide* here for the purpose of this

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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action, but is only temporarily here, and if the action is determined in her favour will certainly leave this country, and very probably, if the action is determined against her, will leave the country under such circumstances as to prevent the defendants from successfully issuing process for the costs of this action. Therefore, unless there is a settled practice that under such circumstances a plaintiff cannot be ordered to give security for costs, there is some reason why the plaintiff in this case should be called upon to give security. But the Common Pleas Division have decided that the established rule of practice is that, whether the plaintiff be a foreigner or an Englishman, where he is resident in this country at the time of the application for an order for security for costs, though only temporarily so resident, the courts have no power to require him to give security. I think this decision is right, and, in order to show that it is so, it is necessary to go into the cases which have been referred to on the point. In favour of the view that a plaintiff who is temporarily resident within the jurisdiction cannot be compelled to give security for costs there are five cases in which the point has been decided. In 1815, *Ciragno v. Hassan* (6 Taunt. 20); in 1819, an *Anonymous case* (8 Taunt. 737); in 1827, *Willis v. Garbutt* (1 Y. & J. 511); in 1840, *Dowling v. Harman* (6 M. & W. 131); and in 1852, *Tambisco v. Pacifico* (7 Ex. 816). So far I have only referred to the authorities at common law, and in addition to these decisions the text books on common law practice, viz., Chitty's Archbold's Practice, vol. 2, p. 1415, 12th edit., and Lush's Practice, vol. 2, p. 931, 3rd edit., state the rule to the same effect, though some doubt is expressed, because there have been decisions to the contrary. Three decisions have been cited in argument, which were supposed to be contrary to the conclusion at which the court below has arrived; but two of these cases, when examined, appear to be no authority for the proposition to support which they were cited. These are *Naylor v. Joseph* (10 J. B. Moore, 522) and *Gurney v. Key* (3 Dowl. P.C. 559); for in both those cases, though the plaintiffs may have been within the jurisdiction of the court when the actions were brought, yet it is clear that when the applications for security for costs were made they were out of the jurisdiction. Therefore there is only one case which is really in favour of the contention that security for costs can be ordered in a case like the present, and that is *Oliva v. Johnson* (5 B. & A. 908), decided in 1822. That case was decided by the Court of Queen's Bench after *Ciragno v. Hassan* (6 Taunt. 20), and the *Anonymous case* (8 Taunt. 737) had been decided in the Common Pleas, and neither of these cases were cited. But when the point came before the Court of Exchequer in 1840 in *Dowling v. Harman* (6 M. & W. 131), although *Oliva v. Johnson* was not cited, yet (as pointed out by Martin, B., in *Tambisco v. Pacifico* (7 Ex. 816), it is clear that it must have been in the mind of one of the judges at least, for Parke, B., who took part in the decision in *Dowling v. Harman*, had been counsel in *Oliva v. Johnson*; and, besides, when the point came again before the Court of Exchequer in *Tambisco v. Pacifico*, *Oliva v. Johnson* was cited, and, notwithstanding that decision, the court followed what seems to me to be, with one exception, the unanimous

view that has been taken, and decided that security for costs could not be ordered; and in all the cases, except *Oliva v. Johnson*, it may be observed that the courts did not deal with the question as if they had to decide whether security for costs might reasonably be ordered, but in all these cases they have decided on the settled practice of the courts. That is how the question stands, so far as the common law authorities are concerned, and it seems impossible, on that state of the decisions, to hold otherwise than as the Common Pleas Division have held. But Mr. Fullarton says that there are some cases in equity which are in conflict with their decision. The first of these cases is *Ainslie v. Sims* (17 Beav. 57), decided in 1853. No doubt in that case the rule previously laid down in the common law courts was not followed by the Master of the Rolls, but none of the common law authorities were cited, and moreover in the previous year *Tambisco v. Pacifico* was decided, which was directly contrary; besides which, in the same year (1853) there was a decision to the contrary in Chancery (*Cambotie v. Ingate*, 1 W. R. 533), where Wood, V.C. called attention to the common law authorities, and pointed out that they had not been referred to before the Master of the Rolls, and said that for that reason he did not feel bound to follow the decision in *Ainslie v. Sims*. He says: "By the comity of nations a foreigner, while in this country, was entitled to the same relief in a court of justice as a British subject; on quitting the country the same security could be demanded from both of them; in *Willis v. Garbutt* (1 Y. & J. 511) Alexander, C.B. said, 'no one can have security for costs until his opponent has quitted the country.'" But it is said that, although Wood, V.C. took that view in 1853, he took a different view in 1858 in *Swanzy v. Swanzy* (4 K. & J. 237). I have seen the report of that case, and it seems to me that the Vice-Chancellor did not withdraw from the view he took in 1853, nor did he express any opinion to the effect that the decision in *Ainslie v. Sims* was right. It seems to me that *Swanzy v. Swanzy* was decided upon a totally different principle from that suggested on behalf of the defendants in the present case; that is, that when a plaintiff, whether a foreigner or an Englishman, who is temporarily resident in this country, in order to mislead the defendant, either conceals his address, or gives a false address, or lives at his residence under a false name, under such circumstances the conduct of the plaintiff is in the nature of a fraud on the court, and therefore he will be ordered to give security for costs. In *Fraser v. Palmer* (3 Y. & C. Ex. 280), Alderson, B. said: "If a plaintiff gives the right description of his place of abode when he files his bill, his circulating about afterwards is immaterial unless he goes abroad. He is still open to the process of the court. It is a different thing if he makes a false statement as to his residence; he is then guilty of a fraud on the court, and on that ground is made to give security for costs. It cannot be contended that a person is to give that security on the mere ground that he is in the habit of moving from place to place. The evident meaning of Lord Abinger's dictum in *Calvert v. Day* is this, that it is no excuse for a man to say that he is a hawker and pedlar in order to give a false description as to his place of residence." There-

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fore that explains the meaning of the Vice-Chancellor in *Swanzy v. Swanzy*, and shows that *Calvert v. Day* (2 Y. & C. Ex. 217), the pedlar's case, is no authority on the present point. So stand the authorities, and therefore it seems to me that there is no course open to us except to dismiss this appeal. We are not called upon to say what, if the matter were *res integra*, would be the proper rule, but only to say whether the court below has acted rightly or wrongly in the view which they have taken as to what the rule of practice is. But, as I believe one member of the court has a strong feeling that the present rule is unreasonable, I shall say a few words as to my own view of the matter. From one point of view, if it is clear that a man will leave the country before any execution against him can be satisfied, it would appear unreasonable to hold, from the mere fact that he is temporarily resident within the jurisdiction, that he ought not to be called upon to give security for costs. It is clear that in the converse case no such hard and fast rule exists, for, although generally a plaintiff resident out of the jurisdiction can be called upon to give security for costs, yet it has been held that when he is only temporarily out of the jurisdiction, and his permanent residence is within the jurisdiction, and there is every probability of his returning, the court will not compel him to give security. Again, if a plaintiff, who is permanently resident out of the jurisdiction, but has property within the jurisdiction which can be made subject to the process of the court, in such a case, the reason of the rule being withdrawn, the rule gives way, and the court will not order security to be given. It might fairly be said that the converse ought to hold good, and that where the court sees every probability of the plaintiff going out of the jurisdiction, if he should fail in his action, before the process of the court could be executed against him, this should be considered good ground for ordering security for costs; on the other hand, however, it is neither convenient nor proper to extend the cases in which plaintiffs are compelled to give security for costs. Although I can see some strong reasons why a change in the rule might be beneficial, I do not wish to be understood as giving an opinion in favour of a change.

BAGGALLAY, L.J.—The authorities both at common law and in the Chancery courts have been so fully explained by Thesiger, L.J., that I only wish to make a few observations with reference to the case of *Swanzy v. Swanzy*. In all proceedings in Chancery it was always necessary for the plaintiff or petitioner to state his residence accurately and fully, and, as a general principle, independently of whether the plaintiff was a foreigner or not, or was temporarily or permanently resident within the jurisdiction of the court, it was sufficient ground for ordering him to give security for costs if his residence was not truly and accurately stated on the bill when it was filed. In *Swanzy v. Swanzy* the plaintiff had taken lodgings in one place and had then gone to live in another place, in both cases under a name which was not really her true name. That clearly amounted to a failure to give the description required, and that alone was sufficient to cause the court to order security for costs to be given, quite irrespective of the question of the plaintiff being a foreigner. I may add, that I think the principle always acted on,

except in one or two cases, is that laid down by Wood, V.C. in *Cambottie v. Inngate*.

BRAMWELL, L.J.—The question is as to what the practice of the court is, and I cannot disagree with the judgment of the court, for I think that it is as Thesiger, L.J. has laid it down. I must admit that I formerly thought it was otherwise, and I wish we could alter it. If one looks at what is to be guarded against, it is the possibility of the defendant, if he should hereafter be successful, losing the fruits of his judgment; but, as the practice stands, we do not inquire whether in all probability the plaintiff or his goods will be here after judgment, but whether they are here now. I cannot but think that the practice is unreasonable, and I regret that it is as it has been shown to be.

*Judgment affirmed.*

Solicitors for plaintiff, G. S. and H. Brandon.  
Solicitors for defendant, T. W. Denby and Co.

Dec. 14, 1878, and March 22, 1879.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

BUTTON v. O'NEILL (a)

APPEAL FROM THE COMMON PLEAS DIVISION.

*Bill of sale—Change of residence before registration—Description in affidavit—17 & 18 Vict. c. 36, s. 1.*

*Where the maker of a bill of sale has changed his residence between the date of the bill of sale and the date of registration the affidavit filed with the bill of sale should state the residence at the date of the affidavit, and not at the date of the bill of sale.*

THE plaintiff was the claimant under a bill of sale, and the defendant was an execution creditor of the grantor of the bill of sale. The bill of sale, which was executed on the 29th June 1877, was expressed to be made between "John Parker (the grantor) of Cranbrook House, Kenninghall-road, Lower Clapton" of the one part, and the plaintiff of the other part. After the making of the bill of sale the grantor changed his residence, and in the affidavit, which was dated the 9th July, he was described as "now residing at St. Anne's Villa, Wood Green."

At the trial of an interpleader issue it was objected on behalf of the defendant that the description of the grantor's residence in the affidavit, being a description of his residence at the date when the affidavit was made, was incorrect, and that the residence at the time when the bill of sale was executed should have been stated in the affidavit, and therefore that the bill of sale was void under the Bills of Sale Act 1854 (17 & Vict. c. 36, s. 1). (b)

On this objection a verdict was directed for the defendant. The plaintiff obtained a rule *nisi* for

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

(b) By the Bills of Sale Act 1854 (17 & 18 Vict. c. 36) sect. 1—"Every bill of sale of personal chattels made after the passing of this Act . . . or a true copy thereof, and of every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same . . . and of every attesting witness to such bill of sale be filed . . . within twenty-one days after the making or giving of such bill of sale."

This Act is repealed by sect. 23 of the Bills of Sale Act 1878 (41 & 42 Vict. cap. 31), but the words upon which the decision turned are re-enacted by sect. 10. Under the Act of 1878 the filing must be within seven days.

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a new trial on the ground of misdirection, which was discharged by the Divisional Court (Lord Coleridge, C.J. and Lopes, J.). The plaintiff appealed.

*Dec. 14.*—*Finlay* for the plaintiff.—The object of the Act is to give information, and this object is better carried out if the affidavit states the residence where the maker of the bill of sale lives when the affidavit is made, than if it describes him as living at a place where he has then ceased to live, and where he could not be found or traced: (*Hatton v. English*, 7 E. & B. 94; 26 L. J. 161, Q. B.) The case relied upon for the defendant in the court below (*The London and Westminster Loan and Discount Company v. Chase* (6 L. T. Rep. N. S. 781; 12 C. B. N. S. 730; 31 L. J. 314, C. P.) so far as it supports the defendant's contention, is contrary to the universal practice, for the printed form of affidavit always used is in the present tense, and contains the words "resides at." If the grantor had changed his occupation, the new occupation should be stated, and if a single woman gave a bill of sale, and married before it was registered, it would be misleading to describe her in the affidavit by her maiden name. The defendant's contention would withhold from tradesmen the information which it is the object of the Act to give; see

*Picards v. Brets*, 1 L. T. Rep. N. S. 45; 5 H. & N. 9; 29 L. J. 18, Ex.;

*Routh v. Roublet*, 1 E. & E. 850; 28 L. J. 240, Q. B.;

*Jones v. Harris*, 25 L. T. Rep. N. S. 702; L. Rep. 7 Q. B. 157; 41 L. J. 6, Q. B.

In *Broderick v. Scale* (23 L. T. Rep. N. S. 864; L. Rep. 6 C. P. 98; 40 L. J. 130, C. P.) the present point did not arise.

The defendant in person.—*The London and Westminster Loan and Discount Company v. Chase* (*ubi sup.*) is a direct authority against the plaintiff's contention. *Broderick v. Scale* (*ubi sup.*) is also in point; and so is *Murray v. Mackenzie* (32 L. T. Rep. N. S. 777; L. Rep. 10 C. P. 625; 44 L. J. 313, C. P. [CORROX, L.J.—In that case the description was not, and never had been, correct.]

*Finlay* in reply.

*Our. adv. vult.*

*March 22, 1879.*—The judgment of the court (BRAMWELL, BRETT, and CORROX, L.JJ.) was delivered by BRAMWELL, L.J.—This case is very embarrassing. The question is whether an affidavit stating truly the residence of the maker of the bill of sale at the time of the making of the affidavit, which was not the residence at the time of the giving of the bill of sale, nor that in the bill of sale, is sufficient under the Bills of Sale Act (17 & 18 Vict. c. 36). Sixteen years ago it was held in *The London and Westminster Loan and Discount Company v. Chase* (12 C. B. N. S. 730; 31 L. J. 314, C. P.), that it was right to state the residence in the bill of sale, if it was truly stated then, though changed at the time of the affidavit, and it was said it would not be sufficient to state it as in the case before us. If this authority had been acted on, most certainly we ought to follow it. For it is obvious that it is of very little consequence which way the law is, and it would be very mischievous to overrule a case so acted on, and thereby invalidate the registration in many cases. But, upon inquiry, we have found that the authority has not governed the practice; on the contrary, the in-

variable form of the affidavit is to state that the residence of the grantor "is" so and so. Now, if that case was rightly decided, all these affidavits are wrong; for they all speak of the time present, that is, of the swearing of the affidavit, and not of the execution of the bill of sale. The time of each may be the same, but it is not sworn to. The matter will appear plain thus: Suppose the affidavit says the residence is A., and suppose it is the residence stated in the bill of sale; suppose the affidavit was wilfully false, and B. was the residence; suppose an indictment for perjury; there could be no conviction; the defendant would not have sworn what was the residence when the bill of sale was given; he would have sworn what it was at the time of the affidavit; but that, according to the above case, is immaterial. That case, however, also decided that the affidavit was sufficient, though it said "is a gentleman," and though at the time of the affidavit (which was made some weeks after), the grantor of the bill of sale was in trade. The difficulty was got over by holding that "is" was bad grammar, and meant "was." But, with all respect, the grammar was good enough. It is not a reason for saying that grammar is bad, that on the facts appearing the truth would not be expressed by the language used. It is impossible for us to agree with that part of the decision, and we must therefore examine the statute, and judge for ourselves. The words are "together with an affidavit of the time of the bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same." As was observed in the case cited, the framer of the statute was loose in his language. It is manifest that "the time of such bill of sale being made or given" means the time when such bill of sale was made or given. The language would have been right if it had been "at the time of the making or giving of such bill of sale." So of the next words; they should in strictness have been, "a description of the residence and occupation of the person who has made or given the same," for it is a past act. But it there had been those words, it is manifest that this affidavit would be right. A description of the residence and occupation of a person who has done a thing means a description of his residence and occupation at the time of the description. If I were to say to anyone, "Give me a description of the name and occupation of the author of the Correlation of Forces," I should not ask where Mr. Justice Grove lived at the time when he wrote and published it, nor what he then was, but where he resides now, and what he now is. This is confirmed by the enactment as to bills of sale under executions. For surely, if the execution has been out for a year, as may be the case, it would be the residence when the bill of sale was executed, rather than that when the execution issued, that should be given. We have said that it matters not which way the law is; but, if there is a choice, surely, whatever the object of the statute, it is better that as late a description of the maker of the bill of sale as possible should be given, and the affidavit may be later, but cannot be earlier, than the bill of sale. What people want to know is whether A. B., now being so-and-so, and residing at —, has given a bill of sale, and surely the later they can hear of him the better. If Mary Smith, of A. street, spinster, marries

John Brown, of B. street, the day after she has given a bill of sale, it would be more easy to trace and identify her if described as Mary Brown, wife of John Brown, of B. street, than if described, as in the bill of sale, as Mary Smith, of A. street. We cannot agree with the reasoning of the court in the case cited. It is to be remembered that the construction there given to the statute and affidavit was admitted to be strained and forced, and was to support the bill of sale, which there has always been a strong tendency to do. It is further to be observed that that decision is in opposition to the opinion of Wightman, J. It is true that two Acts of Parliament (a) as to bills of sale have passed since the case cited, and have not altered the law laid down. It is true also that there is language in all the statutes indicating that the framers of them may have thought that residence and occupation in the bills of sale would be given. If that appeared in the first Act, it would be a legislative interpretation of its meaning; but it does not, and it is not enough that it appears that the framers of the other Acts thought that it would be so, especially when it is borne in mind that in the immense majority of cases the bill of sale and affidavit are contemporaneous. In the result we would abide by that case so far as it construes the Act, but for the practice not being in conformity with it, so that we can only uphold a large number of bills of sale by holding, as was done in that case, that the language in the affidavit is ungrammatical. This we cannot do. We must therefore dissent from that case, and reverse the judgment.

*Judgment reversed.*

Solicitors for plaintiff, Carr, Banister, Davidson, and Morris.

Defendant in person.

Nov. 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

BIDDER AND OTHERS v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY. (b)

*Practice—Appeal—Case stated by arbitrator—Lands Clauses Consolidation Act 1845, s. 25—Common Law Procedure Act 1854, ss. 5, 32—Judicature Act 1866, s. 19.*

*An appeal lies from the decision of a Divisional Court on a special case stated by an arbitrator appointed under sect. 25 of the Lands Clauses Consolidation Act 1845, to settle a question of disputed compensation.*

APPEAL by the defendants from the decision of the Queen's Bench Division (Cockburn, C.J. and Mellor, J.) on a special case stated by an arbitrator who had been appointed to assess compensation under sect. 25 of the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18). (c)

H. Sutton (Webster, Q.C. with him), for the plaintiffs, took a preliminary objection to the hearing of the appeal. Sect. 5 of the Common Law

(a) 29 & 30 Vict. c. 96 (repealed by 41 & 42 Vict. c. 31, s. 23) and 41 & 42 Vict. c. 31.

(b) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

(c) Sect. 25 of the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18) contains provisions for the appointment of arbitrators in cases of disputed compensation, and provides that "such appointment shall be delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made."

Procedure Act 1854 (17 & 18 Vict. c. 125) (a) does not embrace references under the Lands Clauses Consolidation Act, and therefore no appeal lies. Any order that may be made is an order by consent:

*Jones v. The Victoria Graving Dock Company*, 36 L. T. Rep. N. S. 347; L. Rep. 2 Q. B. Div. 314; 46 L. J. 219, Q. B.

J. Brown, Q.C. (Edwards, Q.C. and W. Graham with him) for the defendants.—The arbitrator had power to state a case, and the Divisional Court had jurisdiction to hear it; therefore an appeal lies under the Common Law Procedure Act 1854 (17 & 18 Vict. c. 125) ss. 5, 32.: see

*Rhodes v. The Airedale Drainage Commissioners*, 35 L. T. Rep. N. S. 46; L. Rep. 1 C. P. Div. 402; 45 L. J. 861, C. P.;

*Jones v. The Victoria Graving Dock Company* (*ubi sup.*).

The decision of the court below is an "order or judgment" from which an appeal lies by sect. 19 of the Supreme Court of Judicature Act 1873 (36 & 37 Vict. c. 66).

BRAMWELL, L.J.—I should have had considerable doubt, if the Judicature Act had not been passed, whether we had jurisdiction to hear this appeal, because error only lay on a judgment. In a reference like this I should doubt if there were power in the court to order payment of money, because the arbitrator does not order payment of money, but can only fix the amount. I should doubt whether error lay under sect. 32 of the Common Law Procedure Act 1854. But within the meaning of the Judicature Act 1873, sect. 19, I think this is an order or judgment, and therefore an appeal lies.

BRETT, L.J.—The Court of Appeal has held that under the Lands Clauses Consolidation Act, where an arbitrator was appointed, this is a submission under the Common Law Procedure Act 1854, and that the arbitrator has power to state a case to be heard by a divisional court. The decision of the court on the special case is an order within sect. 19 of the Judicature Act 1873, and therefore an appeal lies.

COTTON, L.J.—I am of opinion that by the 19th section of the Judicature Act 1873, we have power to hear this appeal. The Queen's Bench had jurisdiction, for it was decided by the case cited (*Rhodes v. The Airedale Drainage Commissioners*), that a reference under the Lands Clauses Consolidation Act is within sect. 5 of the Common Law Procedure Act 1854, and there is power to state a case. If so, the Divisional Court had juris-

(a) By the Common Law Procedure Act (17 & 18 Vict. c. 125), sect. 5: "It shall be lawful for the arbitrator upon any compulsory reference under this Act, or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the Superior Courts of Law or Equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award, as to whole or any part thereof, in the form of a special case for the opinion of the court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the court."

By sect. 32: "Error may be brought upon a judgment upon a special case in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary."

By the Supreme Court of Judicature Act 1873 (36 & 37 Vict. c. 66, s. 19): "The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned of Her Majesty's High Court of Justice, or of any judges or judge thereof" (subject to the Act and rules).

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NUTTER v. ACCRINGTON LOCAL BOARD.

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diction to hear the case, and their decision is open to appeal. We will therefore hear the appeal.

*Objection overruled.*

Solicitor for plaintiffs, *Lewis and Sons*, for *Sheratt and Son*, *Kidsgrove*.

Solicitors for defendants, *Burchells*.

Nov. 29 and Dec. 21, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

NUTTER v. ACCRINGTON LOCAL BOARD. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Local board—Power to raise level of street—Right to compensation—11 & 12 Vict. c. 63, ss. 2, 68, 144.*

*By the Public Health Act 1848 (11 & 12 Vict. c. 63) s. 68, all streets which were highways, were vested in and were under the management and control of the local board of health.*

*By sect. 2 the word "street" applied to and included any highway (not being a turnpike road).*

*By sect. 144 compensation was to be made to any persons sustaining damage by the exercise of the powers of the Act.*

*Defendants, by agreement with the trustees of a turnpike road, took upon themselves the maintenance and repair of the footway only of the road; defendants raised the level of the footway, and thereby caused damage to the house and land of the plaintiff, which were adjacent.*

*Held, by Brett and Cotton, L.JJ. (Bramwell, L.J. dissenting), that this damage was the subject of compensation within sect. 144.*

*Judgment of the Queen's Bench Division reversed.*

THE following case was stated by an arbitrator in an action on an award:—

1. The plaintiff was in Sept. 1864, and is now, the owner of a house and land in the town of Accrington, adjacent to a certain road called the Whalley-road.

2. The defendants became in 1857 the local board of health, and are the urban sanitary authority for the town and district of Accrington, under the provisions of the Public Health Act 1848, and the other Acts therewith incorporated.

3. The house and land of the plaintiff, and that part of the Whalley-road adjacent thereto, are within the district of the said local board.

4. By Act of Parliament of 29 Geo. 3, a turnpike trust was established which included the Whalley-road, part of which was within and part without the district of the Accrington Local Board, and such trust expired in 1874, up to which time toll-gates were maintained, and tolls taken at various parts of the road.

5. There has always, for fifty years at least, been a footway immediately adjacent to the plaintiff's premises, and previous to the establishment of the local board, the turnpike trustees had maintained, and from time to time repaired the footway and the carriage-way, both within and without the local board district, with the exception of the pavement within the local board district. The carriage-way adjacent to the plaintiff's property had not been paved at the time the footway was raised as hereinafter set forth.

6. After the establishment of a local board, and previous to the year 1871, by agreement between the local board and the turnpike trustees, the local board sometimes provided curb stones for the

footpath of such part of the Whalley-road as was within their district, and the trustees put them in; and the trustees did everything that was done for the maintenance and repair of the carriage-way.

7. In the year 1864 the trustees communicated to the defendants their intention of erecting a toll-bar in another turnpike road in the township of Accrington subject to the same trust; and afterwards in Feb. 1865, the defendants, in order to induce the trustees not to erect such toll-bar, passed the following resolution, which was in due course communicated to the trustees, and accepted by them: "Resolved that the proposal made to a deputation from this board by the trustees of the turnpike road at their meeting of 15th Sept. last, to the following effect: 'That the local board should take upon themselves the future repair of such parts of the turnpike road within their district as are already and may be hereafter pitched with stone, and all such parts of the footpaths as are already or may hereafter be flagged at least a yard in width, and that other parts of the road or footpaths shall be continued to be repaired by the trust,' be accepted by this board."

8. That part of the footpath immediately adjoining the plaintiff's land was flagged more than a yard in width previous to 1864.

9. Previous to 1871 a further agreement had been entered into between the local board and the trustees, whereby, amongst other things, the trustees undertook to raise the level of the carriage-way at a part of the road immediately opposite the house and land of the plaintiff, and the defendants on their part undertook to raise the footpath to a corresponding height.

10. In or about the month of May 1871, in execution of the last-mentioned agreement, the trustees raised the level of the carriage-way opposite to the plaintiff's house and land; and the defendants raised the footpath to a corresponding height.

11. The plaintiff sustained damage within the meaning of sect. 144 of the Public Health Act 1848, by the raising of the footpath by the defendants, and such damage was the necessary and direct result of the raising of the footpath, and not of any negligence of the defendants in the execution of the work.

12. In Oct. 1874 proceedings against the defendants were commenced by the plaintiff to obtain compensation under the provisions of the Public Health Act 1848, and after all due preliminaries required by the Act were performed, were carried on *ex parte* by the plaintiff, and on the 19th Jan. 1875 an award was published whereby the defendants were ordered to pay to the plaintiff 112*l.* compensation for the damage she had sustained, and a further sum of 111*l.* 5*s.* 8*d.* taxed costs.

13. The said award was in all respects a good and valid award, provided that the damage sustained by the plaintiff was a proper subject for arbitration and compensation within the meaning of the Public Health Act 1848, and the other Acts therewith incorporated.

14. Neither of the sums of 112*l.* and 111*l.* 5*s.* 8*d.* have been paid by the defendants to the plaintiff.

15. That part of the Whalley-road which is adjacent to the plaintiff's house and land was at the time the footpath was raised as herein mentioned, and is, "a street," unless the court find (1) that it

(a) Reported by F. B. HUTCHINS, Esq., Barrister-at-Law.

was a turnpike road; and (2) rule as a matter of law that a turnpike road is excepted from the definition of street within the true intent and meaning of the Public Health Act 1848, (a) and other Acts incorporated therewith. The questions for the opinion of the court are:

(1) Whether the claim of the plaintiff was a claim within the true intent and meaning of the Public Health Act 1848 and other Acts incorporated therewith; and (2) whether the arbitrator had authority to make such award, and whether the said award is good and binding upon the defendants.

Judgment was given for the defendants by Cockburn, C.J. and Mellor, J. (reported 38 L. T. Rep. N. S. 609) and the plaintiff appealed.

Nov. 29, 1878.—The case was argued in the Court of Appeal by Gully, Q.C. and Forbes for the plaintiff, and Crompton for the defendants. The following cases were cited:

*R. v. Fullford*, 33 L. J. 122, M. C.;  
*Boulton v. Crowther*, 2 B. & C. 703;  
*Brine v. The Great Western Railway Company*, 2 B. & S. 402; 31 L. J. 101, Q. B.;  
*Ferrar v. The Commissioners of Sewers for London*, L. Rep. 4 Ex. 227;  
*Vaughan v. The Taff Vale Railway Company*, 5 H. & N. 679; 29 L. J. 247, Ex;  
*R. v. The Trustees of the Oxford and Witney Turnpike Roads*, 12 A. & E. 427.

*Our. adv. vult.*

Dec. 21, 1878.—COTTON, L.J.—In this case an action was brought to enforce an award ascertaining the amount of compensation payable to the plaintiff in consequence of alterations which were made in a road near her house by the defendants, the Accrington Local Board of Health, and the question to be decided on this appeal is, whether the matters in respect of which the plaintiff claims

(a) Public Health Act 1848 (11 & 12 Vict. c. 63):

Sec. 2. "The word 'street' shall apply to and include any highway (not being a turnpike road) and any road, public bridge (not being a county bridge) lane, footway, square, court, alley, or passage, within the limits of any district."

Sec. 68. "All present and future streets being, or which at any time become highways within any district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof by any surveyor of highways or by any person serving the office of surveyor of highways shall vest in and be under the management and control of the said local board of health, and the said local board shall from time to time cause all such streets to be levelled, paved, flagged, channelled, altered, or repaired, as and when occasion may require; and they may from time to time cause the soil of any such street to be raised, lowered, or altered as they may think fit, and place and keep in repair fences and posts for the safety of foot passengers."

Sec. 144. "Full compensation shall be made . . . to all persons sustaining any damage by reason of the exercise of any of the powers of this Act; and in case of dispute as to amount, the same shall be settled by arbitration in the manner provided by this Act."

Local Government Act 1858 (21 & 22 Vict. c. 98), s. 41: "It shall be lawful for any local board, by agreement with the trustees of any turnpike road or with any corporation or person liable to repair any street or road, or any part thereof . . . to take upon themselves the maintenance, repair, cleansing, or watering of any such street or road, or any part thereof . . . on such terms as the local board and the trustees or corporation or person or surveyor aforesaid may agree upon between themselves."

The Public Health Act 1875 (38 & 39 Vict. c. 55) repeals all the above sections (by sect. 343), and re-enacts the same provisions; see sects. 4, 148, 149, 306.

compensation were done under the powers of the local board, so that compensation is payable to the plaintiff under 11 & 12 Vict. c. 63, s. 144. An arrangement was entered into between the Accrington Local Board and the trustees of the turnpike road (the road on which the act of which the plaintiff complains was done) that the control of the road should be divided between them longitudinally, i.e., that the one body should retain the footpath and the other the carriage-way; and the defendants altered the level of the part of which they took charge. One point which has been raised is this, that, although by 21 & 22 Vict. c. 98, s. 41, the local board had power to make arrangements with the turnpike trustees to take charge of a particular portion of the turnpike road, yet this power could not be exercised by one body taking the centre and the other the side of the road, but that one body must take a portion of the road up to a particular point, and the other the remainder. I cannot accede to this objection, for I am of opinion that it is not necessary, in order to constitute a valid exercise of the power given by sect. 41, that the local board and the turnpike trustees should divide the road between them by a line drawn across it at right angles to the centre line. I think they may divide the road in any reasonable way which they may think fit to adopt. But the real question to be decided is, whether the place where the alterations were made by the defendants was part of a street vested in them under 11 & 12 Vict. c. 63, s. 68. It was contended on behalf of the defendants that this road was not a street within the meaning of that section, because by the interpretation clause of the same Act (in sect. 2) "the word 'street' shall apply to, and include any highway (not being a turnpike road)," &c. The contention was that, looking at the interpretation clause, and sect. 68, nothing can be a street within the meaning of sect. 68 which is also part of a turnpike road. In my opinion this is not so, for the interpretation clause in sect. 2 is not restrictive; it does not say that the word "street" shall be confined to any highway not being a turnpike road, but that it shall "apply to and include" any such highway. By that clause the meaning of the word "street" is enlarged, not restricted, and in my opinion that which in ordinary language, independently of the Act, would be a street, does not cease to be so by the provisions of the Act because it is part of a turnpike road. No doubt it is true that, independently of the interpretation clause, there might be other words in the Act sufficient to show that the provisions relating to streets could not apply to anything that is part of a turnpike road, even though it would otherwise be a street; but, in my opinion, none of the provisions of the Act are sufficient thus to restrict the effect of the enactments as to streets. Some little difficulty may possibly arise in consequence of the street (or some portion of it) over which the turnpike trustees have certain powers being vested in the local board under the statute; but I do not think that any inconvenience which may arise from this cause is sufficient to prevent the meaning which they would otherwise bear from being given to the words. It must be remembered that by a later Act (21 & 22 Vict. c. 98, s. 41) the trustees of the turnpike road and the local board were empowered to make arrangements as to the management and



care of particular parts of the streets. I think that section was passed expressly for the purpose of preventing any difficulty which might have arisen under the earlier Act in consequence of a street which also formed part of a turnpike road being vested in the local board, while at the same time the turnpike trustees had certain powers over it under their Act. In my opinion, therefore, this was a street within the meaning of 11 & 12 Vict. c. 63, s. 68, and the plaintiff is entitled to compensation under sect. 144. It was also contended that the amount of compensation awarded was excessive, but that is a matter with which we are not concerned here. We have only to decide whether the act complained of was done by the defendants under the powers given to them by statute; in my opinion it was, and the judgment of the court below ought to be reversed.

BARRT, L.J.—If the road in question had not been a turnpike road it would clearly have been within the definition of a street, and I think the fact of its being a turnpike road does not prevent its being a street. There does not seem to be any inconsistency in saying that a turnpike road is a street, either independently of the statute or within the meaning of the statute; this road therefore, being a street, was vested in the local authority to the extent stated in *Coverdale v. Charlton* in this court (40 L. T. Rep. N. S. 88; L. Rep. 4 Q. B. Div. 104). Whatever the obligation of the turnpike trustees might be as to keeping the roadway in repair, the local board might alter the road. They did alter it, and in so doing they assumed to exercise the powers of the Act, and in my opinion they were exercising them. I think therefore that any injury which may have been done to the plaintiff was the subject of compensation, and that compensation was properly awarded for it; I therefore agree with Cotton, L.J., that the judgment ought to be reversed.

BRAMWELL, L.J.—The question in this case turns upon the meaning of 11 & 12 Vict. c. 63, s. 68, by which "all present and future streets" might be altered by the local board. It is said on behalf of the plaintiff that the roadway in question here is a street, for it is said that the word "street" in the interpretation clause in sect. 2 includes not only the highways, &c., there referred to, but everything which is a street; that the interpretation is not the whole of the meaning of the word "street," and therefore that a turnpike road is not necessarily excluded. The consequence would be that the interpretation clause is not exclusive. I quite agree with this. There is one interpretation clause which says that "words importing the singular number shall include the plural number, and that words importing the plural number shall include the singular number;" if that clause were taken to be exclusive, the words in the singular would never mean the singular, and the words in the plural would never mean the plural. This is, therefore, an additional interpretation. Then it is said that this is a street, and it is so, but it is also a turnpike road. Then it is necessary to look at sect. 68 to see if there is anything which will enable one to come to a conclusion as to what the Legislature intended. With the greatest respect for those who hold the contrary opinion, I cannot help thinking, on reading the words of the section, that it means, as the court below held, that a street which is also a turnpike road

should not be included. Has the section taken away the management of the turnpike road from the turnpike trustees? I do not think that is intended. But it seems to me that it is speaking of those things with regard to which the management is transferred to the local board. It seems to me, therefore, that the words of sect. 68 show that a street which is also a turnpike road is not included in that section. The case is one on which I would rather not express a very confident opinion, especially after hearing the contrary opinions which have been expressed. There is one other remark. By sect. 117 of the same Act the local board were to be the surveyors of highways; that certainly did not include a turnpike road. I am therefore of opinion, on the question mainly argued, that the judgment was right, and ought to be affirmed. But there is another point, which I think is substantial. If the acts were done under the powers of the turnpike trustees, I cannot see how any action would lie against the trustees, or persons acting on their behalf. The trustees have power, under their Act of Parliament, to raise and alter the road, and it was held in *Boulton v. Crowthor* (2 B. & C. 703), that no action would lie against the trustees of a turnpike road for acts done *bond fide* and within their jurisdiction. I am inclined to think that, on principle, no action ought to be maintainable if the owner of property adjoining a highway is not the owner of the soil of the highway; I do not think that he has any right by law to have the road continued at a particular level. It may be inconvenient to him to have the road altered if he has built with reference to the level of the road; but it may be inconvenient to the public not to have the road altered. I am not clear, therefore, that there was not a more meritorious defence than was supposed in the court below. If so, there is no ground for saying that the defendants are continuing and maintaining a wrong, for, if the act was rightly done by the turnpike road trustees, the defendants were justified in maintaining it. I think the judgment ought to be affirmed, but, as the other members of the court are of a different opinion, it must be reversed.

#### Judgment reversed.

Solicitors for the plaintiffs, *Bidsdale, Craddock, and Bidsdale*, for *Robinson and Sons*, Blackburn.

Solicitors for defendants, *Johnson, Weatherall, and Co.*

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Nov. 22, 1878, Feb. 20 and 24, 1879.

(Before JESSEL, M.R.)

EMMA SILVER MINING COMPANY LIMITED v.  
GRANT. (a)

Order for trial of issues of fact—Order XXXVI., r. 6—Company—Promoter's secret profits—Allowances to promoter for money actually expended. The vendors of a mine entered into an agreement with G., a financial agent, to sell the mine for 1,000,000l., to a company to be formed by G., under which agreement G. was to receive 20 per cent. of the amount of the capital which should be allotted. By a subsequent agreement between the vendors and D., the nominee of G., but described

(a) Reported by G. W. KING, Esq., Barrister-at-Law.

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EMMA SILVER MINING COMPANY LIMITED v. GRANT.

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*as acting on behalf of the intended company, the vendors agreed to sell the mine to the company for 1,000,000l. The company was afterwards formed, and the prospectus and articles of association, which were settled by G., referred to the second agreement, but no mention was made of the first agreement, under which G. received considerable sums of money.*

*An action was brought by the company against the vendors, and against G., and others claiming amongst other things to have the purchase set aside; that an account might be taken of the sums received by G. under the the first agreement; and that he might be ordered to pay the same to the plaintiff company.*

*Upon the application of the plaintiff company, an order was made under Order XXXVI., r. 6, for the trial of two issues of fact before the trial of the action, namely, whether G. was a promoter of the plaintiff company, and whether he had received any and what sums of money without the knowledge of the plaintiff company under the first agreement as a promoter from the vendors or out of the purchase money for which he was accountable, the order being prefaced by an undertaking by the plaintiff company not to seek relief against G. in respect of any cause of action other than that covered by the issues, and the plaintiff company discontinuing such portion of the action as the court should direct.*

*On the trial of the issues,*

*Held, that G. was a promoter of the plaintiff company, and was liable to pay to the plaintiff all sums he had received from the vendors or out of the purchase money, after deducting therefrom the amounts actually and bona fide expended by him for securing directors, providing their qualifications, and in payments to members of the press for writing up the company, and to brokers for sustaining the shares in the market.*

*Bagnall v. Carlton (6 Ch. Div. 371, 37 L. T. Rep. N. S. 481) considered.*

This was an action by the Emma Silver Mining Company Limited, against Albert Grant, Maurice Grant and other persons, and also against the Emma Silver Mining Company (a corporation incorporated according to the laws of the State of New York, in the United States of America), and related to the purchase by the plaintiff company of a mine in the territory of Utah, in the United States of America, called the Emma Mine. In the year 1871 the defendants Trevor William Park, and William Makepeace Stewart under an arrangement with the American Company in whom the mine was then vested, came over to England for the purpose of negotiating a sale of the said mine and promoting a company in this country for the purpose of purchasing the same.

On the 2nd of Nov. 1871 an agreement was entered into between the defendants Park and Stewart, and the defendant Albert Grant, then carrying on business in London under the name of Grant and Company.

The agreement, so far as material to be stated, was as follows:

Memorandum of an agreement, made the 2nd of Nov. 1871 between the Hon. Trevor William Park, of Vermont, and the Hon. William Stewart, of Nevada, part owners of the Emma Mine, and acting under full authority from all the other owners, hereinafter called the "vendors" of the one part, and Messrs. Grant and

Co., bankers, of the other part, whereby it is agreed as follows:

1. The vendors shall sell the Emma Mine, and all the appointments, rights, and privileges now held, used, and enjoyed therewith as a mine in operation, together with all the ore in hand, and 46,300l. in cash to a joint-stock company to be formed by Grant and Co. for the purchase of the property.

2. The price to be paid for the said purchase shall be the sum of 1,000,000l., one half thereof to be paid in cash at the date mentioned in the prospectus for the payment of the instalment, and upon the said mine, property, ore, cash, and appurtenances, being duly transferred to and absolutely vested in the said company, and the remaining half to be paid in fully paid-up shares of the said company.

3. The share capital of the company shall be offered to the public for subscription to the amount of 2500,000, at the expense of Messrs. Grant and Co., and Messrs. Grant and Co. shall be entitled to receive and be paid by the vendors 20 per cent. of the amount of the capital of the company, which may be allotted and taken up after deducting the amounts of any shares which may have to be and are repurchased.

The said agreement contained other provisions, which were afterwards varied by the agreement of the 5th Dec. 1871 hereafter stated.

At the date of this agreement the defendant Maurice Grant was in the employment of the defendant Albert Grant, as a salaried clerk, but on the 1st Jan. 1872 he entered into partnership with him, and the business was carried on under the style of Grant Brothers and Company.

The statement of claim alleged that upon the said agreement of the 2nd Nov. 1871 having been entered into, the parties thereto acting as promoters of the company that was afterwards formed (being the plaintiff company) proceeded to organise the said company, and to obtain the consent of certain influential persons and firms to act as directors and officers of the same, and that they induced certain persons therein named to become directors.

On the 4th Nov. 1871 an agreement was entered into between Park, on behalf of "the vendors" of the one part, and G. H. Dean, described as "acting on behalf of a company then intended to be formed and incorporated under the laws of England by the name of the Emma Silver Mining Company, Limited, (who, as the plaintiff company alleged, was a nominee of Albert Grant's), of the other part, for the sale of the mine to the intended company. The purchase was to include the mine therein described, with the plant, goods, and chattels in and about the same, and all the stocks of ores in the mine, and the sum of 46,300l., proceeds of ore sold and then in hand. The agreement stated that the purchase money was to be the sum of 1,000,000l. sterling, of which 500,000l. was to be paid in cash, and 500,000l. in fully paid-up shares of the company. The vendors were to pay all the expenses of and incidental to the formation of the company up to the allotment of shares.

The plaintiff company, by their statement of claim, alleged that the defendant Park, during the negotiations, prepared a prospectus to be issued by the proposed company, and that the same, as altered by the defendant Albert Grant, was submitted to the persons who had agreed to become directors. The qualifications of the directors were, it was alleged, provided by Albert Grant.

The plaintiff company was incorporated on the 8th Nov. 1871.

By the memorandum of association the nominal

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capital was stated to be 1,000,000*l.* divided into 50,000 shares of 20*l.* each, and the objects for which the company was formed were stated to be (amongst others) the carrying out of the agreement of the 4th Nov. 1871, the purchase, acquisition, and working of the Emma Mine, the purchase of other lands or mines in the territory of Utah, and such machinery and implements as might be necessary for carrying out the working of the mines.

By the articles the contract of the 4th Nov. 1871 was expressed to be adopted by the company, so far as its provisions were intended to be binding on the company therein contemplated. The articles provided that the defendants Park, Schenck, and Stewart and three other persons therein named whose qualification shares were, it was alleged, provided by the defendant Albert Grant, should be the first directors of the company.

On the same day on which the plaintiff company was incorporated a prospectus prepared by the defendants Park and Albert Grant was issued inviting subscriptions for 25,000 shares of 20*l.* each described as the unappropriated capital of the company. In this prospectus the defendants Anderson, Schenck, and Puleston were described as trustees of the plaintiff company, and it was stated that they had consented to act as trustees for the shareholders until the property was duly transferred. This prospectus was, it was alleged, circulated by and at the expense of Albert Grant with the approval of Park and Stewart, and was based on the representations made by Park to them and to some of the directors.

Neither the agreement of the 4th Nov. 1871, nor the memorandum and articles of association, nor the prospectus contained any reference to the agreement of the 2nd Nov. 1871, nor to the provision contained therein as to the payment by the vendors to Grant and Co. of 20 per cent. of the amount of the capital of the company, nor to any profit to be received by Albert Grant as promoter of the company.

Before the 1st Dec. 1871 more than 400,000*l.* had been paid to the credit of the said trustees on account of the 25,000 shares in the plaintiff company which had been allotted to applicants according to the terms of the prospectus, but the solicitors of the plaintiff company not having given the trustees a certificate that the transfer of the property had been completed, they were prevented from paying any part of the purchase money to the vendors out of the funds standing to their credit.

Thereupon an agreement dated the 1st Dec. 1871, and made between Park and the said trustees, was entered into by which it was agreed that Park should forthwith fully execute, complete, and deliver all transfers and assurances required by the solicitors to the company, and give to the company actual possession of all the property, including the sum of 46,300*l.* cash as past earnings, and that, upon the solicitors receiving notice from their agent at New York that the title was good, the trustees should pay the said sum to Park.

The statement of claim alleged that Grant and Co. advanced to Park the sum of 45,000*l.* upon the security of the first moneys payable to the vendors in respect of the purchase money to enable him to place 46,300*l.* to the credit of the plaintiff company with their bankers representing the same

to be the produce of the ore derived from working the mine.

By a memorandum of agreement dated the 5th Dec. 1871, made between Park and Stewart described as owners of the Emma Mine of the one part, and Grant and Co. of the other part, it was agreed that certain stipulations in the said agreement of the 2nd Nov. 1871 should be modified, and it was further agreed, in consideration of the further services of Grant and Co., in carrying out the arrangement for the acquisition of the mine by the company, and the further expenses incurred by Grant and Co., in relation to the company, and in consideration of Grant and Co. agreeing to absolve Park and Stewart from all claim in respect of Grant and Co.'s expenses in respect of the agreement of the 2nd Nov. 1871, that the vendors of the mine should deposit with a nominee of Park and Grant and Co. all the 500,000*l.* of fully paid-up shares in the company to which the vendors were entitled as part of the purchase money for twelve months unless they should be disposed of as thereafter provided; also that Grant and Co. might as long as the said shares remained so deposited, sell and dispose of the said 500,000*l.* of shares to the best advantage according to their discretion, unless Park should elect to take the same as therein provided, and that upon every sale that might be effected of any of the said shares Park should pay to Grant and Co. the commission of 1*l.* per share, and whether such sales should be effected to Grant and Co. or not should also pay, and Grant and Co. be entitled to retain one-half of the net proceeds of the sale of the said shares. It was also agreed that Park should be at liberty to withdraw from deposit a certain number of the shares in which case Grant and Co. were not to be entitled to any remuneration.

By the statement of claim it was alleged that this agreement was concealed from the directors of the plaintiff company, other than Park, Baxter, and Stewart, and from the plaintiff company.

The statement of claim also alleged that on the 5th Dec. 1871 the trustees, in compliance with the direction of Park, paid to Grant and Co. out of the 400,000*l.* then standing to their credit, the sum of 145,000*l.*, and paid the balance to Park; also that the said sum of 145,000*l.* paid to Grant and Co. was paid on account of the 45,000*l.* lent to Park as before mentioned, and on account of the 100,000*l.* payable to Grant and Co. under the agreement of the 2nd Nov. 1871; also that the defendants, Park, Baxter, Albert Grant, and Maurice Grant, or some or one of them, with the knowledge of the others, had before the plaintiff company was incorporated, and before the issuing of the prospectus, agreed to make the various payments or allotments of shares to the several persons in the statement of claim mentioned, out of the moneys and shares which the vendors were to receive from the company, or out of so much thereof as Grant and Co. were to receive as promoters, and that such sums and shares had since been paid or allotted, but the fact that such persons were to receive such sums of money and shares was concealed from the plaintiff company.

The statement of claim further alleged that the defendants Albert Grant and Maurice Grant had sold a large number of shares retained by Park as part of the vendor's shares, at prices considerably

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exceeding their value, and had received from Park, by way of commission, and as their share of net profits under the agreement of the 4th Dec. 1871, sums amounting to 32,421*l.*, of which 19,600*l.* was received on account of commission on the shares sold by them including those bought by them for the purpose of keeping up the market, and afterwards resold; and that the last-mentioned sums were all paid to them out of the purchase moneys received by Park from the plaintiff company.

It also alleged that in calculating the said net profits the defendants Albert Grant and Maurice Grant deducted all the sums paid by them to the directors, brokers, solicitors, and other officers of the company, as well as many other payments made by them to members of the newspaper press and others with the object of facilitating the promotion of the company, and enabling them to dispose of the shares.

The plaintiff company claimed (1) That the acts of the directors of the plaintiff company (being the nominees of and paid by and under the control of the vendors and promoters) in adopting and carrying out the agreement of the 4th Nov. 1871, were not binding on the plaintiff company, and that the purchase by the plaintiff company of the mine might be declared to be not binding on them and be set aside. (2) That accounts might be taken of the dividends received by the defendants Park, Baxter Stewart, Albert Grant, and Maurice Grant or any of them on account of the 25,000 shares allotted in pursuance of the said agreement, and of the sums received by them on the sale or disposition of the said shares beyond the par value, and that they might be ordered to repay the same to the plaintiff company, also that the respective defendants might be ordered to pay and account for to the plaintiff company, all sums of money, and the value of all shares and other property which they respectively had obtained (either in their or his names or name, or in the names or name of any other person or persons), and all profits which they might in any manner have derived as promoters, directors, or trustees, or for the plaintiff company, either out of the moneys and shares to be paid and allotted under the said agreement of the 4th Nov. 1871, or otherwise in respect of any transaction in which they were respectively engaged as such promoters, directors, or trustees; together with other relief.

The defendants, Albert Grant and Maurice Grant, by their statement of defence denied most of the material allegations in the statement of claim.

On the 22nd Nov. 1878 an application was made by the plaintiff company under Order XXXVI., r. 6, for an order directing the trial of the following issues of fact: First, whether the defendants Albert Grant and Maurice Grant, or either of them, were or was promoters or a promoter of the plaintiff company; and secondly, whether any and what sums of money were received or derived by the defendants Albert Grant and Maurice Grant or either of them, without the knowledge of the plaintiff company under the agreements of the 2nd Nov. 1871 and the 5th Dec. 1871, or either of them or otherwise as promoters or a promoter, from the vendors to the plaintiff company, or out of the purchase-money payable in cash and shares by the plaintiff company or otherwise, for which the said defendants or either of them were or was accountable.

*Davey, Q.C., Bowen, and Grosvenor Woods* in support of the motion.

*Moulton* for the defendant Albert Grant, and *Bomer* for the defendant Maurice Grant, opposed the motion.

JESSEL, M.R.—I do not intend to lay down any general rule for the proper construction of Order XXXVI., r. 6, because first of all I think one judge has no right to embarrass other judges by laying down general rules of construction; and in the second place I think it is very undesirable to limit the operation of a rule conveyed in general terms by stating the circumstances, or all the circumstances under which the judge thinks the discretion ought to be exercised. The discretion is general. Of course it is a judicial discretion, and there must be sufficient reason for exercising it, but what I intend to do is to state one or two cases in which I have been asked to put the rule in force, and what I have done, and why; and then I shall state why I think I ought to put the rule in force in the present instance. I have been asked to do so in the case of a defendant. The first case that came before me was a case in which a lady alleged that she was the legitimate child of somebody, and that as such she was entitled to take some very long and expensive and intricate accounts against some trustees. The trustees showed by affidavit that the lady was born before the marriage of her parents, and that there were very strong grounds indeed for supposing that she was not a legitimate child at all. I thought it a proper case, inasmuch as the expense of taking the accounts would have been enormous, and the whole suit would have ended in nothing but costs if the plaintiff did not establish her legitimacy, that the issue of legitimacy or illegitimacy should be tried first under this rule. I so directed, and as I am informed the result was that the lady did not succeed in establishing her legitimacy, and there was an end of the action, which was exactly what I anticipated. In a case of this kind, my opinion is that the judge must have some evidence which will make it at least probable that it will put at end to the action. The plaintiff is not to be harassed at the instance of the defendant by an innumerable series of trials, each trial taking issue on every link of the plaintiffs' case. That is not the meaning of the rule as I understand it, but it may probably be applied in such a case as that I have stated, when the judge has serious reason to believe that it will put an end to the action. I have had another case in which the plaintiff alleged a very long title, and claimed an estate. He alleged himself to be the heir-at-law of a person who was entitled to this estate. He wanted a great deal of discovery, and the possession of large property. The defendant said the plaintiff was a pauper, that it was a mere experimental action, and that there was not a shadow of ground for his claim. In that case I felt no hesitation in directing an issue whether the man was heir-at-law. It turned out that he was not, and I believe the case was abandoned, and was never tried at all. There was a third case I remember before me at chambers—I only give these instances as illustrations—in which a man brought an action on behalf of himself and all other the tenants of a manor to restrain the inclosure of a common. The defendants said, "This will be a very expensive action to try; it will

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involve the customs of the manor and rights of common" and, as usual, the commoners put up a man, who, although not technically, was really a pauper, to sue on behalf of himself and all others, the only result of which action would be that the defendants would have to pay the costs out of their own pockets. They alleged and proved by affidavit that the person who was plaintiff, and who said he was tenant of the manor, was not so, that his name or the name of his ancestors had never appeared on the court rolls of the manor, and that he was not a tenant of the manor. The only answer that I could get from the plaintiff was that he believed he was a tenant, but he could not show how. I thought, before the defendants were put to the enormous expense of a trial of all the issues, it was right to put the plaintiff to the proof that he was a tenant at the time. But I do not remember before having had an application on the part of the plaintiff, and, as far as I can learn from the inquiries I have made, no one else is aware of any such case. Now it appears to me that when the plaintiff makes the application, different considerations arise. The defendant has, of course, a right to shape his own case, and to say to the plaintiff, "You must prove every part of your case; if I can put my finger on one part of your case, and show that there is no foundation for it whatever, it is quite wrong to subject me to the whole expense of a protracted investigation, and especially when you, the plaintiff, cannot pay the costs of it." But when a plaintiff has chosen to frame his case in this way, and has chosen to join several defendants, because they are more or less connected with some part of the subject matter of the action, although not connected with the whole of it, it does not then at all follow as a matter of course that he is to be at liberty to retire from it as to any portion of the case, and say, "I should like to try one part of it only, and to leave the defendant afterwards to be subject to a second or third trial to try the rest of it." I think the defendant has, speaking generally, a right to answer, "You ought to have thought of this before you brought your action or put in your statement of claim; if you wanted any part of the action to be tried separately, you should have brought a separate action." I do not wish to be understood as saying that subsequent events may not have occurred which may justify the plaintiff in making the application, but subject to that it appears to me as a general rule that the plaintiff has no right to make the application if the defendant objects. But if the plaintiff comes into court and says this, "Since the commencement of my action subsequent events have occurred which convince me that I had much better give up the right of action as against particular defendants, and limit my action to the trial of certain issues only, and ask the court to try those issues," it does not appear to me the defendants have any right to complain. There will only be one trial, therefore there will be no increased costs, and, as against those defendants, they get the benefit of the abandonment of the further relief asked against them, because the plaintiff says that he will limit his relief to what will result from the issues which are to be tried. So far as those defendants are concerned it must be a benefit, that is, a benefit in one sense only—a benefit theoretically—because practically it is no benefit, and if they are wrong, the sooner the action is tried against them the

worse for them, and the greater the delay the better for them; but I am not now putting it in that shape at all. Here the plaintiff company say in effect, "When we brought the action we intended to try it against all the defendants according to the terms of the agreement, and we have, according to our view, a clear case against the defendants (the Grants) for a certain cause of action." The other defendants, including the Grants, have chosen, as regards another cause of action, to apply for a commission to Utah in the United States, and the plaintiff company say, that if they succeed upon that application, the result will be that the trial of the remaining cause of action will be delayed until an indefinite period, and to avoid that they submit to limit their cause of action against the defendants (the Grants) to the one cause of action as to which they want the issues stated. It seems to me that in some shape or other that application is reasonable and should be acceded to. It is one that, except as regards delay, cannot injuriously affect the defendants, and it may obviously be very beneficial to the plaintiff company if it avoids the delay of the trial of the action. I think the case before me comes under the 6th rule of Order XXXVI, the words of which are, "The court or a judge may in any action at any time, or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others." Now, if I stayed the action, it might be objected that there were no other issues to try, but there are other issues to try as between the other defendants, and issues as to which they may desire, the Grants to be present, and therefore I shall only put the plaintiff under terms not to ask relief against the Grants in respect of any other cause of action than that included in the issues. Then there is one other point which I think I ought to decide. I think the case to be brought within this rule ought to be one of simple issues. I do not think it is convenient to travel through a long record, and to get a number of complicated issues, and excerpt them, so to say, from the pleadings. But in this case it appears to me the issues are simplicity itself. There are two issues in form. In reality they are only one. The real issue to be tried is whether the Grants, as promoters of the company, pocketed 100,000*l.* or thereabouts out of the purchase-money without the knowledge of the company. That is really the only question I have to try. It appears to me to be a very simple issue which I can try very well, and therefore I shall make the order in the terms proposed. The costs of the motion will be reserved, and the order will be prefaced by an undertaking by the plaintiff company by their counsel not to seek relief against the defendants Albert Grant and Maurice Grant in respect of any cause of action other than that covered by the issues, and also to consent to an order to discontinue such portion of the action as and when the court shall direct.

The defendants Albert Grant and Maurice Grant appealed from this order, and on the hearing the Court of Appeal affirmed the order with a variation, the words "the plaintiffs discontinuing such portion of the action as the court shall direct," being substituted for the plaintiffs' undertaking to consent to an order to discontinue.

The issues of fact then came on for trial, and

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during the trial, the action as against the defendant Maurice Grant was compromised, and an order was taken by consent that he should pay to the plaintiff company the sum of 2250*l.*, with interest, at 4*l.* per cent. per annum from the 12th May 1872 in satisfaction of their claims against him.

*Davey, Q.C., Bowen, Grosvenor Woods, and Foulkes*, for the plaintiff company, contended that the defendant Albert Grant was a promoter of the plaintiff company, and could not be allowed to receive any part of the purchase-money or any profit on shares sold by him under agreements which were concealed from the company, and that in ascertaining the amount of the profit he was not entitled to be allowed sums paid for securing the services of directors or payments to members of the newspaper press for writing up the company, or to brokers for sustaining the shares in the market.

The defendant Albert Grant appeared in person, and argued that the issues ought not to be tried at present as there was a pending action by the plaintiff company against the vendors for a rescission of the contract for the purchase of the mine, and also that there was no fiduciary relation between himself and the plaintiff company.

JESSEL, M.R.—I have two issues to try. The first is whether the defendants, Albert Grant and Maurice Grant, or either of them, were or was promoters or a promoter of the plaintiff company. The case as against Maurice Grant has been compromised, and therefore the issue remains merely as against Albert Grant. The second issue is whether any and what sums of money or profits were received or derived by the defendant Albert Grant, without the knowledge of the plaintiff company under certain agreements or otherwise as promoter of the company, or out of purchase-money for which he, that is, the defendant Albert Grant as promoter, was accountable to the plaintiff company. The first objection taken by the defendant is that this issue ought not to be tried at present. The ground upon which he put it was that there was a pending action against the vendors to rescind the contract. In the first place, if there were anything in the objection at all (which I will consider presently), it comes too late because there is an order of mine to try these issues, which order has been affirmed by the Court of Appeal, and therefore I am bound to try the issues quite independently of this objection. I need not say that the objection was not taken either before me or before the Court of Appeal, and there is no decision upon it. Still, there is the order, and in obedience to that order I should certainly try the issues whether the objection was good or bad. In the next place the objection was not taken before me until after the plaintiffs' counsel had opened the issues and completed their case, and I need not say that a preliminary objection seeking to postpone a trial, comes too late after the trial has proceeded to that extent. I will now say a word or two about the objection itself. It will be remembered that at the present moment the contract remains unrescinded; therefore, the argument must go to this extent that the claim by one of the parties to rescind the contract puts an end to it, that must be the meaning of the proposition; but no judge has ever said, and I do not suppose any judge ever will say, that the mere claim of one of the parties to a contract to rescind puts an end to

the contract. There is, however, a possible meaning, which though not expressed in the argument may be intended, and that is this, that a claim to rescind a contract by the plaintiffs is irrevocable by them, and that the defendants may compel them to rescind whether they like it or not. Upon that point there is an express decision and a decision the other way. The case of *Bagnall v. Carlton* (*sup.*) was a suit by bill praying that the agreement for the purchase of the property might be set aside, or, in the alternative, that the defendants other than Bythewood might be decreed to be jointly and severally liable to repay all the profits which they had made by the transactions, the plaintiffs offering to allow expenses properly incurred. When the cause came on for hearing, or before it came on—it is not very material to consider which—the plaintiffs compromised with some of the defendants, namely, the vendors, and agreed to affirm the contract in consideration of a sum of money, and it was held that the other defendants,—whom I will call the agency defendants to distinguish them from the vendors—had nothing to do with that compromise, that their liability remained notwithstanding the compromise, and that the purchasers could pass over the prayer for rescission and seek relief under the alternative prayer for payment on the footing of the contract remaining. The argument for the appellants, who succeeded, was this: "We have a right to give up our claim to rescind the contract without prejudicing our claim against the promoters." James, L.J. says, "The case against the vendors was that the plaintiffs were by reason of what had taken place entitled to an absolute rescission of the contract, and the plaintiffs and those defendants, the vendors, agreed to put an end to that case in consideration of a sum of money paid by the vendors to them. That was the price of the company giving up that which beyond all question, it seems to me, they were entitled to, that is to say, the right to have the contract rescinded and the right to have the whole purchase money repaid to them. With that price so paid for the compromise, it appears to me, the other defendants have really nothing to do." That is a decision, therefore, that a mere claim to rescind, even in a case where the plaintiffs were entitled to rescind, did not put an end to the contract or have the effect of rescinding it and did not place the agents, who were made liable on the footing of the contract being a valid one though it was really open to rescission, in a better position than if no claim for rescission had been made. There is another view of the case which has struck me forcibly, not as a preliminary objection but as a defence. Can the promoter or agent say, "I shall be liable for such a sum on the footing of the contract being valid, but you are attempting to rescind it, therefore until you finally elect to treat the contract as a valid one, I am not to be liable for anything." If his liability depended entirely on the validity of the contract that would be a defence, and it may be that before I give judgment, I shall want to know whether the plaintiffs elect to rescind the contract or not. But the remarkable part of this case is this—if the plaintiffs succeed in rescinding the contract, a large sum which they now claim from the defendants as, what I will call, promotion money, will be a part of the purchase money, and in that way they may still have a right



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to claim it from the defendants, assuming always that the other persons who are liable to repay it do not repay it. However, that is not the question I have now to decide, because I must decide on the facts as they are proved before me, and all that is proved before me is a contract which is not rescinded by the defendant in this issue, in which he insists upon it being a valid and proper contract, and it does not appear to me that he, by insisting on the contract as a valid one, can take advantage of any threatened attempt on the part of the plaintiffs to rescind the contract as against one person. In other words I try the issues on the existing facts, one of such facts being a valid and subsisting contract. If it should turn out hereafter that those facts are altered, there may be some right on the part of the defendant to prevent my giving judgment, or from executing judgment when given. Assuming the contract to be a valid contract, what have we here? We have, it appears to me, a case wholly undistinguishable from the case of *Bagnall v. Carlton* on any principle. The case is a somewhat singular one in one or two of its features, but I am afraid not singular in all its general features. The vendors of the Emma Silver Mining Company entered on the 2nd Nov. 1871, into an agreement with Messrs. Grant and Co., which then consisted only of the defendant, Albert Grant, which may be shortly stated. The vendors were the Hon. Trenor William Park and the Hon. William Stewart on the one part, and the defendant, Albert Grant, under his trade name of Grant and Co., of the other part. It was agreed that the vendors should sell the Emma Mine, with certain other things for 1,000,000*l.*, one half in cash and one half in shares. Now to whom were they to sell it? To a joint-stock company to be formed by Messrs. Grant and Co. for the purchase of the property. Therefore it was an agreement not to sell directly to Messrs. Grant and Co., but to a nominee of theirs. That is what it comes to. Then there was an arrangement that Messrs. Grant and Co. should bear the expenses, and were to be entitled to receive from the vendors 20 per cent. of the purchase money. As regards the cash it was to be 100,000*l.*, and as regards shares a similar amount, but that was afterwards varied by a subsequent agreement, and the profit was made different. Then in pursuance of that agreement on the 4th of the same month of November there is an agreement—which is of course a nominal one—an agreement by the same vendors to sell the same mine for 1,000,000*l.* to a nominee, a man who has really nothing to do with it except to have his name put into the agreement. Then on the 7th or 8th Nov. Mr. Grant settles a prospectus. When I say settles, I mean he finally settles. He had been settling it all the time, but it is finally settled then, and it is issued to the public. That prospectus does this, it suppresses all allusions whatever to the original agreement of the 2nd Nov., which is simply an agreement for the sale to a nominee of Mr. Grant, and it sets out as a reality the contract of the 4th Nov. and it represents to the public that that is the real contract for sale, the real contract for sale being a contract for sale with Mr. Grant to sell to any company he could form. That being the position of matters, the first point to be considered is, whether that was a transaction which on the face

of it amounted in equity to a fraud. Now, a very eminent judge has said that it is not necessary to be a lawyer in order to be an honest man, and I quite assent to that proposition. I do not think it is necessary to understand equity law in order to be convinced that if you tell the public that a mine is sold by the vendors for a million of money when in fact it was agreed to be sold for a million of money less 200,000*l.* on the terms of the real purchaser that it should be sold to a company to be formed by himself, and that he should provide some expenses—I think most people will understand that they would be deceived by that representation. Of course if it were a real sale for a million to a person really buying they would suppose that they had the protection of a real purchaser, a person who therefore would look to some extent after the value of the thing to be bought, and when they saw a respectable list of directors, in fact something more than respectable, a distinguished list of directors, advertised, who would, of course, be supposed to look after their own interest in a company in which they would take a considerable stake in the shape of shares, and in whose management they would take part, and to whose recommendation to the public they lent the sanction of their names, and their high social position, they would naturally suppose that they had looked after the thing, and that they had taken care to see that the company about to be formed would have value for its money; all that appears to me untruly represented by this prospectus. It is represented as a *bona fide* purchase for 1,000,000*l.* with the sanction of these eminent gentlemen as directors, when in fact it was in substance, though not exactly, a purchase for 800,000*l.* put off on the company for 1,000,000*l.* In order to show the view which has been taken by a court of justice of this kind of transaction, I will read a few words from the judgment of Bacon, V.C. in the case of *Bagnall v. Carlton*. He speaks of the prospectus, and the words apply exactly to the prospectus before me, with some additions: "It wholly omits the consideration that the employment of the agent was for the purpose of forming a company, and of inducing other persons to subscribe in reliance upon a representation which was untrue; for it was not true that the purchase money payable to the vendors was the sum mentioned in the prospectus, but it was the purchase money stated in the ostensible agreement, *minus* the amount to be paid by the vendors to their agents as a reward for procuring the subscription, and the nominal purchase-money so diminished was the true sum which was to go into the pocket of the vendors." I think that the answer to that, namely, that the amount made no difference is fallacious. The amount makes all the difference. If you represent that a sum is to be paid, you may honestly and perhaps fairly omit a trifling amount of commission, say 2*s.* 6*d.* per cent. for the brokerage on the stock or anything of that kind. The rule is *de minimis non curat lex*, but where you actually take out one-fifth, of course it is quite clear the amount does make that an untrue representation, which might be substantially true if the amount was trifling. Then it may be said, "But what had Mr. Grant to do with it?" The answer is, that Mr. Grant was not only the promoter, which he was by forming the company, but he was the person who made the representation. He actually settled and



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signed the prospectus which was issued, and again I will quote a few words from the same judgment of Bacon, V.C.: "But if the case were not supported by authority, I should not hesitate to say that the persons by whom this representation was made did by making it—by inviting and soliciting the confidence of the persons to whom it was addressed—contract fiduciary relations with those persons." That is, if he took upon himself to represent to them, not the whole of the facts but a portion of the facts, and to omit what he ought to have known and must be taken by a court of justice to have known, was a very material statement. But, as I said before, something must be added to this case. Mr. Grant not only formed the company, but he obtained with one exception, I think, the names of the directors, and these directors were known to him not to be independent directors. I am sorry to say that, in my opinion, with two exceptions, those two exceptions being of persons not procured by him, he "bought" the directors, and in a very peculiar way he set about it. He therefore knew that these directors were not only qualified by him, that is, they received their interest in the company from him, but they had no real interest which would induce them to check any of the statements he made, because if they did they would get nothing, whereas if they remained as directors, and did not check him in any way, they would get some profits at all events, namely, the qualification shares; but he must also have known, from the names and the circumstances I am going to mention, that the public would take a different view of his directors, and would not imagine that the directors were obtained in the way in which they were obtained. Now the way in which they were obtained was this: Mr. Albert Grant went to a member of Parliament, a gentleman of family and position, and asked him to obtain directors for him. There was an exception, and I except the American directors, who were not procured by Mr. Grant, but he asked the gentleman I have referred to to obtain directors. This gentleman, fully understanding I should think from what subsequently occurred that he was to be paid for obtaining these directors—for it appears pretty plainly from the correspondence that he must have known it, and have anticipated it—went about and obtained directors, representing to them that they would receive shares with a qualification, I suppose, and thereby induced them to become directors of the company. When directors had been obtained, Mr. Grant, who, I must say, appears, when he obtained large sums, to have been liberally disposed in his expenditure of them, gave this gentleman 1500*l.* in hard cash for obtaining the directors. Now directors so obtained, I think, can hardly be represented to the public as holding that position which directors named in a prospectus in this way ought to hold. Of course the public imagine, or did imagine till recent years when these matters have become public through the medium of courts of justice that these directors were people who had a real stake in the enterprise, and not the mere nominees of the promoter, obtained either for money or for shares, and who had no intention whatever, except to get as many shares allotted to them as they could obtain. It is again an unfair representation to hold out to the public that this is a sale

by the mine-owner to the nominee, for the company, so to say, approved of and controlled by an eminent and independent body of directors. The whole of it is in my opinion an untruthful representation by reason of the suppression and concealment of truth, not untruthful in the sense of direct falsehood, but untruthful because it is intended to convey to the public an impression different from the reality, and because it is known by the person who conveys it, or ought to be known by him, to be materially different from that which was the real state of the case. That being so, it appears to me that the promoter who issues such a prospectus as this, and acts in the way I have mentioned, has really nothing to complain of, if his conduct is described in the way in which Bacon, V.C. described it in the case of *Bagnall v. Carlton*. But in addition to this we must also recollect that the promoter does sometimes tell his directors all about it, and then, it is said, that binds the company. It has, however been decided that the company includes those persons amongst the public who are invited to take shares, and it is no answer at all to say that the nominees, the directors, whose names were inserted as part of the getting up of the company were in league with the promoter. In this case it is not clearly proved to my mind that they were in that sense. No doubt some conversation took place on the day of allotment, which would have put independent directors, men who had not received their qualifications from the promoter, on inquiry. But these men were not likely to enquire. Why should they? Inquiry before allotment could have ended, and would have ended probably only in one result; that there would be no allotment, and they would get no shares, and therefore it would not be probable that they would take any step even by a statement which would have aroused the suspicions and the spirit of inquiry in persons who had a real interest and a real stake in the company, in the sense of putting their own money into it. But in my opinion there is not a pretence for saying that there was any communication made to the allottees or anything in the shape of full disclosure made to the board of directors. Whatever the concealment was, concealment it remained. That being so, I come to the next question. For what sum ought Mr. Grant to be made liable? And that depends upon what the principle is on which the court decides these questions. Mr. Grant becomes, as I understand it under the authorities, a trustee, agent, or person in a fiduciary position as regards the company, one who has undertaken a duty towards the company of such a character as incapacitates him from making a secret profit at the expense of the company. That he has undertaken that duty in this case I think is very plain indeed, because he not only was the person who was to form the company, but he himself bought on behalf of the company by the very first contract. The second contract again is by a nominee of his on behalf of the company, and he himself, whether he actually drafted or whether he settled and approved the memorandum and the articles of association is quite immaterial, was the person who was the author of those instruments, adopted the contract on behalf of the company, and acted from the beginning to the end for the company, formed it, provided it with directors, made a contract for it, and adopted that contract for it.

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Now it has been decided by a very great number of cases that a person in that position is in a fiduciary position, he is a promoter. It is not necessary that he should have done all these things to make him a promoter, even some of them would be sufficient, but he is undoubtedly a promoter, and, as a promoter, as the man who has formed the company, he cannot take a secret profit—he must let his company know what profit he has taken, and deal with them, so to say, at arm's length. In a well known case, *The New Sombroero Phosphate Company v. Erlanger* (5 Ch. Div. 73; 36 L. T. Rep. N. S. 222), James, L.J. says: "A promoter is, according to my view of the case, in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property which he desires to sell to the company, it is quite open to him to do so; but, upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. I can see no difference in this respect between a promoter and a trustee, steward, or agent." Let us see what the position of Mr. Grant was. He had a contract with Park and Stewart to buy the mine of them, and that they should sell it to a company of his nomination, and he forms the company to buy. Can he say after that, that he is not in a fiduciary position within the authorities towards that company? It is clear that he cannot. Therefore, the only question is, whether he can make any profit at all and not disclose it? Upon that the authorities are quite plain. The moment a man is in a fiduciary position, however that fiduciary position may arise, he must deal with his principal on the footing of making a full and fair disclosure of everything material in relation to the dealing or transaction in which he acts in the fiduciary capacity. The case of the *Liquidators of the Imperial Mercantile Credit Association v. Coleman* (L. Rep. 6 H. L. 189; 28 L. T. Rep. N. S. 1) is a very good illustration of that. There Coleman was a stockbroker, and he told his fellow-directors that he had an interest in the transaction. He did not tell them the extent of his interest, and it was decided that, inasmuch as his fellow-directors might have been under the impression that he merely took his ordinary commission as a stockbroker, and thereupon confirmed the transaction, he was liable to refund all his profits, because it turned out that he had made a large and extraordinary profit beyond the usual commission of a stockbroker, and it was decided that he was compellable to state not only that he had an interest, but what interest it was before he could sustain the transaction of sub-agency. The case of *Bagnall v. Carlton* is so like the present case—in fact one of the defendants there was Albert Grant himself—that it is hardly possible, I think, to suggest any distinction at all in favour of the defendant in this case. But, then the question is, what is he liable to pay? Now, as I understand it, he is liable to pay the amount of the profit he has made. It has been argued that, as in a sense he gets part of the purchase money, he is liable on the ground of his paying back the difference of the purchase money. That cannot be, as it appears to me, the true ground. No doubt, in substance, the representation that the contract is a contract for the purchase for 1,000,000*l.*, when 200,000*l.* is to be deducted as a commission, is substantially a mis-

representation by over-stating the purchase money, but it does not make that commission part of the purchase money in that sense. In other words, suppose the purchaser agrees with the vendor to confirm the contract, and takes a larger sum from him than the difference and the commission, that would not, as was decided in the case of *Bagnall v. Carlton*, affect the position of the agent who had negotiated the contract. If it could be proved, for instance, that the original purchase-money was, we will say 100,000*l.*, that the vendors agreed to take 90,000*l.*, and to pay 10,000*l.* as commission, and that they had refused an offer of 89,000*l.*, and if after the matter was discovered rather than submit to exposure, or for other reasons they agreed to a confirmation of the contract, and to accept 80,000*l.*, so that the purchaser had never paid more than 80,000*l.*, the purchaser would not be the less entitled to recover 10,000*l.* from the agent. The purchase money is now reduced to 80,000*l.*, but he would have the right to say to his agent: "You made a profit by that position of trust and confidence which was reposed in you; as agent you cannot hold that profit as against me. Although the result of your misconduct was really to entitle me to obtain the property, and enabled me to obtain the property at a less price than I could have obtained it if you had not been guilty of misconduct, yet that advantage to me will not enure to your benefit, and cannot entitle you to retain one single shilling of the improper profit you made.—It appears to me that is the true view of the cases that the person in the fiduciary position cannot keep the secret profit, and that the fact that the relations of the profit to the purchase money originally are altered, can make no difference. Indeed, we might have it the other way. The agent who received the commission might be not the agent of the vendor but the agent of the purchaser. The purchaser might like his bargain, and might say: "Though I have given 100,000*l.* for this, which I might possibly have bought at 90,000*l.*, I will not give it up, I will affirm the contract; I think it is worth more." He might have sold it for more a week afterwards, and yet he would be entitled to take from his own agent the commission improperly received by the agent from the vendor. If that be the true principle it remains to consider what is the amount of profit derived by the agent in this transaction? The broad view of the case is to take the whole transaction together and see how much more money he has got than he would have had if he had never entered into it at all. As I read *Bagnall v. Carlton*, although the point did not arise there exactly as it arises here, I think that was the view of the Court of Appeal. James, L.J. says this, with regard to the costs, charges, and expenses, incurred by the defendants, "The costs, charges and expenses, I think they had a right independently of the offer in the bill to deduct, because what they were liable to pay the company was the profits which they had made in a fiduciary character, that is to say, the net profits which they had made, and I think that costs, charges, and expenses might properly be deducted in ascertaining the net profits, and to that extent, therefore, they were, I think, entitled, independently of the offer in the bill." Baggallay, L.J. concurs, and Cotton, L.J. says this, "That being so," that is as to the fiduciary relation, "the prin-

ciple of equity clearly applies. Carlton and Grant are trustees for the company. They cannot by any possibility make themselves a profit in the transaction in which they were trustees." Then he says this, "I think I need add nothing to what has been said by the Lord Justice as regards the charges and expenses. The principle on which I decide this case is this, that the trustee cannot make for himself a secret profit, and the profit is the net balance of the 85,000*l.*, after deducting any charges and expenses properly incurred in the formation of the company." He uses these words "properly incurred" because there was no contest in that case as to whether they were properly incurred or not. He defines it at the beginning as a "secret profit." That being so, what is the amount of Mr. Grant's profit? If he believed that—as I am satisfied from his own statement he did believe—how did he deal with it? He dealt with it in forming the company, and he dealt with it by paying the ordinary expenses of forming the company, and by making divers large payments which have been challenged as improperly made. Assuming that what was alleged was all proved (though I do not say it was all proved because a great deal of it was inference from entries in the books,) first, he pays a sum of money to the gentleman by whom the directors were introduced. In the next place he furnished shares to these directors who were introduced. In the next place he paid very large sums in various ways to brokers for sustaining the market, and he also paid 10,000*l.* to another firm of brokers in lieu of a share of the profits which he had agreed to give them for waiving and giving up a kind of option to purchase which they possessed previously. Besides that he is then alleged to have paid not inconsiderable sums of money to persons connected with the press either as writers in it or otherwise, for puffing or laudatory statements respecting the company or mine; and it is said that all those payments were immoral and improperly made and ought to be disallowed. Now, I am not trying that question. It does not appear to me that the amount of profit can be decided by the fact of some of the payments being such payments as will not obtain for them the commendation of the court. That is not the question. They were *bond fide* made by Mr. Grant at the time when he believed this money was his own. They were not payments for nothing. Mr. Grant is a man of business, and he only paid for value received. He assumed, and I dare say correctly assumed, that the services for which he paid were worth the money he paid for them, and that being so, can I say that the expenses he so incurred are not to be deducted from the amount he received in estimating his secret profit? You have a right to take from him that which he improperly acquired by means of his being concerned in this illegal transaction, and it is no answer to say that one part of his expenses were illegally and improperly made in ascertaining what that profit was. These are expenses connected with and forming part of the entire transaction, and it seems to me that in estimating his profit I ought to find out his real profit, that is, the net result of the transaction which was left to him; but whether I approve or disapprove of the mode in which he carried out the transactions, or the items of expenditure which he made, the result in ascertaining the net profit cannot be affected by the moral nature or

propriety of that expenditure. I think therefore we ought to ascertain the net profit simply on the principle of deducting from all the receipts all the payments. Now I come to the items. The first item is the receipt of 100,000*l.* in money. He must be charged with that. The second item of receipt is a sum of 45,000*l.* or thereabouts, which was the net result of the sale of shares, and which came in lieu of the 100,000*l.* worth of shares which he was to have by the first agreement. Of course those are sums received. Then there were two small sums which he received for sustaining the market, for the result, as appears by the books, of sustaining the market, was in this case a profit. That sum he received for sustaining the market by dealing with those shares in the way I have mentioned. Then there is a small sum of 1500*l.* or thereabouts which really falls into the same category as the 45,000*l.* It is a portion of the shares which it was said he was entitled to take and sell for his own benefit. That is the amount of profit derived by those sums. I think they are chargeable, and should be charged against him. I then deduct all sums actually paid by him, whether to brokers for getting rid of the option, or to brokers for getting rid of the shares, or for sustaining the market, or to the directors, or to the agent who procured the directors, or to the gentlemen connected with the press, if there were any such, for the part they took in the transaction. It seems to me all those sums ought to be allowed to him. Taking the books to be correct, those sums will be deducted from the sums he is charged with. I find, as a verdict, that he is liable as promoter for the balance, together with interest, at 4 per cent. from the date which has been mentioned.

Solicitors: *Snell and Greenip; J. J. Ridley; Lewis and Lewis.*

#### QUEEN'S BENCH DIVISION.

*April 25 and June 20.*

(Before COCKBURN, C.J. and LOPES, J.)

PHILLIPS v. SOUTH-WESTERN RAILWAY COMPANY. (a)

*New trial—Insufficient damages—Personal injury—Pecuniary loss.*

*A plaintiff complaining of a personal injury is entitled to compensation for the pain undergone, the effects on the health according to degree and probable duration, the incidental expenses, and the pecuniary loss; and if it appear that a jury must have omitted to take into account any of these heads of damages, and that the verdict is under the circumstances unreasonably small, it is competent to a court to order a new trial at the instance of the plaintiff, although there be no misdirection by the judge, nor mistake or misconduct on the part of the jury.*

THIS was an action for damages caused by personal injuries resulting from an accident on the defendants' railway, tried before Field, J. and a special jury of the City of London, at the beginning of April 1879.

The plaintiff was a London physician, who, in Dec. 1877, when at the age of forty-six, was so injured, whilst travelling on the defendants' line, as to be utterly incapacitated, both physically and mentally, from pursuing his profession; and

(a) Reported by M. W. M'KELLAR, Esq., Barrister-at-Law.

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his life, according to the medical evidence, must in a very short time be lost in consequence.

The average of his net professional income for the ten years preceding the accident, after large deductions for the expense of making the income, was 5000*l.* a year. The medical attendance upon the plaintiff had been gratuitous, but it was estimated that 1000*l.* was the expense incurred before the trial by reason of the accident. The plaintiff was in the enjoyment of a private income of 3500*l.* a year.

The jury found a verdict for the plaintiff on the question of the defendants' negligence, and assessed the damages at 7000*l.*

A rule nisi for a new trial had been obtained on the plaintiff's behalf on the grounds that the judge had misdirected the jury in saying that they were not to attempt to give the plaintiff an equivalent for the injury he had suffered, and that the damages were insufficient.

*Ballantine*, Serjt., and *Dugdale*, for the railway company, showed cause against the rule.—There is nothing wrong in the judge's direction; for, although he used the words complained of in the rule, this applied only to the pain and suffering the plaintiff had undergone. The judge told the jury that they must give him full compensation for his pecuniary loss, so far as they could estimate it. In the estimate they made they may have taken into consideration all the items of loss, because they had to set against them the risk of life in the plaintiff's profession, and other probabilities of the diminution of income. But even if the damages under the circumstances be inadequate, there is not to be found any authority for granting a new trial on that ground alone in an action of tort; and on the contrary there are many instances of the court's refusal to entertain such an application as this, unless there has been a mistake in law or in figures, or misconduct on the part of the jury:

*Forsdike and Wife v. Stone*, L. Rep. 3 C. P. 607;  
*Falvey v. Stanford*, L. Rep. 10 Q. B. 54;  
*Bowley v. London and North-Western Railway Company*, L. Rep. 8 Ex. 221;  
*Mayne on Damages*, p. 447;  
*Armstrong v. Haley*, 4 Q. B. 917;  
*Hayward v. Newton*, 2 Str. 940;  
*Rendall v. Hayward*, 5 Bing. N. C. 424;  
*Kelly v. Sherlock*, L. Rep. 1 Q. B. 686.

The *Attorney-General* (Sir J. Holker, Q.C.), *Pope*, Q.C., and *A. L. Smith* supported the rule.—The direction complained of is not expressly limited to the personal injury, and may well have been understood to apply also to the pecuniary loss. In *Blake v. Midland Railway Company* (18 Q. B. 93) *Coleridge*, C.J. said in his judgment (at p. 111): "When an action is brought by an individual for a personal wrong, the jury, in assessing the damages, can with little difficulty award him a solatium for his mental sufferings alone, with an indemnity for his pecuniary loss." These two matters should therefore have been kept quite distinct by the judge in charging the jury. The cases cited as authorities against this rule are either actions for libel or slander, which involve other questions than mere pecuniary loss, or depend upon their own special circumstances. The verdict is not sufficient to cover the actual pecuniary loss of income, together with the incidental expenses, which had been incurred at the time of the trial; and there is no allowance what-

ever for the mental and physical sufferings, nor for the prospective pecuniary loss. The same principles of computation should be applied, whether the income lost is large or small. This was expressly laid down by *Cockburn*, C.J. in *Pym v. Great Northern Railway Company* (2 B. & S., at pp. 768 and 769.)

*Cur. adv. vult.*

June 20.—*COCKBURN*, C.J. delivered the judgment of himself and *LORRE*, J.:—This was an action brought by the plaintiff to recover damages for injuries suffered, when travelling on the defendants' railway, through the negligence of their servants. A verdict having passed for the plaintiff, with 7000*l.* damages, an application is made to this court for a new trial, on behalf of the plaintiff, on the ground of the insufficiency of the damages, as well as on that of misdirection, as having led to an insufficient assessment of damages; and we are of opinion that the rule for a new trial must be made absolute; not, indeed, on the ground of misdirection, for we are unable to find any misdirection, the learned judge having in effect left the question of damages to the jury, with a due caution as to the limit of compensation, though we think it might have been more explicit as to the elements of damages. It is extremely difficult to lay down any precise rule as to the measure of damages in cases of personal injury like the present. No doubt, as a general rule, where injury is caused by the wrongful or negligent act of another, the compensation should be commensurate to the injury sustained. But there are personal injuries for which no amount of pecuniary damages would afford adequate compensation; while, on the other hand, the attempt to award full compensation in damages might be attended with ruinous consequences to defendants, who cannot always, even by the utmost care, protect themselves against the carelessness of persons in their employ. Generally speaking, we agree with the rule as laid down by *Brett*, J. in *Bowley v. London and North-Western Railway Company* L. Rep. 8 Ex. 231, an action brought on the 9 & 10 Vict. c. 93, that a jury in these cases "must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider under all the circumstances a fair compensation." And this is in effect what was said by *Field*, J. to the jury in the present case. But we think that a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. There are the bodily injury sustained, the pain undergone, the effect on the health of the sufferer, according to its degree and its probable duration, as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business, which again may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life. If a jury have taken all these elements of damage into consideration, and have awarded what they deemed to be fair and reasonable compensation under all the circumstances of the case, a court ought not, unless under very exceptional circumstances, to disturb their verdict. But,

looking to the figures in the present case, it seems to us that the jury must have omitted to take into account some of the heads of damage which were properly involved in the plaintiff's claim. The plaintiff was a man of middle age and of robust health. His health has been irreparably injured, to such a degree as to render life a burden and source of the utmost misery. He has undergone a great amount of pain and suffering. The probability is that he will never recover. His condition is at once helpless and hopeless. The expenses incurred by reason of the accident have already amounted to 1000*l*. Medical attendance still is, and is likely to be for a long time, necessary. He was making an income of 5000*l*. a year, the amount of which has been positively lost for sixteen months, between the accident and the trial, through his total incapacity to attend to his professional business. The positive pecuniary loss thus sustained all but swallows up the greater portion of the damages awarded by the jury. It leaves little or nothing for health permanently destroyed and income permanently lost. We are therefore led to the conclusion not only that the damages are inadequate, but that the jury must have omitted to take into consideration some of the elements of damage which ought to have been taken into account. It was contended on behalf of the defendants that, even assuming the damages to be inadequate, the court ought not on that account to set aside the verdict and direct a new trial, inadequacy of damages not being a sufficient ground for granting a new trial in an action of tort, unless there has been misdirection, or misconduct in the jury, or miscalculation, in support of which position the cases of *Rendall v. Hayward* (5 Bing. N. C. 424) and *Forsdike v. Stone* (L. Rep. 3 C. P. 607) were relied on. But in both those cases the action was for slander, in which, as was observed by the judges in the latter case, the jury may consider not only what the plaintiff ought to receive, but what the defendant ought to pay. We think the rule contended for has no application in a case of personal injury, and that it is perfectly competent to us, if we think the damages unreasonably small, to order a new trial at the instance of the plaintiff. There can be no doubt of the power of the court to grant a new trial where in such an action the damages are excessive. There can be no reason why the same principle should not apply where they are insufficient to meet the justice of the case. The rule must therefore be made absolute for a new trial.

*Judgment for plaintiff.*

Solicitors for plaintiff, *Hargrove, Fowler, and Co.*

Solicitor for defendant, *M. H. Hall.*

COMMON PLEAS DIVISION.

May 1, 5, and 6.

(Before DENMAN and LINDLEY, JJ.)

PHILIPPS v. PHILIPPS AND OTHERS. (a)

*Practice—Discovery—Affidavit of documents—Action of ejectment—Judicature Act 1875, Order XXXI., r. 12.*

*The defendant in an action of ejectment will not be ordered to make an affidavit of documents unless the court is satisfied, upon the pleadings or upon affidavit, that the plaintiff has some tangible ground of action.*

*Semble, per Lindley, J.: Such an order should never be made before the delivery of the statement of claim.*

THIS was an action of ejectment, in which the plaintiff had taken out a summons calling upon the defendants to make discovery on oath of all documents which had been or were in their possession, custody, or control, relating to the matter in question, and to the lands claimed in the action. The summons was heard by Field, J., sitting at chambers, and was referred by him to the court.

The plaintiff, Sir James Erasmus Philipps, was the twelfth baronet. The pedigree began with Sir Thomas Philipps, knight, of Picton Castle, in the year 1513. Morgan Philipps was the immediate predecessor in title of Sir John Philipps, the first baronet, and the second, third, fourth, fifth, and sixth baronets succeeded each other from father to son, or from brother to brother. Sir John, the sixth baronet, died in 1764, and he had a brother, Bulkeley, who died in 1776. Sir John's son, the seventh baronet, was the first Lord Milford, who died without issue in 1823. The defendants claimed under Bulkeley by the female line, he being the younger brother of Sir John, the sixth baronet. Bulkeley married Philippa, daughter of William Adams, and there was a daughter of that marriage named Maria, who married James Child in 1815. Of that marriage there was another daughter, called Maria Artemisia, who married the Rev. James Henry Gwyther, who assumed the name of Philipps, and died in 1875. He left a daughter, Mary Philippa Philipps, who married Charles Edward Gregg Fisher, who had since also assumed the name of Philipps, and was one of the defendants.

The following statement of claim had been originally delivered in the action:

1. The plaintiff is a baronet and the heir male of the body of Sir Thomas Philipps, of Picton Castle, knight, who was living in the year 1513. The plaintiff is also the heir male of the body of Sir John Philipps, of Picton Castle, baronet, who died in or about the year 1629. The plaintiff is also heir-at-law of Sir Erasmus Philipps, of Picton Castle, who died in or about the year 1697.

2. The plaintiff is also the heir-at-law of the first Lord Milford, who died in or about the year 1823, there being no legitimate descendants now living of Bulkeley Philipps, the uncle of the said Lord Milford.

3. The plaintiff is also eldest son of the late Sir James Evans Philipps, baronet, who died in the year 1873, and whose residuary estate on his death became and was vested in the plaintiff by the last will and testament of the said Sir James Evans Philipps.

4. The plaintiff says that under and by virtue of certain deeds, assurances, wills, and documents in the possession and control of the defendants, the plaintiff is entitled to the possession of the said premises and hereditaments claimed herein in the plaintiff's writs as such heir male, heir-at-law, residuary devisee, or as being the person entitled to the baronetcy now held by the plaintiff.

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

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5. The plaintiff alleges that the said Sir Thomas Philipps, Sir John Philipps, Sir Erasmus Philipps, Lord Milford, and Sir James Evans Philipps were at the times of their respective deaths seized in fee of the said premises and hereditaments.

6. The plaintiff, in the alternative, alleges that he is entitled to possession of the said premises and hereditaments, or to some of them, under divers Crown grants, which are in the possession or control of the defendants.

7. The defendants are and lately have been in possession of the said premises and hereditaments, and have received the profits thereof, but refuse to give the plaintiff possession of the said premises and hereditaments, or to pay over, or account for the said profits.

A summons was taken out by the defendants to strike out this statement of claim as embarrassing. The master, the judge, and the Queen's Bench Division refused to make any order; but the Court of Appeal reversed these decisions, and ordered the statement to be struck out. Thereupon the present summons was taken out by the plaintiff. In support of the application there was an affidavit by the plaintiff, which stated that by a will proved in 1583 Morgan Philipps entailed the estates on his son John, the first baronet. The estates passed to the second baronet, and in direct line up to the sixth baronet, who made a will, under which the estates came into the hands of the first Lord Milford. In the year 1820, the first Lord Milford made a will in which he devised the estates to Richard Grant, who afterwards became the second Lord Milford. The second Lord Milford died leaving no male issue. The plaintiff went on to say that he verily believed that between the will of the sixth baronet and that of the first Lord Milford a deed was executed under which he was entitled to the estates. The Rev. James Henry Alexander Philipps professed to trace his descent from Bulkeley Philipps, but the plaintiff believed that the latter died leaving no legitimate issue, and that the defendants had in their possession documents relating to the estates which were material evidence as to his title. The plaintiff further stated that he heard Mr. Longbourne, one of the trustees under the will of Mr. Philipps, say, in the Probate Court, that in consequence of his claim to the estates he urged Mr. Philipps to alter his will, pointing out to the testator that a claim having been raised to the estate by Sir Erasmus Philipps, who claimed to be the right heir of the first Lord Milford, in certain events Mrs. Fisher would be wholly unprovided for, and that the testator ultimately consented to adopt that advice, carrying it out by a codicil dated May 1875. The plaintiff concluded his affidavit by saying he was advised that he could not properly state his claim in the action unless inspection was given him of the documents he had referred to.

The affidavit of Caroline Lewis stated that she lived in a cottage on the estate in question, and that she had heard the first Lord Milford say that he was in agony through having alienated the estate. Shortly before his death, the second Lord Milford, accompanied by his doctor and his valet, came to her and gave her a little box to take care of containing a deed, which he read to her. The deed settled the estates on the male line, and had been executed by the first Lord Milford. It was not to take effect until after some deed that had been previously executed. The deed was left with her to take care of until the time for acting upon it arrived; or, if she was about to die, she was to hand it to the mayor and corporation of Haverfordwest. After the death of the second Lord

Milford she continued to live in the cottage, but one day, having been out, she found the doors locked against her. When she was able to gain admission she found the box empty, the deed having been taken away.

The affidavit of Lady Milford, widow of the second Lord Milford, stated that her husband was speechless during the last days of his illness. He evidently had something on his mind, and frequently strove to make a communication to her, but he died without doing so. Previously he had informed her more than once that he had made a will. She had conversed with Miss Caroline Lewis, whose narrative was consistent with many circumstances with which she (Lady Milford) was acquainted. Her husband had often told her that he knew the first Lord Milford's intention was that no female should ever inherit the Picton Castle estate.

The affidavit of the Rev. Thomas Halt, now of Lincolnshire, but formerly chaplain at Picton Castle, stated that he had often heard the plaintiff's claim to the estate spoken of at the Castle, and it was suggested that the plaintiff should be bought off for 60,000*l*.

The affidavit of Mrs. Lloyd, widow, stated that, on one occasion when her husband was driving home from Picton Castle, he told her that some years before he was driving with Lord Milford, who, speaking of his dislike of his half-brother, said that there was a deed which gave the estate to the baronet's family.

On behalf of the defendants, various persons had made affidavits denying statements in the affidavits filed on behalf of the plaintiff, in particular the statements in the affidavit of the Rev. Thomas Halt. And the joint affidavit of the defendants Charles Edward Gregg Philipps and his wife stated that to the best of their knowledge and belief they had not in their custody any deed executed by the first Lord Milford, between the year 1823 and his death, as mentioned in the plaintiff's affidavit, nor any will of the second Lord Milford, nor any other deed or document which directly or indirectly gave the estates or any other interest therein to the baronet's family, or any person through whom the plaintiff pretended or could pretend to claim subsequent to the second Lord Milford.

The *Solicitor-General* and *C. Bowen* for the plaintiff.—The Court of Appeal, in striking out the statement of claim in this case, suggested this application. *Bramwell, L.J.*, in his judgment (*L. Rep. 4 Q. B. Div. 130; 39 L. T. Rep. N. S. 557*), says: "Then it is further said this mode of pleading is unavoidable. . . . What is the remedy for the plaintiff's difficulty? To my mind an obvious one. Instead of driving the defendants to ask for particulars of the statement, which, I think, is a most objectionable proceeding, what the plaintiff ought to have done, on this objection being made, would have been to produce an affidavit showing how matters stood, and asking that the summons to amend these pleadings might be adjourned until he got discovery; and then to make an independent application for discovery. That is my notion of how such a difficulty as this ought to be obviated. To that it is argued no one ever heard of such a thing being done. If I were to answer that question I should say, scores of times. It has happened to me over and over again when such an application has been made to

me, at least in an analogous case where the application is for further and better particulars of demand, and the plaintiff says that he cannot give them, because the materials for giving them are in the possession of the defendants; I have always said a plaintiff cannot be permitted to go to trial and say that he was entitled to a sum of money, but that he cannot give the defendant any particulars of it. Such a case has constantly occurred, and what I have always said is this, the plaintiff must give the particulars; if he has an affidavit that he cannot give them I will adjourn this summons for better particulars, and he may make an application for discovery. That is the right course to adopt, and the only course in my opinion." There is no difference between an action of ejectment and any other action with reference to discovery. If the documents were described the plaintiff would be able to specify the particular deeds under which he claimed. Subsequently the question would arise whether the plaintiff would not be entitled to production and inspection, but all that he wanted now was to be in a position to properly make out his statement of claim. It must be admitted, that, as a rule an order for discovery was not made until after the delivery of the statement of defence; but in this case the issue between the parties was already plain. There could be no doubt that discovery must be granted sooner or later, and the only question was whether the plaintiff had not made out a sufficient *prima facie* case to entitle him to an order for discovery at the present stage.

*Cave, Q.C., Whitehorse* (of the Chancery Bar), and *Gould*, for the defendants.—This application is premature; discovery is not granted until after the delivery of the statement of defence. The defendants, if they have to make their affidavit, now must set out the whole of their documents. They cannot possibly say that any document does not relate to the plaintiff's case, when they do not know what that case is. Documents relating to matters in question in the cause mean documents relating to matters pleaded in the cause. It was not enough for the plaintiff to say, "I think I have got a title to your land. Just look over your documents and see whether you have any that will help me in any way." This was not the application suggested by the Court of Appeal. According to the observations of the judges in the Court of Appeal the application which they contemplated should be made was not an application, such as was now made, for general discovery, but an application which supposed the previous existence of a statement of claim, and discovery sought in order to enable the statement, if objected to on the ground of vagueness, to be more carefully set out. They cited

*Gardner v. Irvine*, L. Rep. 4 Ex. Div. 49;  
Judicature Act 1875, Order XXXI., r. 11;  
*Wigram on Discovery*, 2nd edit., p. 15;  
*Smith v. Fox*, 6 Hare, 386; 10 L. T. Rep. O.S. 363;  
*Evans v. Lewis*, L. Rep. 1 C. P. 656;  
*Jones v. Platt*, 6 H. & N. 697; 4 L. T. Rep. N. S. 411;  
*Adams v. Lloyd*, 3 H. & N. 351; 31 L. T. Rep. O. S. 219;  
*Anderson v. Bank of British Columbia*, L. Rep. 2 Ch. Div. 644; 35 L. T. Rep. N. S. 76;  
*Atherley v. Harvey*, L. Rep. 2 Q. B. Div. 524; 36 L. T. Rep. N. S. 551;  
*Disney v. Longbourne*, L. Rep. 2 Ch. Div. 704; 35 L. T. Rep. N. S. 301;

*Cashin v. Cradock*, L. Rep. 2 Ch. Div. 140; 38 L. T. Rep. N. S. 52;  
*Owen v. Wynn*, L. Rep. 9 Ch. Div. 29; 38 L. T. Rep. N. S. 623.  
*Edwards v. Wakefield*, 6 E. & B. 462;  
*Morris v. Farr*, 6 B. & S. 203.

*C. Bowen* in reply.

DENMAN, J.—This case is one of a very unusual character undoubtedly, and it is one in which we have felt bound to hear everything that could be urged upon the subject, from the fact that the application was founded upon language used in the Court of Appeal, which to a very considerable extent undoubtedly is relied upon, and not unreasonably relied upon, as an encouragement for this application. The way in which the case has originated is as follows: The plaintiff being a baronet, the twelfth baronet of a long line of baronets, has brought an action of ejectment against the tenants in possession and the persons interested as landlords, or as tenants, of a large estate in Wales, consisting, we are told, of very valuable property, extending over twenty-two parishes. After issuing his writ, he proceeded to frame a statement of claim; after stating that the plaintiff was the eldest son of the baronet who died in 1873, and whose residuary estate on his death became vested in the plaintiff by a last will and testament of the said Sir James Philipps, it went on to state that under and by virtue of certain deeds, assurances, wills, and documents in the possession and control of the defendants, the plaintiff is entitled to the possession of the said premises and hereditaments claimed in the plaintiff's writ as such heir male at law, residuary devisee, or as being the person entitled to the baronetcy now held by the plaintiff. Then there was an allegation in the alternative, that certain of the baronets were at the time of their respective deaths seised in fee of the said premises, and another allegation in the alternative that the plaintiff is entitled to possession of the said premises and hereditaments, or some of them, under divers Crown grants which are in the possession or control of the defendants, and that the defendants are and lately have been in possession of the premises, and received the rents but refuse to give the plaintiff possession of the premises and hereditaments. A summons was taken out to strike out the statement of claim as embarrassing. The master made no order; the defendant appealed to the Queen's Bench Division, and there two judges, Mellor, J. and Huddleston, B., sitting for the Court of Queen's Bench, affirmed the order. Thereupon, there was an appeal to the Lords Justices. I do not intend at the present moment to go into the question of how far that is or is not an authority for the present application, but the result of it was that the appeal was allowed, and that statement was set aside as embarrassing, and thereupon, under the belief that the judgment of the Court of Appeal suggested such an application as the present, the present summons was taken out. That summons was first referred by the master to the judge, and then by the judge to the full Court of Queen's Bench for which we are sitting, so far as this application is concerned. The form of the summons was to show cause why the defendants should not make discovery on oath of all documents which have been, or are, in their possession or power relating to any matter in question in this action.



That is the first part of it. It then has certain other words which are not usual in such summonses, and which I think it is not material to discuss at all critically, because it is always competent to the court to reject anything which is out of course in such applications. Mr. Whitehorne has relied upon them as showing that that was an unusual application, but the substance of the application is an application under Order XXXI., r. 12, why the defendants should not make discovery on oath of all documents relating to any matter in question in the action. Now, it appears to me that, though it was perfectly legitimate that in such a case as this the whole history of the law of discovery should be carefully discussed, and that our attention should be called to the law as it has been administered in Courts of Equity from the earliest times, owing to the novelty of this case, and to the importance of this case, and also to the apparent difficulty occasionally in reconciling some of the decisions, still, after all, this case is one which must be decided upon the words of Order XXXI., r. 12, and we must look first to those in order to see what course ought to be taken in such an application as this; and see how far the authorities, either in the Courts of Equity, or in the Common Law Courts, or in the High Court, since the Judicature Act, bear, upon the proper construction of that rule. Now rule 12 is as follows: "Any party may, without filing an affidavit, apply to a judge for an order directing any party to an action to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the action." Now, to a certain extent the way has been cleared for us by some decisions upon this rule. In the first place the rule provides that there may be an application to a judge without filing any affidavit. It appears to me that the only meaning and the only intention of that part of the rule was to dispense with that which had been laid down as an inflexible rule by the courts before the Judicature Act came into operation, that there must always be an affidavit making out clearly that there is in the possession of the person who is ordered to make discovery some one particular document relating to the matters in dispute, before any such order for discovery will be made; and undoubtedly this rule does now dispense with that strict requirement. So far it is an indication that this rule is intended to facilitate discovery and not to hamper it by one of the requirements which existed before the Judicature Act. Then it goes on to provide that the party may, without filing any affidavit, apply to the judge for an order directing any other party to make discovery of documents which are and have been in his possession or power relating to any matter in question in the action. Now, I think that the way again has been cleared for us here by a decision of the Exchequer Division, to which our attention has been called. That is the case of *Hancock v. Guerin* (L. Rep. 4 Exch. Div. 3), in which it was held that this application for discovery would not as a rule be granted before defence, for a very good reason, namely, that until defence, as a rule, you cannot tell that the application for discovery may not be either a mere fishing application or an application which may be made merely for the purpose of swelling costs which it may be quite unnecessary to

incur, or an application which may be futile on the ground that it may be acquiring information through inspection of documents as to matters which, when the pleadings are more advanced, and when the parties know each what the allegation of the other is, may become perfectly clear and out of the way of litigation. It appears to me that that case is an authority at least for the proposition that this clause is not to be construed as meaning to encourage a laxity and too great facility in granting discovery at a stage in which it can do injustice, and when it is not fairly and properly required. Then there is another decision bearing upon the case. It is a case which was not much discussed undoubtedly, and I do not know that it assists us here, because it is not disputed that this section is one which may apply to actions of ejectment and that many of the considerations which are applicable to other actions apply to actions of ejectment. I mean the case of the *British Mutual Company v. Reed* (L. Rep. 3 C. P. Div. 196). That shows that it is to apply to cases of ejectment as well as to other cases, though it may be that in considering cases of ejectment a different rule of discretion at all events may be desirable from that which is applicable to other cases. Then come the final words of the rule, which are "documents which are or have been in his possession or power relating to any matter in question in the action;" and it appears to me that a judge ought to be satisfied before he grants an order enabling another person to call upon his opponent to make discovery of documents in his possession, at all events, that there is a reasonable probability of his having in his possession documents which do relate to some matter in question in the action, and that it is because that ought to be the requirement that the courts have held that as a rule it will not take place before defence, because before defence, as a rule, it is not possible for either party to tell with any certainty whether, amongst a very large bundle of documents in his or their possession, documents which they possess, or any of them, do or do not refer to the matter in question in the action. Now, applying those principles to the present case, the question is whether the plaintiff here has made out at this stage a case authorising us, or making it right, at all events, for us to say that the defendant is now to make discovery on oath of the documents relating to any matter in question in the action; whether it will be fair to the defendants at this stage, upon such information as we have before us, to order them to make discovery of the documents that they have by labelling them, by describing them, by identifying them, by date or otherwise, or in any way verifying them as documents which relate to any matter in question in the action. Now, notwithstanding the able argument of Mr. Whitehorne as to what was the case in equity and what is the law now with regard to this subject, it appears to me that we cannot lay down an absolute rule that in no case could the court order a discovery of documents before a statement of claim. I think that the argument and all the cases which have been cited in Courts of Equity and in Courts of Common Law only amount to this, that it ought not to be before the court may have a clear notion that they are not assisting a mere fishing or speculative case, but a case appa-

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rently resting upon something like a reasonable foundation. And if the case were made out to my satisfaction, of a claim resting upon a fair and reasonable foundation, not merely speculative, and not merely fishing, I should feel disposed to say that that was a case in which I would at once act upon Order XXXI., r. 12, and order discovery of documents; so that the case really in my judgment turns upon that question, whether it can be so put in the particular case. Now, before discussing the facts of this case further, I will state what I consider to be the result of the case in *Philipps v. Philipps*, in the Court of Appeal. It has been very fully commented upon, and arguments on both sides have been urged, and as sometimes happens, a very different view may be taken of the same expression used by judges in their judgments so far as their intention is concerned. It appears to me, I may say, after carefully reading the judgment of Bramwell, L.J., there is nothing in that judgment that amounts to an opinion that in this particular case, upon such affidavits as we have here, the court would be bound to or would be justified in ordering discovery. And I will call attention to some of the passages from which I gather that it was not his intention to go so far as has been supposed. The decision itself was only one that upon that particular statement of claim the plaintiffs could not proceed, because it was so drawn as to be embarrassing to the defendant, it not showing that there really was a title in the plaintiff except by the mere assertion that the plaintiff was entitled, and by allusion to certain deeds and documents which it stated were in possession of the defendants, which were not set forth, so that it was impossible for the defendant to demur to the statement of claim by reason of the general statement and by the total absence of anything to enable the court to judge one way or the other whether the case upon which the plaintiff was relying was a good case in law or not. That being the ground of the decision, the learned Lord Justice used many expressions which have been commented upon. Amongst others this is strongly relied upon, "That is a statement which, if true, shows a good title in the plaintiff because it says as he to somebody he is entitled to possession. But if he is entitled to possession he is entitled to maintain this action, and therefore Mr. Cave cannot demur. But the allegation is not an allegation of one fact only; it is an allegation, for aught I know, of fifty facts." The passage, however, which is most relied upon is that which is said to amount to a suggestion that the plaintiff should go for discovery. "Instead of driving the defendant to ask for particulars of the statement, which, I think, is a most objectionable proceeding, what the plaintiff ought to have done on this objection being made, would have been to have produced an affidavit showing how matters stood, and asking that the summons to amend these pleadings might be adjourned until he had got discovery, and then making an independent application for discovery. That is my notion of how such a difficulty as this ought to be obviated." Now, I must say, I do not read that as at all amounting to this, that upon such an affidavit as this, or upon anything which should amount to a mere speculative case, to a mere fishing case, such an application as this would be granted. And it appears to me to be perfectly consistent with

every word that the Lord Justice has used, that he would himself be very jealous in his scrutiny of an affidavit which was brought forward for the purpose of enabling discovery to be got before a statement of claim. It does not at all follow that because it may be very difficult to make a statement of claim without getting further information than a plaintiff possessed, that therefore a plaintiff is justified in applying for discovery. That depends upon what the plaintiff has to found his proceedings upon, and it appears to me that this passage, "produce an affidavit which showed how matters stood," leaves the whole question perfectly open to our discussion without being in any way tied by anything which Lord Justice Bramwell has said. He does state what he has done in certain cases which he considers analogous, where an application was for further and better particulars of demand. As to that part of his judgment, it may be, without the least disrespect to Lord Justice Bramwell, competent to us to question whether the analogy is quite complete between an ordinary action where particulars are required and a case in which an attack is made upon persons in possession of property by an attempt to get an affidavit of discovery as to the whole title deeds of the persons in possession. A sum of money appears to me to be a question in dispute of a different character with reference to the application of the principle which has been applied to those cases, from the question of dispossessing persons who are in possession of land. Then I do not think there is any other part of Lord Justice Bramwell's judgment which bears very much upon the question which is now before us, unless it be the conclusion, and the conclusion which he then drew from the pleading which was then before him was as follows:—"The conclusion I draw from the whole of these pleadings is that it is a sort of fishing statement of claim, and that the plaintiff might really almost as well have made his statement of claim in this shape, 'I am entitled to possession of these premises, and I call on you, the defendant, to inform me what answer you can make to that.' I consider it is a wrong mode of stating a claim, and that the appeal must be allowed." It appears to me from that very passage, that Lord Justice Bramwell would not be a party to expedite or assist any claim which had, according to his judgment, the character of a fishing claim, and that that principle is applicable to the consideration of the question now before us just as much as it was applicable then in the absence of anything like a real definite ground for thinking that there are documents which are, in the ordinary sense, documents material to the question in dispute with reference to some question, the nature of which is distinctly brought before the court. Lord Justice Brett's judgment did not throw out any suggestion at all with reference to this subject, nor does it appear to me to bear upon it one way or the other, but in Lord Justice Cotton's judgment there is an allusion to that part of the judgment of Bramwell, L.J. which is important, and it appears to me to be again very carefully worded, so as to leave it quite open to the tribunal before which any application of the present character might be made to act upon general principles, and not to be in any way biased by what the Court then said. He alludes to it in this way: "As Bramwell, L.J. has said, even if he has any

difficulty in stating his title, he might amend his pleading when he has got from the defendant such discovery as he may be entitled to. I say distinctly as he may be entitled to, because of course the defendant will be entitled to protect himself against fishing attempts to get at his title deeds, and will be entitled to prevent anyone from getting that which the defendants pledged themselves to contain only their own title." Mr. Bowen has read that as though it was all one protection, and as though the question of protection did not arise until the order of discovery had been made, and until the defendants desired to protect themselves by stating that the deeds in question contain only their own title, and did not contain any evidence in any way supporting the title of the plaintiff. I must say I cannot read it quite so much in his favour as that. It appears to me it contains two protections, not only to save defendants from having to give actual discovery, but to prevent them from having to make affidavits on the subject, unless there be some real case made by their opponents, whether by the writ itself, whether by the pleadings, or indeed even upon affidavit. Then, holding as I do that pleadings are not a *sine quâ non*, holding that there are cases, or that there may be cases, in which even before the pleadings such a course as this may be taken, then the question arises whether here the plaintiff has established such a case. Now, I must confess that, having heard the argument upon the affidavits themselves and the discussion upon the manner in which the facts are stated on the one side and denied, and perhaps in some cases not denied so specifically as one would have desired in affidavits, but at the same time not, I think (with one exception), admitted on the other side—looking at the affidavits as a whole, on the one side and on the other, I have come to the conclusion that this is too speculative a claim—that is, too fishing an application, that it is not founded upon that which appears to be a sufficient ground for the commencement of an action on the part of the plaintiff, and however *bona fide* the plaintiff may be in his belief, from talk that he has heard, that upon a full investigation of the matter it may turn out that he is the rightful owner of estates which have been for a considerable time in the hands and possession of others, it appears to me that he has not given sufficient ground for thinking that he knows enough to make it justifiable for him to put the defendant to schedule a list of all the documents that he possesses relating to the estates. It is perfectly conceivable that there may be in existence such documents as those of 1764 and 1824. Indeed, one would rather suppose that there might be some such documents in existence; but it is perfectly consistent with all the facts which the plaintiff alleges that those documents might be in existence, and yet that the claim in question may be a perfectly speculative, a vague and a misty claim, founded only on mere surmise and mere suspicion. Now, is it so, or is it not, in point of fact? As far as one can judge from the affidavits, it does appear to me a claim of that description. The plaintiff makes out two or three alternative speculative cases; he states that it is possible that there may be a settlement which would be inconsistent with the defendant's rights. Even then, possibly, it might be such a document as would be perfectly consistent with the defendant's right to remain in possession by reason of

the Statute of Limitations. He supposes that two persons who appear in the pedigree of the defendant, and who lived a long time ago, were illegitimate; but that is founded upon nothing but mere surmise apparently, or gossip of the wildest description, so far as appears on the face of the documents. Then with regard to the existence of the supposed deed, it does not rest undoubtedly only on the evidence of Miss Lewis, because I should say at once that there is some indication of the existence of some deed of the character, so far as the date is concerned, of that of which Miss Lewis speaks, but so far as the conversations which are spoken to by Miss Lewis are concerned, there is not only a conflict of evidence, but there is an inherent vagueness and mistiness about them, and a great question as to the kind of person who has been speaking of such matters. I am at a loss to see what real ground the plaintiff has for thinking that there are any documents which will support any title that he could make to the land; and, what is worse for the plaintiff's case, I am at a loss to see what the plaintiff's case really is. And I think that where a man is not able himself to say what the ground is upon which he is claiming estates, that is of itself very strong ground for rejecting a proposal that he should put the person in possession to a discovery of his deeds. Mr. Bowen has ingeniously argued upon the dilemma in which he is placed; that the Court of Appeal would not allow the statement of claim which was originally drawn because it was not definite enough, and he comes to us and says, "Enable me to make it definite," and that it would be very hard if he were not to be allowed to have the only machinery by which he can make it more definite. That is a hardship, I think, of his own creating. It is a hardship arising from his proceeding to attack the possession of another person in lands upon gossip and idle statements which, for aught that appears, may be mere gossip and mere idle statements. It arises from the attempt to attack the possession of another person without knowing sufficiently anything which would make a good title in himself. And if so, then it does not at all follow that, because the one application was refused, the other ought to be granted. On the contrary, the very same objection which exists to the original attempt exists to the present attempt, and the same principles which applied to the original decision seem to me just as much to apply to the present decision. Therefore, it being admitted that this after all is a question of discretion as to the application of Order XXXI., r. 12, it appears to me that looking at the case with the best discretion I can exercise with regard to it, we should be doing great injustice here if we were to put the defendant to discovery of his documents of title at the present stage, notwithstanding that the plaintiff, down to this time, has not sufficient information to enable him to make a proper statement of claim. If he should hereafter be enabled to make a proper statement of claim, then it may be the question will be entirely altered; but I think it would be very wrong to encourage litigation by throwing out any suggestion at all as to any other step that ought to be taken by the plaintiff. I know not whether he has any good title or not. All I can say at present is I see no evidence of it, that the thing is left in absolute darkness, and that I do not think he has made out

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a case for putting the defendant upon discovery of his documents.

LINDLEY, J.—I am of the same opinion. Apart from the supposed encouragement which has been given to this application by the Court of Appeal, I should have thought it would have been free from all difficulty; but in deference to what was said there, and in deference to the very able argument of Mr. Bowen, I have endeavoured to discover whether there is any ground, any proper ground, for acceding to this application. The state of the thing is simply this. The defendants are in possession of certain large estates in Wales; the plaintiff is out of possession, he wants to get in, and he has begun an action for recovery of the land, in other words, an action for ejectment, and has gone so far as to issue his writ. At present there is no statement of claim at all. He has endeavoured to state one. He stated one as best he could, and that has been held to be insufficient, and it has disappeared, so that we have to deal with the case now in this state of things. The plaintiff has issued his writ, and he asks now that we should make an order upon the defendant to make an affidavit as to all the documents in his possession, or which were in his possession, relating to the matters in question in the action. Now is there any authority for that? So far as I know, such an application has never been made before either to the Court of Chancery or to a court of common law. I never heard of it, and never read of it, and Mr. Bowen has not produced any case in which such an attempt has been made before the Judicature Act or since, so far as I know. But, however, it does not follow, because the application is novel and without precedent, that, therefore, it is wrong and erroneous. We must look a little further in order to see whether there are or are not any sufficient grounds for acceding to it. Now, the application is made under the 12th rule of Order XXXI., which says, "Any party may, without any affidavit, apply to a judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the action." The history of that clause, I think, is now tolerably plain. The introduction of the words, "without filing an affidavit," was intended to enlarge the power of the common law courts with respect to discovery; the introduction of the words, "apply to a judge for an order," was made to restrain the Chancery practice in enabling people to administer interrogatories to their opponents without rhyme or reason, which was a real abuse of the practice, though commonly done every day. That was the history of the introductory words of the Order. Now, the first thing is what is meant by those words, "relating to any matter in question in the action?" Everything turns on the true appreciation of that. Before I investigate that further, I will turn to the form of affidavit which is given in the rule. It is form 9, in Schedule B., and it runs thus: "I have in my possession or power documents relating to the matters in question in this suit. I object to produce such and such documents," and then he says, why? Now, what is meant by the "matter in question?" Certainly, I do not understand that as meaning the thing in dispute. That would be that the defendant would have to produce or make

an affidavit of all the documents he has got relating to the land, or a ship, or anything else. That is not the thing. It never did mean that, and a little consideration will show that it cannot mean that, as I shall endeavour to show presently. Mr. Bowen has said it does not mean in issue. Possibly that may be so, because there may be cases in which it may be right to make an order of this kind before issue is actually joined. That I understand, and I assent to it. Then he says it is not necessary that there should be pleadings to show what the matter in dispute is. Possibly not, because in interpleaders, for example, there are no pleadings, and therefore I should not like to say as a universal proposition that there must be pleadings. But still there must be something or other to show what the matter in question is, and I understand by the language "matter in question" the alleged title of the plaintiff. In this case that is what I understand by the "matter in question." Not the thing claimed, but his alleged title. Well, what is the alleged title here? So far as we know it is merely this, that he alleges a title to turn the defendant out. That is all we know apart from the affidavits. Now, just consider whether it is right to force upon the defendant the obligation of making an affidavit as to all the documents relating to the alleged title of the plaintiff without knowing what it is, without having the faintest idea of what it is, except this, that he wants possession. As Mr. Bowen says, that is the only matter in question—that he wants possession. But his title to the possession is the matter in question. Now, supposing one made an order according to Mr. Bowen's suggestion, and the defendant were under stress of that order compelled to make the common affidavit of documents, just see what a difficulty he would be in. We should be absolutely depriving him of every ground of defence, unless he had a conscience sufficiently elastic to swear anything which happened to suit his convenience; we should deprive him of his right to object on the ground that the statute had run, for example, or on any other ground, which, after statement of claim, might be open to him on demurrer. We should force him either to produce all his documents or to swear in the dark that he had got nothing which related to the matter in question. It appears to me we ought not to put the defendant into such a position. I cannot conceive for a moment that either Bramwell, L.J., or Cotton, L.J. intended anything of the kind. However, that is what we are asked to do, and it appears to me that upon that ground we ought not to do it. Now, let us see further as to whether there are any authorities which throw the slightest light upon it. The older practice, so far as I can trace it, is against it; those cases at law to which Mr. Whitehorn referred us of *Jones v. Platt* (*ubi sup.*), *Edwards v. Wakefield* (*ubi sup.*), and *Morris v. Parr* (*ubi sup.*), are adverse to it. The cases of *Oashin v. Cradock* (*ubi sup.*), and *Disney v. Longbourne* (*ubi sup.*), so far as they go, are all against it. The right way, it appears to me, to try this is to look at it in this way: an order for an affidavit of documents after all is nothing more than an interrogatory. It is a substitute for an interrogatory. Turn to Order XXXI., r. 1, and see what it says: "The plaintiff may at the time of delivering his statement of claim, or at any subsequent time not later than the close of the plead-

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ings, and a defendant may at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, and any party may at any time by leave of the court or a judge, deliver interrogatories." Now, supposing the plaintiff here were to ask us for leave to ask the defendant on oath what documents he had in his possession. There, it is quite obvious, that no such application ought to be acceded to except under circumstances which I cannot myself, I confess, quite conceive, where possibly there might be some necessity for it. It is quite possible that every conceivable case might not be present to my mind, but I do not myself, I confess, see what circumstances would make it right to enable a plaintiff in ejectment to come and ask and obtain such a general order as this before any pleadings at all. With respect to the observations which fell from Bramwell, L.J. I understand them to mean this. Not that, in my opinion, you are entitled to go and get an order for an affidavit of documents, but, for anything I know, you may be entitled to discovery of some sort; if so, go and get that, and make the most of it when you have got it. It is possible that some more limited discovery may be obtained. I am not considering that. Far be it from me to suggest to the plaintiff to try that, because I should be exceedingly unwilling to throw out any suggestion of the kind; but I am quite satisfied of this, that Bramwell, L.J. never meant in that judgment to sanction the notion that the plaintiff in an action of ejectment, when he issued his writ, was to go and call on the defendant to make an affidavit of documents. Whatever else he meant, he never meant that, and his language, when fairly looked at, does not mean that. Now, it is said that the practice in the Rolls Court more or less varies this. But, although it appears from that document which has been handed up that the practice in the court of the Master of the Rolls is somewhat different from the practice in this division, the rule being here not to allow an affidavit of documents as a matter of course, even before defence, the Master of the Rolls' practice as to discovery cannot be meant to apply to actions for the recovery of land. I could not suppose for a moment that that general order applies to an action of that kind, and I am quite satisfied it does not. Mr. Whitehorse says he has ascertained it does not, but the subject matter and the reason of the thing is quite enough to satisfy me that a general order of that sort does not apply to a case of this description at all. My reason for making these observations is this—the title to land in this country is very peculiar. We have not a register of title, it is held under deeds, and it does not at all follow that a man in possession, although he may be rightfully in possession in every sense of the word, morally and legally; that there is not some flaw discoverable in some document or other in favour of somebody or other, and it does not at all follow that if the plaintiff can ransack the defendant's deeds he would not be able to discover some flaw of which the plaintiff would not be able to take the slightest advantage, but of which somebody else might, and that is the reason why courts have always been so extremely jealous in guarding those in possession from exposing their deeds for anybody to see them. Now, I pass on to consider whether there is anything in these affidavits which would

justify this order or make it proper under the special circumstances of the case. *Prima facie* one would refuse it, and refuse it as a matter of course, but there may be possibly some circumstances which may induce us to depart from that ordinary practice, and in a special case make a special order. I wish most carefully to observe that we are dealing only with an order to make an affidavit of documents. The defendant is not asked to answer as to any particular document. The plaintiff is not asking for leave to administer a particular interrogatory, about a particular document. Something of that kind may have crossed the mind of Bramwell, L.J., but that is not the real order asked for. We are asked to compel the defendant to make a common affidavit of documents. Now, let us see what there is about that. I am not going through the affidavits at any great length, because I do not think it necessary to do it; but there are one or two points I will make a few observations upon. First of all, let us take what the Solicitor-General and Mr. Bowen rely upon, namely, the very cautious language of the third paragraph in the defendant's affidavit. The plaintiff has stated in substance by his affidavit two points more particularly upon which he wants discovery in this place. He says first of all that Miss Lewis knows about a deed of 1823, and she is said to be corroborated by some other people in her story about the supposed deed. The defendants, in their affidavits, address themselves, and I think fairly, to that deed, and I will show why, presently, by reference to what they say. The next thing the plaintiff is in search of is some supposed settlement of 1764, and those are the two points, and the only two points, which I propose to make any observations upon. Now, as regards the deed which I will call Miss Lewis's deed, which is the deed of 1823, that and the other documents referred to in the 18th paragraph of the defendant's affidavit are referred to in a manner which I think is quite sufficient for the present purpose, that is, quite sufficient to show us that we ought not to make such a roving order as the plaintiff asks us. The 3rd paragraph of the defendant's affidavit ends with the words "subsequent to the second Lord Milford." The Solicitor-General and Mr. Bowen have referred to that, and have referred to it as qualifying the whole of that paragraph. If it did there would be some weight attaching to their observation that it would look like swearing by the card, but I do not think myself that is the true construction of that paragraph. I look at it in this way: I think that it is addressed fairly and honestly to this supposed deed of Miss Lewis, and then there is at the end of the paragraph which deals with the deed these general words: "Nor any deed, will, document, writing, or instrument whatsoever of any sort which either directly or indirectly gives the said estates or any part of them, or any interest therein to the baronet's family, or to the plaintiff, or any person through whom he pretends, or can pretend, to claim subsequent to the second Lord Milford." I read those words, "subsequent to the second Lord Milford," as applying to and as confined to those documents and things generally, and the reason for that is obviously this, that in one of those numerous alternatives in which the plaintiff is endeavouring to shadow out his case, I will not talk about making out, but shadow out his case, there is something

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said about a claim under some will of the second Lord Milford. That is one of his possible versions. Now, I think myself that, looking at the defendant's affidavit as to the supposed deed of Miss Lewis, the allegations as to that are firmly met, and I do not see myself that there is anything like quibble or equivocation about it. Now, with respect to the second, the proposed settlement of 1864, the plaintiff says in paragraph 14 of his affidavit that he believes that between the will of Sir John, the sixth baronet, and the will of the first Lord Milford, a deed was executed in or about the year 1764 by Sir John, the sixth baronet, upon the marriage of the first Lord Milford. His reasons for that belief are not stated; but I rather gather them from the affidavits, and the learned counsel's observations, to be these: In the first place it is extremely unlikely that property of this kind should not have been the subject of a settlement between 1758 and 1820, and in the next place if you take up Miss Lewis's story about that deed, the object of which was to correct some misdealing with the property by the first lord, there cannot have been any misdealing by him unless there was some settlement, therefore I believe there was a settlement. The plaintiff has not told us how he gets the belief, although, as far as I can discover, that is the kind of ground he has for it. The 7th paragraph of the defendant's affidavit runs thus: "That to the best of our knowledge, information, and belief the plaintiff is not in any way directly or indirectly interested in the will of the first Lord Milford, or the deeds referred to in the 14th and 17th paragraphs of his affidavit, nor do the same or either of them contain anything tending to impeach our title or to support any title of the plaintiff to the estate, or any part thereof, or to any interest therein or material to the case of the plaintiff, so far as the same has as yet been disclosed." Now, I understand from that very much what Mr. Bowen says. I adopt his construction of that. That looks to me as if there were such a deed, and I am rather disposed to infer that there is from that statement. I go a little further, and say if this affidavit were to be made after an order for discovery, that deed might not have been sufficiently protected. That is not the position of affairs. What we ought to consider is this: not what the effect of that would be after an order for affidavit of documents; but whether upon that we ought to make an order for an affidavit of documents; not an order as to any further affidavit as to this particular document, but a general order for all documents whatsoever. It appears to me that the ground is not sufficient for any such purpose as that, even supposing that upon those affidavits some more limited discovery might be obtained by an interrogatory or otherwise, as to which I say nothing. I am of opinion that upon these affidavits we ought not, and should not, be justified in doing that which the plaintiff asks us to do—that is, to make the defendants put in a general affidavit as to their deeds, swearing as to what they had and what they had not, and leaving them to protect themselves with regard to such as they desired to protect themselves as they best could. Of course, I need hardly say, that having been so long at the Chancery Bar I have drawn a great number of these affidavits, and I know perfectly well where the shoe pinches. In a very early part of this discussion I was endeavouring to see

how I could frame an affidavit for any client of mine to swear to, and I despair of doing it; I should be obliged to tell him to produce them all, or else to swear in that reckless way which I refer to, and which no one would be justified in recommending any client. On these grounds I think the order ought not to be made, but the summons ought to be dismissed with costs.

*Motion refused with costs.*

Solicitor for the plaintiff, *H. W. Reave.*

Solicitors for the defendants, *Iliffe, Russell, and Iliffe.*

[NOTE BY REPORTER.—See *Horton v. Batt*, 2 H. & N. 248.]

## Supreme Court of Judicature.

### COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

*Thursday, July 24.*

(Before JAMES, BRETT, and COTTON, L.J.J.)

*Ex parte* SCHOFIELD; *Re* FIRTH. (a)

*Bankruptcy*—Proof—*Bills of exchange held by bankers, "pending discount"*—Secured creditor—Valuation of security—*Bankruptcy Act 1869, sects. 16, 40*—*Bankruptcy Rules 1870, rr. 99, 100.*

A debtor, who had deposited with his bankers for discount a number of bills of exchange accepted by various persons, went into liquidation. At the commencement of the liquidation the bankers had discounted some of the bills, and had carried the amount of them (less the discount) to the credit of the debtor's current account. The bankers had not discounted the rest of the bills, but held them "pending discount," desiring to make inquiries about the acceptors. They had, however, made advances to the debtor on the credit of those bills, but without attributing the advances to any particular bills.

Held (affirming the decision of Bacon, C.J.), that the bankers were entitled to prove in the liquidation for the whole amount of the balance due to them, without deducting the value of the bills held "pending discount,"—bills of exchange handed to bankers for discount not being "securities" within the meaning of the *Bankruptcy Act 1869, sects. 16 and 40.*

THIS was an appeal from a decision of the Chief Judge in Bankruptcy, affirming a decision of the Judge of the Huddersfield County Court.

The hearing in the court below is reported in 40 L. T. Rep. N. S. 464, where the facts of the case are sufficiently set forth.

The Chief Judge having held that bills of exchange were not securities within the meaning of the *Bankruptcy Act 1869, ss. 16 and 40*, and that the bankers were entitled to prove for the whole balance due to them without deducting the value of the bills held "pending discount," the trustee in the liquidation appealed from this decision.

*De Gez, Q.C.* and *E. C. Willis* for the appellant.—A negotiable instrument held as security for a debt ought to be treated in the same way as any

(a) Reported by H. PRAT, Esq., Barrister-at-Law.



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other security. The form of the order in *Ex parte Waring* (19 Ves. 345) shows that bills of this kind are securities. And we say that the bills, not having been valued by the bankers, are forfeited, although they named them in their proof. They also repeated the arguments adduced in the court below, and cited

*Ex parte Twoood*, 19 Ves. 229;  
*Thompson v. Giles*, 2 B. & C. 422;  
*Ex parte Solomon*, 1 Gl. & J. 25;  
*Ex parte Eggington*, Mont. 72;  
*Ex parte Adamson*; *Re Collis*, 38 L. T. Rep. N. S. 917; L. Rep. 8 Ch. Div. 807;  
*Ex parte Downes*, 1 Rose, 96;  
*Ex parte Ashworth*; *Re Hoare*, L. Rep. 18 Eq. 705;  
*Ex parte Price*; *Re Gibbs*, 3 M. D. & De G. 586.

Winslow, Q.C. and F. Knight for the respondent.—Bills of exchange handed to bankers for discount have always been held not to be securities within the meaning of the Bankruptcy Act 1869. To hold the contrary would be to upset the long-settled practice in bankruptcy administration and in the commercial world. They cited

*Ex parte Bloxham*, 6 Ves. 449, 600;  
*Ex parte Phillips*, 1 M. D. & De G. 232;  
*Reid v. Furnivall*, 1 Cr. & M. 538;  
*Ex parte Martin*, 2 Rose, 87;  
*Ex parte Burn*, 2 Rose, 55;  
*Ex parte Sammon*, 1 D. & Ch. 564;  
*Ex parte Reed*, 3 D. & Ch. 481;  
*Ex parte Buford*, 1 Gl. & J. 41;  
*Ex parte Wood*; *Re Wright*, 39 L. T. Rep. N. S. 646;  
 L. Rep. 10 Ch. Div. 554.

*De Gex*, Q.C. in reply.

JAMES, L.J.—Upon consideration of this matter we are of opinion that we cannot differ from the conclusion at which the Chief Judge has arrived. We say that with all respect to the very ingenious, and more than ingenious—the very able argument which Mr. De Gex has addressed to us, and which he addressed to the Chief Judge. I am bound to say I am very much governed—and I think we are all very much governed—in what we are about to say by what the Chief Judge has said as to his own knowledge of the course of business in these banking matters which have come so frequently before the Court of Bankruptcy; and to his mind it appeared, speaking from that knowledge and speaking from the traditions of the court—and in this court tradition is sometimes as valuable as, if not more valuable than, the written word—it struck him as being an absolute novelty that a banker could be called upon to value bills of exchange upon which he had the debtor's name, as well as other names, as his security, and which had been pledged to him for the debtor's debt either wholly or partly. No doubt, at the moment when the bill of exchange was indorsed, the debtor had to some extent the right of property in it. It might be said that he was then depositing his property by way of security. But the rule seems to have been laid down a great many years ago by Lord Eldon that the test whether the bill was to be valued or not, was whether the indorsement was made under such circumstances as to show that the intention of the parties was that the indorser, the debtor, was to be liable upon that bill, that is to say, whether it was a complete indorsement, giving all the remedies of the indorsement, or whether it was to be practically an indorsement without recourse. Sometimes an indorsement of that kind might be made in equity so as practically to be an indorsement

without recourse. If so, then the indorsement was of no benefit, otherwise the conclusion at which Lord Eldon seems to have arrived was that the indorsement itself showed that it was to be a transfer of the bill of exchange to the bank or other persons advancing money upon it with all the remedies in bankruptcy and otherwise which such indorsement could give. There are several cases in which something of the same kind has arisen, that is to say, in which the proof has been made on both estates, where bills had been deposited as collateral security, and the question which is now raised in this case never seems to have been suggested by anyone, and all the cases seem to have proceeded upon the assumption that the current law and practice of the court were otherwise. I think that probably may be explained in this way; that is to say, although at the moment before the indorsement the bill was debtor's property, that is to say, he had a right, no doubt, to sue the acceptor and a right to sue any prior indorser, as it might have represented the value of goods sold by him, yet when it was taken to the banker under such circumstances by the debtor with his indorsement on it, it was taken by the debtor, as borrower, to the banker (the lender) as being an instrument exactly the same as if all the parties had then joined at that moment in giving personal security for the debt. The debtor was able to say, "If you lend me money, you will have my liability and will have the liability of all the persons whose names are on the bill. You will have all these liabilities exactly the same as if we had now joined in giving a joint and several promissory note, or if each of us had given a several promissory note by way of security for it." *Non constat*—it does not follow certainly in any way—that these bills of exchange ever were property in the hands of the debtor. Supposing they had been accommodation bills, supposing the case had arisen that the actual debtor had not got one farthing of interest in the bills at that moment, that he was not parting with any property of his, but that he had only gone to a friend who had lent him his name as an acceptor to the bill and then had taken the bill to the bank, could it be doubted in that case that there was no security of any property of the debtor? He had no property in the bill. He had no right whatever to it. He was only giving the security of somebody, and therefore it seems to me to be nothing unreasonable to say, "You are not to inquire into what the circumstances were, why or wherefore these names appear upon the bills, whether they were accommodation acceptances or acceptances for value, or for what value, or whether there is upon the state of account between the parties anything due or not—that those inquiries are not to be entered into, but that the instrument is given by the debtor and accepted by the creditor; that is to say, given by the borrower and accepted by the lender as being an instrument with several names to it, which the borrower is able at that time to tender as personal security to him for payment of the amount. I think that principle probably explains the matter, and we shrink, if I may say so, from introducing something which we believe would entirely alter the understanding and practice that have prevailed, as explained by the Chief Judge, for years in these matters, not only in law, but in the commercial world generally. We are therefore of



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opinion that this order must stand, and the appeal be refused with costs.

BRETT and COTTON, L.J.J. concurred.

Solicitor for the appellant, *J. W. Sykes*.

Solicitors for the respondents, *Bischoff, Bompas, and Co.*

May 1 and 2.

(Before JAMES, BRETT, and COTTON, L.J.J.)

*Ex parte* SWINBANKS; *Re* SHANKS. (a)

*Solicitor and client—Authority to receive money for client—Possession of mortgage deed executed by client—Debt due from client to solicitor and from solicitor to mortgagees—Bankruptcy—Jurisdiction—Time for raising objection—Bankruptcy Act 1869, s. 72.*

*A solicitor having been instructed by a client, who owed him 201l., to raise 400l. for him by a mortgage of certain houses, prepared a mortgage deed and induced the client to execute it, without receiving the money, and afterwards handed the deed over to the mortgagees as security for a debt of 300l. due by him (the solicitor) to the mortgagees, whom he told that he had himself made advances to the mortgagor. The solicitor soon afterwards absconded. It was not proved that the mortgagor had expressly authorised him to receive the mortgage money:*

*Held (reversing the decision of Bacon, C.J.), that the mortgage deed was void as against the trustee in the bankruptcy of the mortgagor, inasmuch as the mortgagees could not prove that the solicitor was expressly authorised by the mortgagor to receive the mortgage money.*

*Viney v. Chaplin (2 De G. & J. 468) followed.*

*Barker v. Greenwood (3 Y. & O. Ex. 414) distinguished.*

*In a case in which the Court of Bankruptcy has jurisdiction, but would, as a general rule, decline to exercise it and would leave the parties to their ordinary remedy, the objection to the jurisdiction must be taken at the earliest opportunity, and will not be entertained after the objecting party has taken the chance of a decision in his favour on the merits.*

This was an appeal from a decision of the Chief Judge in Bankruptcy.

The facts of the case were as follows:

The trustee in the liquidation of Matthew Shanks, who had carried on business as a builder at South Shields, applied to the County Court at Newcastle-on-Tyne for an order declaring that an indenture of mortgage, dated the 24th Dec. 1877, expressed to be made between Shanks of the one part and John Robinson, a trustee and director of a building society, of the other part, and purporting to convey to Robinson certain houses in Elizabeth-street, South Shields, the property of Shanks, to secure an alleged advance of 400l. by Robinson to him, was fraudulent and void as against the trustee in the liquidation, and that the property comprised in it passed to the trustee free from any incumbrance by Robinson.

The land on which the houses were built had been purchased by Shanks from one Suddards for 100l., but the purchase money had not been paid, nor had any conveyance been executed, and the legal estate was outstanding in Robinson, who had

advanced money to Suddards on a mortgage of certain lands including the land in question.

The mortgage deed sought to be set aside was prepared by William Henry Bell, a solicitor of South Shields, who acted for both Shanks and Robinson. The deed contained the usual recital that Shanks had applied to Robinson for a loan of 400l., and that Robinson had agreed to lend the money upon the security of the mortgage. The name of Bell's managing clerk appeared as the attesting witness to the signature of Shanks to the deed.

In an affidavit made by him in support of the application, Shanks said that during the latter part of 1877 he obtained advances from Bell to the amount of nearly 200l.; that in November of that year, Bell wishing to be repaid, he instructed him to obtain 400l. for him on a mortgage of the houses in Elizabeth-street; that in December, as he was pressing Bell to get the 400l. for him, Bell told him he thought he should be able to get it for him from Robinson; that before he (Shanks) left Bell's office a mortgage deed was tendered to him for his signature; that he at first hesitated about signing it, but ultimately signed it on Bell's telling him that it was necessary that he should do so in order that the deed might be sent to London to be stamped, and that he should not part with the possession of the deed until he got the money from Robinson; that in the course of the same month he made frequent applications for the money to Bell, who told him that he had not seen Robinson and had not got the money, and showed him the mortgage deed unstamped.

On the 5th Jan. 1878 Bell absconded, and Shanks never received the 400l. It was afterwards discovered that Bell had defrauded many of his clients, and that he had misappropriated moneys and securities of the building society, of which Robinson was trustee and director, to the amount of more than 20,000l.

On the hearing of the application in the County Court, Shanks was examined and deposed that the day on which he signed the mortgage deed was either the 1st or the 8th of Dec. 1877, but he thought it was the 8th; he was confident that the managing clerk was not present when he signed the deed, and that no one but Bell was present; that no one then signed his name as a witness to his signature; that before he signed the deed Bell had advanced him sums amounting to 182l., and that afterwards he advanced him further sums of 17l. and 2l., making altogether an advance of 201l.; that he expected that Robinson would have 300l. to pay, and that Bell would get his 200l. and he (Shanks) would get the remainder; that 100l. was to go for the land, and he only expected to put 100l. into his own pocket. In reply to the question whether he ever expected to get the 400l. into his own hands, he said, "I expected to be there when the money was paid, and Bell would get the 200l."

The last sum of 2l. advanced by Bell to Shanks was advanced on the 29th Dec. 1877, when Shanks signed a receipt in these words: "Received of Mr. W. H. Bell the sum of 2l. further advanced on premises in Elizabeth-street, South Shields."

Bell's managing clerk made an affidavit, in which he said that he remembered Shanks executing the mortgage deed at the end of Dec. 1877; that he believed that he himself on the same or the next day caused the deed to be forwarded to London

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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to be impressed with an *ad valorem* stamp; that Bell said to Shanks, "Here is the mortgage to Mr. Robinson, and my clerk will see you sign it;" that Bell left the deed with him (the clerk), who then asked Shanks what amount the security was for, as there were blanks left in the deed for the consideration; that Shanks replied 400*l.*, adding that the land was 100*l.*, that Bell had 300*l.* in bills from Robinson, and that he (Shanks) had received about 200*l.* from Bell, who was going to pay him (the balance of the 300*l.* as he required it; that he (the clerk) then took the deed to a copying clerk, who, under his direction, filled up the blanks with 400*l.*, and that afterwards Shanks executed the deed.

The statements of the managing clerk were positively contradicted by Shanks.

From a letter book kept in Bell's office it appeared that the deed was sent up to London to be stamped on the 28th Dec. 1877. The date of the stamp on the deed was the 29th Dec. 1877. The managing clerk further said in his affidavit that the deed was handed by Bell to Robinson about three days after its return from London. It appeared that the mortgage deed was engrossed on the 30th Nov. 1877.

On the hearing of the application in the County Court, the managing clerk was examined, and deposed that the conveyance of the property by Suddards to Shanks was executed by Suddards about a fortnight after Bell absconded; that Shanks executed the mortgage deed at the end of December, and not on the 1st or 8th of the month. In reply to the question whether he kept a diary when he was in Bell's office, he said that he did so up to May or June 1877, but not afterwards, "because we adopted a separate and different system of keeping the sheets. They were kept on daily sheets, and had to go into the bill book. The sheets were destroyed, I believe, after being entered into the bill book." To the question, "If you had kept the diary up to December your interviews with Mr. Shanks, as you say, and with Mr. Robinson, would appear," he answered, "Yes; if they were important." The judge said, "I should have thought that the managing clerk would keep his diary, and out of that diary the clerk would make his bill of costs?" The witness replied, "That would be the proper course; but we found that the bill clerk was dilatory in his duties, and they got into arrear." The witness was shown one of the daily sheets, and was asked whether there was any entry in December. He said there was not, and that he had no entry or memorandum to show that he attested the mortgage deed or the conveyance to Shanks.

Robinson was examined before the registrar of the County Court, prior to the hearing of the application. He deposed that he executed the mortgage deed a day or two before the 24th Dec. 1877. He admitted that he paid no money when the mortgage deed was handed over to him, but said that he had in Oct. 1877 accepted for the accommodation of Bell a bill of exchange for 500*l.*, which he had had to pay when it matured at the beginning of November. He said that Bell had promised to pay the money in a few days, or to give him security; that Bell paid part of the money, and handed over Shanks's mortgage deed as security for the balance, 300*l.*; that Bell told him that he had already advanced money (though

he did not mention the amount) to Shanks on the security of the property, and he took Bell's word for it; that he made no inquiries of Shanks, and did not know him, but was satisfied with seeing that he had already executed the deed; that he did not know the signature of Shanks, but was satisfied with what Bell told him. He admitted that he was aware some time before that Bell had been misappropriating property belonging to the building society. With regard to the other 100*l.* he stated that Suddards had previously mortgaged to him certain property, including that which he had agreed to sell to Shanks, and that on the execution by Suddards of the conveyance to Shanks, in which Robinson himself joined as mortgagee from Suddards, he allowed Suddards in account the 100*l.* purchase money which Shanks had agreed to pay to Suddards for the land on which the Elizabeth-street houses were built, and in that way he (Robinson) paid the 100*l.* for Shanks.

The County Court judge held that the mortgage deed was fraudulent and void as against the trustee in the liquidation, and that the property of Shanks comprised in it passed to the trustee free from any incumbrance or charge by Robinson.

On appeal the Chief Judge held that Bell was authorised by Shanks to receive the 400*l.* from Robinson, and to retain out of it what was due to himself, and declared the deed to be valid as against the trustee for 301*l.* (the 201*l.* advanced by Bell to Shanks, and the 100*l.* allowed by Robinson to Suddards) and interest.

From this decision the trustee appealed.

*Swanston, Q.C.* and *Finlay Knight* for the appellant.—Bell had no authority to receive the mortgage money. *Viney v. Chapman* (2 De G. & J. 468) shows that the mere possession of the mortgage deed, signed by Shanks, did not give him such authority. Robinson was not authorised to pay the money to Bell, and without express authority he was not justified in doing so. They also cited

*Vorley v. Cooke*, 1 Giff. 230;

*Ogilvie v. Jeaffreson*, 2 L. T. Rep. N. S. 773; 2 Giff. 353.

*Winslow, Q.C.* for the respondent.—It was clearly intended by Shanks that Bell should retain the 201*l.* out of the mortgage money, and in those circumstances *Viney v. Chapman* does not apply. *Barker v. Greenwood* (2 Y. & C. Ex. 414) shows that Bell had under the circumstances an implied authority to receive the money. At the very least the mortgage deed is valid as a security for the 100*l.* paid by Robinson for the purchase money of the land owing by Shanks.

*Creed* followed on the same side, and, the Court having intimated an opinion in favour of the appeal, raised the following objection, which had not been taken either in the County Court or before the Chief Judge.—This is not a case in which the Court of Bankruptcy has any jurisdiction under the 72nd section of the Bankruptcy Act 1869; or at least it is a case in which the court has always refused to exercise its jurisdiction, and has left the parties to their ordinary remedy:

*Ex parte Dickinson; Re Pollard*, 38 L. T. Rep. N. S. 860; L. Rep. 8 Ch. Div. 377;

*Ex parte Brown; Re Yates*, 40 L. T. Rep. N. S. 402; L. Rep. 11 Ch. Div. 148.

Without calling for a reply,

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JAMES, L. J. said :—With regard to the objection to the jurisdiction of the Court of Bankruptcy, it is very likely that if it had been taken in the first instance the court might have said that the case must be tried in the ordinary tribunals. But sect. 72 of the Act of 1869 gives the Court of Bankruptcy a jurisdiction almost without limit, for the Legislature trusted the court not to exercise the jurisdiction in an improper case. But when the objection has not been taken in the County Court or in the Court of Appeal from that court, in which the decision was in favour of the present respondent, it would be monstrous to throw away all the expense which has been already incurred, and to tell the parties to fight the case out in the Chancery Division. It is too late to raise the objection after the respondent has taken his chance of a decision in his favour in the Court of Bankruptcy. Upon the merits of the case it appears to me that the decision of the County Court judge was perfectly right, with the exception of something which I shall presently mention as to the sum of 100*l.* allowed in account to Suddards. The recital in the mortgage deed that Robinson had agreed to lend Shanks 400*l.* on his application for the loan was a mere fiction of Bell, and no part of the 400*l.* was ever paid by Robinson to Shanks or to any person as his agent by his authority. The deed was handed over to Robinson as security for Bell's debt; it got into his hands through a gross breach of duty, almost amounting to embezzlement, on the part of Bell. Bell had no right to give the deed to Robinson except on the completion of the mortgage, by which the money would have got into the hands of Shanks. Robinson, however, claims to hold the deed as a security to the extent of the 201*l.* which Shanks owed Bell. No doubt, if the transaction had been honestly carried out according to the intention of Shanks, Robinson would have had a charge upon the property for 400*l.* and Bell would have retained the 201*l.* out of the 400*l.* But the transaction intended by Shanks never has been carried out, and it is impossible to make a new bargain for the parties, and give Robinson a security for the 201*l.* It is his misfortune that he was dealing with such a dishonest man as Bell. He simply took a security for the debt already due to him, and did not advance any money on the faith of Bell's representations, and was not entitled to any charge on the property for his old debt. The 100*l.* paid or allowed by Robinson to Suddards stands, however, in a different position, and Robinson is entitled to an unpaid vendor's lien on the property for that, and the order must be made without prejudice to that lien. In my view of the case it is not necessary to say anything with regard to the evidence of the managing clerk about the conversation which he had with Shanks, because, if it is true, it did not amount to anything like an authority to Bell to receive the 400*l.* for Shanks and hand the balance over to him after deducting his own debt. The County Court judge, having seen and heard both Shanks and the managing clerk, came to the conclusion that he must believe Shanks and not the clerk, and I see no reason whatever for dissenting from that conclusion. At any rate, it is impossible to prove an authority to Bell to receive the money by means of a conversation as to which Shanks swears one way and the clerk the other way. But it does strike me as a very odd thing that no diary

should have been kept of the transactions, and that the entries should have been made only on loose sheets of paper which were capable of being easily destroyed. I trust I shall never hear of such a proceeding in a solicitor's office again. I cannot conceive any honest reason for making these entries on loose sheets, but I can conceive that there might be very good reasons for concealing the transactions of this absconding solicitor at a time when he was embezzling the moneys of his clients. I think the managing clerk ought not to have lent himself to any such proceedings.

BRETT, L.J.—At the last moment, after the appeal had been argued by two counsel for the appellant and one for the respondent, the objection was raised that neither the County Court judge, nor the Chief Judge, nor this court, had any jurisdiction in the matter; and it was said that several decided cases proved this. It appears to me that the words of the 72nd section of the Act are sufficient to give the jurisdiction, and that none of the cases cited have decided that there is no jurisdiction. They only decided that, in such a case as this, the Court of Bankruptcy would not, as a general rule, exercise its jurisdiction. As neither party, however, raised the objection before, but, on the contrary, they both argued the case fully on its merits, it appears to me that it would be very wrong for us to entertain the objection now. We have, therefore, to decide the case on the law and the facts. It appears to me that it was a most wholesome decision in the case of *Viney v. Chaplin* (2 De G. & J. 468), that the mere fact that a solicitor had the possession of a deed did not give him authority to receive money for his client. It would have been most dangerous if it had been decided otherwise. The solicitor must have an express authority. But, in the present case, even if there was an express authority to the solicitor to receive the money, the authority was not followed; and with respect to the omission to keep a diary, if such a thing was really done, it was because this office was full of fraud, and I should look with great suspicion on the confidential managing clerk. But I do not believe a word of the story, for it is the interest of a solicitor to keep a diary, as by means of it he makes his charges against his clients. I believe that a diary was kept and that it has been destroyed, and it is obvious that the clerk must have been a party to destroying it. Any evidence, therefore, given by him ought not to be relied on if it is contradicted, and his evidence is contradicted by Shanks. Bell was never expressly authorised by Shanks to receive the money, though Shanks, in his ignorance, may have supposed that he had implied authority. If Shanks ever gave any authority, it was only an authority to receive the whole 400*l.*, and to retain a part of it himself. The difference to Shanks cannot be over-stated. If the 400*l.* had been paid by Robinson, 100*l.* of it would have gone to meet the purchase money of the land. Bell would have kept 201*l.*, and would have been paid that debt as between him and Shanks, and Shanks would have had 100*l.* for himself. But, in fact, Bell was not paid the 201*l.*, and could have sued Shanks for it, and Shanks never received the 100*l.* The position of Shanks, therefore, was wholly changed, and changed to his detriment, and all this was done in direct fraud of Shanks. It is said that the case of *Barker v.*

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*Greenwood* (2 Y. & C. Ex. 414) is an authority contrary to our conclusion, but it appears to me that it does not touch the present case. That case is only a decision that if a solicitor has authority to receive money for his client, and to retain part of it for himself, he is not bound to receive in cash that part which he is to retain, but may set it off in account with the person from whom he receives it. Therefore *Barker v. Greenwood* does not touch the present case, which must be decided on the authority of *Viney v. Chaplin*. The result is that Bell had no authority to receive the mortgage money, and consequently the mortgage deed ought to be cancelled. I agree with what my Lord has said as to Robinson's lien in respect of the 100*l.* which he paid to Suddards.

COTTON, L.J.—The first question is as to the objection, which has been taken very late, to the jurisdiction of the court. Now the 72nd section of the Bankruptcy Act 1869 gives the court the very largest jurisdiction to deal with questions arising in any case of bankruptcy, including such a question as that which is now before us. But the case is one of a kind in which the court does not usually exercise the jurisdiction, but, on the contrary, declines to do so. If the objection were really to the existence of any jurisdiction, it could never be taken too late; indeed, the court would be bound itself to take the objection as soon as it saw that it had no jurisdiction, without the submission of the parties. But when the objection is only that the jurisdiction is an extraordinary one and that the court has a discretion as to its exercise, it ought to be raised at the earliest opportunity, and it is not right that a party who is dissatisfied with the decision of the court should at the last moment contend that the case is one in which the court would not, under the circumstances, exercise its jurisdiction. How does the present case stand? The decision of the County Court judge was in favour of the present appellant. The present respondent appealed to the Chief Judge, not on the ground of jurisdiction, but upon the ground that the decision was wrong on the law and on the facts, and the Chief Judge reversed the decision. After this decision in his favour, and after the present appeal had been argued until it came to the turn of his junior counsel, it was, in my opinion, too late for the respondent to raise the objection. Of course the court itself might at any time say that it thought the case so doubtful that it would leave the parties to their ordinary remedy, but that is not what has happened here. I agree with the other members of the court that there is no reason why we should decline to exercise our jurisdiction. [His Lordship then examined the facts of the case and arrived at the same conclusion as the other members of the court.]

*Appeal accordingly allowed.*

Solicitors for the appellant, *Hopwood and Sons*, agents for *B. Purvis*, South Shields.

Solicitors for the respondent, *Pitman and Lane*, agents for *B. C. Bell*, South Shields.

Wednesday, May 14.

(Before JESSEL, M.B., BRETT and COTTON, L.JJ.)

Re BANISTER; BROAD v. MUNTON.(a)

*Vendor and purchaser—Conditions of sale—Misleading—Sale under direction of the court—Function of conveyancing counsel.*

*In a sale under the direction of the court, one of the conditions of sale required the purchaser to assume the truth of a certain statement of facts. Other facts were subsequently discovered by the purchaser, which tended to throw doubt on the title to the property. On a summons by the purchaser asking to be allowed to rescind the contract, or else that there should be an open reference as to title on the ground that one of the conditions of sale was misleading, Fry, J. held that the condition was not misleading, and that the vendor had acted with perfect good faith, and dismissed the summons.*

*At the hearing of the appeal by the purchaser, the statement of title laid before the conveyancing counsel of the court by the vendor's solicitor, on which the conditions of sale were framed, was produced. Although this statement was in evidence in the action, it was not seen by Fry, J. when the case was before him.*

*Held (reversing the decision of Fry, J.), that, upon the evidence disclosed by the statement of title, the condition was misleading, and that the purchaser was entitled, notwithstanding the condition, to have a good holding title; and if it was not shown within fourteen days, he would be entitled to rescind the contract. If the vendor elected to rescind the contract, the purchaser must have his deposit repaid with interest, and his costs of the original hearing, and of the appeal. If the vendor elected to show his title, the purchaser would have his costs of the original hearing, but there would be no costs of the appeal.*

*The conveyancing counsel of the court is bound to see that the conditions of sale are proper, in the interest of the persons entitled to the property which is to be sold under the direction of the court; but as between the vendor and the purchaser, any error by him must be treated as the error of the vendor.*

THIS was an appeal from a decision of Fry, J. (reported *ante*, p. 319.) The facts were shortly these:

The action was for the administration of the estate of Lucy Banister, and in it an order was made for the sale of certain real estate. Under that order the property was put up for sale by auction, and was sold. One of the conditions of sale stated that a declaration would be produced and handed over to the purchaser that the property was taken by the declarant of one Esther Banister, in Oct. 1835, and had since been held by the declarant of her, and those claiming under her in succession, to the present time; and "the purchaser shall be satisfied with the title so made, as showing a good and sufficient title, without the production of any other document of title whatsoever previous to the will of the said Esther Banister in 1860, who shall be assumed to have been seized of and entitled to the property in fee simple in possession, free from incumbrances, at the time of the letting in 1835, and up to and at her death. It is not accurately known, and cannot now be satisfactorily explained,

(a) Reported by E. S. ROCHS, Esq., Barrister-at-Law.

how she acquired the property, and it is expressly stipulated that no other title than the above shall be required or inquired into, whether in the vendor's possession, power, or knowledge, or not, neither shall he be bound to answer any requisition relative thereto." An abstract of title in accordance with this condition was delivered to the purchaser. It was discovered, in the course of inquiries made by his solicitor about the payment of succession duty, that in 1845 a suit of *Banister v. Ellis* had been instituted in the Court of Chancery, in which Esther Banister was plaintiff, and from the pleadings in that suit it appeared that she had been in possession of the property as executrix of her father, to whom it had been, in 1822, mortgaged by a tenant for life. The object of the suit was to determine the rights of the plaintiff and a first mortgagee of the property in respect of the proceeds of a policy of assurance which had been also comprised in the mortgages, and the proceeds of which had been received by the first mortgagee. The petitioner then took out a summons to rescind his contract, or that an open reference as to title might be directed, on the ground that the above condition of sale was misleading. The vendor's solicitor deposed that all the information in the possession of the vendor which appeared to bear upon the title to the property was placed by him before the conveyancing counsel of the court, and that the conditions of sale were settled by him, and the abstract of title furnished in accordance with his advice.

In the court below, Fry, J., upon the evidence before him, came, without hearing the vendor's counsel, to the conclusion that the vendor had acted *bonâ fide*, and that it was true that he did not know, and could not satisfactorily explain how Esther Banister had acquired the property. He also held that there was nothing to show that the purchaser would not get a perfectly good holding title, and he dismissed the summons with costs.

The purchaser appealed.

Upon the hearing of the appeal the court called for the production of the statement which was laid by the vendor before the conveyancing counsel of the court. From that statement it appeared that the mortgage to Esther Banister's father was a mortgage of a life estate in the property; that the mortgage came to an end by the death of the tenant for life in 1844, and that Esther then remained in possession of the property without any title at all; and that thus, by continued possession, the persons who claimed through her had acquired a perfect title to the property by possession in 1874.

*J. Pearson, Q.C.* and *E. T. Holland* for the appellant.

*Glassey, Q.C.* and *Buckley* for the vendor.—The following cases were cited:

*Blacklow v. Laws*, 2 Hare, 40;

*Hume v. Bentley*, 5 De G. & Sm. 520;

*Edwards v. Wickwar*, 13 L. T. Rep. N. S. 428; L. Rep. 1 Eq. 68;

*Beasley v. Carter*, 20 L. T. Rep. N. S. 381; L. Rep. 4 Ch. App. 230;

*Else v. Else*, 25 L. T. Rep. N. S. 927; L. Rep. 13 Eq. 196;

*Harnett v. Baker*, 32 L. T. Rep. N. S. 382; L. Rep. 20 Eq. 50;

*Jones v. Clifford*, 35 L. T. Rep. N. S. 937; L. Rep. 3 Ch. Div. 779;

*Manson v. Thacker*, 38 L. T. Rep. N. S. 209; L. Rep. 7 Ch. Div. 620;  
*Waddell v. Wolfe*, L. Rep. 9 Q. B. 515; 43 L. J. Q. B. 139.

JESSEL, M.R.—This is an appeal from a decision of Fry, J., and I must say that there are materials before this court which were not before the learned judge in the court below, and I cannot help thinking that if those materials had been presented to him his conclusion would not have been the same as the one to which he came when the case was argued before him. Now, the sole question which it appears to me we have to decide is, whether this condition was a fair one. I will explain what I mean by that. First of all, no one will doubt for a moment that in sales by the court there should be at least as much good faith shown towards the purchaser, and perhaps a little more, than is required by ordinary vendors out of court. The old Court of Chancery—and this court is its successor—has always felt bound to see that purchasers are fairly and honestly dealt with in every respect; and if there is any difference—I do not say there is—the difference must surely be in favour of a purchaser who bought under the decree and order of the Chancery Division. In considering the position of the vendor I quite agree that in a case of this kind, where a trustee or *cestui que trust* is under disability, the course of the court is to require the title to be laid before its conveyancing counsel who settles the conditions, and the solicitor who adopts that course, and fairly gives to the conveyancing counsel all the material facts known to himself, is not in the slightest degree to blame if it should afterwards appear that there has been some mistake or miscarriage in the framing of the conditions, and I must say further that having read the instructions laid before counsel, I think the solicitor in this case did present to him all the material facts which were necessary to enable him properly to frame the conditions. The miscarriage, if miscarriage there be, I do not in the slightest degree impute to the gentleman who laid the instructions before the conveyancing counsel, but still the conveyancing counsel, though in one sense the officer of the court, is the conveyancing counsel of the vendor. It is quite true, if the vendor or somebody institutes an administration suit, he is compelled to go to the conveyancing counsel as a part of the proceeding, but it does not at all change the relationship in which the counsel stands to the vendor as between vendor and purchaser, and therefore if there has been a mistake, in my opinion, as between vendor and purchaser, the vendor is no better off than if the mistake had been made by a conveyancing counsel not appointed by the court. Now the next question to consider is what is the rule as to representation. I apprehend that the considerations which induce a court to rescind any contract, and the considerations which induce a court of equity to decline to enforce specific performance of a contract, are by no means the same. It may well be that there is not sufficient to induce the court to rescind the contract, and still sufficient to prevent the court enforcing it. Here the purchaser comes to the court and says, do not compel me to take a title under these conditions—either give me something more (I will consider in a moment what more) or else let me off the contract altogether. Now what he complains of is this:

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He says, I bought under conditions which were not truly framed, which contained representations either expressed or implied, which are untrue, and were untrue to the knowledge of the vendor at the time those conditions were framed. Now if they were untrue, and the real facts were known to the vendor, then they are untrue to the knowledge of the vendor, however innocent he may be of intentional misrepresentation, because the actual vendor, the trustee, took all the precautions to get the conditions properly framed, but still those are untrue representations or misrepresentations; and therefore it is shown that the material statements made which were either expressly made or impliedly made were untrue. Under such circumstances I think the purchaser could not be held to be bound by the condition, that is, bound to the extent of being compelled to take the title. Now there are two grounds of complaint. The first is, that the purchaser is required to assume that one Esther Banister, was seised of, and entitled to the entire property in fee simple in possession free from incumbrances at the time of letting the farms in 1835, and up to and at her death. The second ground of complaint is this: It is not accurately known, and cannot now be satisfactorily explained how she acquired the property. Then there is a stipulation that the purchaser is to make no inquiry as to any other title. It is said that the vendor knew well that Esther Banister was not in 1835 entitled to the entire property in fee simple, and that knowing that well, he was not entitled to put a condition asking the purchaser to assume she was, because it would inferentially amount to a statement that so far as he knew anything to the contrary she was so seised and entitled in fee simple, and it appears to me this objection is well founded. I do not think a vendor is entitled to say that the purchaser shall assume that which the vendor knows not to be true. The utmost that can be asked of the purchaser is that he shall assume something of which the vendor knows nothing; but it does appear to me inferentially to represent to the purchaser that, at all events so far as the vendor is concerned, it is not an untrue statement as regards the second point. If it should turn out that it was accurately known and could be satisfactorily explained how she acquired the property, that would be an untrue statement of fact beyond question, and if known to the vendor of course would be an untrue statement to his knowledge. Now in this particular instance it happens that the vendor was the solicitor, and he prepared what I must say is a very concise and clear statement as to the title to be laid before the conveyancing counsel. It appeared by the affidavits that such a statement had been prepared in writing, and I think, speaking with the utmost deference, that Fry, J., should have called for that statement in writing. It is clear it could not be protected, because if you once charge that the vendor knows a fact contrary to that stated in the conditions of sale, and has in his possession a writing written by himself showing that he knew the fact, of course that writing is not protected. Now, that being so, and looking at this statement, I find that the Esther Banister in question acquired a title in this way: There was one Burrell, who gave the property to a Mrs. Montero for life, with remainders over—contingent remainders to her two daughters; that

Mrs. Montero and her two daughters, by deed, mortgaged the property to one Banister—I will not trouble about the other mortgage, which is not material for what I am going to state; that Banister died, and that John Banister, the mortgagee made this very Esther Banister one of his executrices, and she was the sole person who proved the will. Therefore she became the sole legal personal representative of John Banister, and under the conveyance by Mrs. Montero would have become mortgagee of the property for the life of Mrs. Montero, and I am told there was a fine, although that does not appear on the face of the case, and also a contingent fee belonging to Mrs. Montero's daughter. That being so, and it being stated as the case, there is not the slightest doubt on the question as to how she became entitled. What happened next was this, and it is a very singular state of things. The tenant for life, that is the mortgagor, died in 1844, having survived both her daughters, so that the contingent fee never became a vested fee, and therefore the ultimate fee descended to the heir-at-law of the original testator, Burrell, all of which is stated in the case with the greatest clearness, and was of course well known. From that time to her own death in 1860 Esther Banister remained in possession. Can it be said that her title was not thoroughly well known? She got into possession during the life of Mrs. Montero, and she remained in possession after her death. Of course it is as clear as possible what probably happened. The heir of Burrell was not known, because Burrell died a great many years before. His will is dated in 1784, and it was proved in 1790. The great probability is that in 1844 nobody knew anything about him or his family either, and Miss Banister continued in possession. What therefore remains to be known about the possession I cannot imagine. It is the mortgage remaining in possession after the mortgage estate had come to an end. It appears there was a dispute about the other property mortgaged, and about the policies of insurance, until the Chancery suit; and the result of the Chancery suit to which the legal personal representatives of Mrs. Montero were parties was, that in 1847 the other property was conveyed to Miss Banister. Of course this could not be conveyed because it had ceased to be comprised in any of the deeds, and she remained therefore in possession simply and solely as a person whose title was not attacked by the true owner whoever he was. That being so, it appears to me the vendor knew firstly, that in 1835 she was not seised in fee; and secondly, that he knew quite accurately how she obtained the possession. It follows from what I have said that there is a perfectly good title if these facts are proved. I might mention, to show how perfect the statement of title is, that it appears that John Banister left this mortgage specifically to his three daughters subject to charges in favour of two others. It is stated that the charges of the two others are released—it is not of much consequence whether they are or not, as he died in 1825; and the other two daughters, who were owners since Banister died, left their property to this lady, so that her title would be complete also, independently of the question of the statutes. She devised to one Thomas Banister, he devised again, and his devisers sell it. A better title, if that is true, cannot be

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imagined, and I do not see any good whatever for not showing it. That is for the vendor's solicitors to consider. In that position of matters is it right that we should compel the purchaser to rely on this condition, he having been led to purchase on the assumption and the fair assumption that what was stated was a fair representation of the true state of the title? I think it is not, and I think the purchaser is entitled to say to the court, either show me a title (I will consider in a moment what title) or let me off altogether. What title ought to be shown? As I have already said, assuming that all in the statement of the case is capable of proof, it appears to me there is a good and marketable title; but that does not at all define the extent of the right of the purchaser. When I come to look at these conditions it appears to me clear that the purchaser would not say he bargained for more than a good holding title. He is told that his title is to begin with a declaration, and a will, and is not therefore such a title as on the face of it would be a marketable title, and he is satisfied to buy under such conditions. It does not appear to me that he is entitled to ask for more than it is represented to him he would obtain; and therefore although I think the reference might well be answered as regards the title that it is a marketable title, the reference should be confined to a good holding title and the order which we, therefore, propose to make is this—to discharge the order of the court below, and if the vendor elects to show his title—as to which he should have a reasonable time—we might state that in the opinion of this court notwithstanding the tenth condition, the purchaser is entitled to require a good holding title to be shown. I do not know how long you want, Mr. Glasse? [Glasse.—Ten days or a fortnight, my Lord.] Very well. If the vendor, within a fortnight, elects to show that title, then refer it to chambers to ascertain whether a good holding title can be made out. If not, the contract will be rescinded on the usual terms. Now, as regards the costs, I must say it would have been more satisfactory to me if the purchaser had called for this evidence, which he knew was in writing and existed, before the court below, or after the judge had directed the document to be produced; and I cannot help thinking that this appeal would not have been heard of at all, if that course had been adopted. It seems to me it would be right under all the circumstances of the case, considering the appellant has now succeeded upon the facts not disclosed in the court below, to give him the costs of the application in the court below, and to direct no costs of the appeal. Of course if the contract is rescinded it will be on the usual terms, that he pays back the purchase money with interest.

BRETT, L. J.—I can see no proposition of law laid down in this judgment of the court below which is wrong, and I can see no conclusion of fact upon the evidence, which was present to the mind of Fry, J. which is erroneous. But it seems to me there are facts before this court which raise a question of law, which question was not decided or dealt with in the judgment of Fry, J., and that such facts make that judgment one which it is not right to uphold. It may be—and I am sure I do not say anything to the contrary—that if the facts which are now before this court had been called to the attention of Fry, J., he would have insisted

upon seeing the statement in question. As the case stands before us it seems to me that unless the purchaser can do away with some stipulation which is contained in the 10th condition of sale he is bound by that in its terms, and he has everything to which he is entitled. If the condition of sale had been in contest before a court of common law under the old state of the law, he would have had everything he was entitled to, and could not have asked for more; but I think the authorities show that in a court of equity the insistence that a thing should be assumed, does by implication contain a statement that no facts are known to the persons who require them which would make that assumption a wrong one according to those facts. There is, therefore an implied representation in the insistence that certain matters should be assumed. Now if it had been necessary to hold that there was any want of good faith on the part of the trustees in this case, nothing should have induced me, with my present knowledge of the law, to say that any man is guilty of want of faith or is guilty of fraud, whatever may be his knowledge of facts, unless I am convinced from that knowledge of the facts that he had a wrong intention in his mind. I do not believe that there is any case which would oblige us to do what, to my mind would, be such an outrageous thing as to hold that a man is guilty of want of faith or fraud, so long as he has an honest mind. I agree entirely with Fry, J., that there was no want of good faith in this case, and I agree with him that if there was a want of good faith, that is to say, if a person asked for an assumption of this kind knowing at the time facts which made it wrong to ask for that, and with an intention to deceive, then I agree that the condition should not be held binding. In the absence of want of good faith I do not see that this contract can be rescinded. But then there comes in the doctrine that if there be a misrepresentation of facts, however innocently made, the court of equity will not enforce the performance of the contract. Now you have facts which were known to the trustee at the time this condition was drawn up, which facts, when shown to the court here, the court is obliged to say, would make it wrong to assume that which is the purport of the assumption in the condition. Under these circumstances can it be right to decree specific performance of the contract against the purchaser without his having the opportunity of obtaining a good holding title. It is said that we ought to do so, because it was no fault of the trustee, and that if there was an error by anybody, it was the error of the conveyancing counsel. But I cannot help saying that, if that is a true state of facts, you must bring in a principle of law which is well known, which is, that if there are two innocent parties, and there is an error by a third party, it is the one party who in law is supposed to not who must suffer. I cannot help thinking that a conveyancing counsel in drawing up a condition of sale is acting for the vendor, and that when an error exists in the condition, you must not decree specific performance against the purchaser. I therefore think, upon the facts made known to this court, although there is no want of good faith at all, yet that, as this condition of sale is part of the contract, there has been an erroneous representation, and that under those circumstances specific performance cannot be



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decreed in the terms of the contract, and that the purchaser here has a right to have the abstract of title shown to him and proved.

COTTON, L.J.—The result of this case may be that the purchase money will have to be returned and that the purchaser will get his costs; that is to say, the result may be the same as if the contract had been rescinded; but it is not a question of rescinding the contract on the ground of misrepresentation made by the vendor to induce the purchaser to enter into it. The question is whether or no the court will hold the money of the purchaser, and compel him to take a conveyance upon the title, which has already been shown to him; that is to say, it is a question of specific performance, and not of rescinding the contract. Now how does the question arise? A title was shown to the purchaser in accordance with the conditions of sale, but on making enquiries as to matters which were open to him under those conditions as to the title shown, he ascertained a certain fact which he contended raised a doubt as to the title being in accordance with what was stated on the conditions of sale, and he required the vendor to make a further abstract of title, or to have a further investigation of title to clear up the doubt. Now if the purchaser is not concluded by the conditions of sale, it must be admitted that he is entitled to further information and further investigation of title than that which he has already got. He has not got such a title as the court can force upon him. But then it is said, you having concluded yourself by those conditions of sale, you have got all you are entitled to; you must not ask anything more, and are not at liberty to show that the title is defective as far as the facts are already shown by the title and shown to you. Now the question therefore is, whether or no for the purposes of specific performance the purchaser is bound by the conditions of sale, so that the court will force upon him a title which is not shown to be either a good holding title or a good marketable title, in consequence of what is contained in those conditions of sale. I take it that conditions of sale must be fair, and for the purposes of the present case I think one may lay down this, that in conditions of sale there must not be made any representation or condition which can mislead the purchaser as to the facts within the knowledge of the vendor, and that the vendor is not at liberty to require the purchaser to assume, as the root of his title, that which documents within his possession show not to be the fact, even though those documents may show a perfectly good title in another state of facts, and the question here in my opinion is whether or no it is not shown that there were within the knowledge of the vendor, facts which made the 10th condition of sale a misleading condition. In my opinion that is shown to be the case. I will take only one of these statements. The Master of the Rolls has dealt more fully with the second, but after stating how the title is to begin from 1835 with a lease or declaration of title—a person having been in possession under Esther Banister—it goes on in this way: "Who shall be assumed to have been seised of and entitled to the entire property in fee simple in possession free from incumbrances at the time of letting the farm in 1835, and up to and at her death." Whether or no the documents were before Fry, J. it is shown there were facts within the knowledge of the

vendor inconsistent with what the purchaser is there asked to assume. That being so, in my opinion it would be wrong under any circumstances to hold the purchaser by this condition and preclude him from making those inquiries, which the facts that have come to his knowledge render it desirable he should know, in order to see whether there is a good title. But I think in a case of this sort, where the sale is by the court, the court is bound to take more especial care, if possible, that there shall be nothing in the conditions or in the representations therein contained which by possibility can mislead a vendor, because the purchaser has a right to assume the court will take very good care that there will be nothing that can in any way mislead him as to the title he is getting. But it is said there is no fault here on the part of the vendor personally; that if it is anybody's fault it is an error (and counsel, judges, and everyone else must fall into errors) of the officer of the court, and that therefore the purchaser should not be relieved. In my opinion that is an entire mistake as to the functions, in such a case, of the conveyancing counsel, as between vendor and purchaser. No doubt the trustee vendor is bound to go to the conveyancing counsel, but he is the person who is appointed to see that the conditions are such as the trustee can properly sell upon, having regard to the interests of the persons who take an interest in the property, whether before the court or not, for whom the trustee is selling, and for whom the court asked him to sell and did direct a sale. As between the purchaser and the vendor and all parties interested in the sale, any error committed by the person so consulted and so advising must be considered as the error of the vendor and the purchaser is entitled so to treat it. Then there is another point to which I would advert. Mr. Glasse has said, what can the purchaser gain by this. He has not shown that he has not got a good title and the Master of the Rolls has said that on the facts stated it will be shown he has got a good title. But he is entitled to be satisfied as to how his title is to be made out, and although the facts stated in the case, if true and made out, may make a good title (upon that point I give no opinion as it is not properly before us now) he has a right to see whether those facts can be made out, and he has a right, in my opinion, notwithstanding that condition, to have those difficulties which he has shown to exist cleared away before his purchase money is taken and divided, and before he is compelled to take specific performance of this contract.

Solicitors: *G. A. Crawley and Arnold; Munton and Morris.*

*Wednesday, May 21.*

(Before JESSEL, M.R. and JAMES and BRETT, L.JJ.)

*Re* PILCHER (deceased); *PILCHER v. HINDS.* (a)

*Practice*—*Action for the recovery of land—Joinder with other causes of action—Application after service of writ—Rules of court 1875—Order XVII., r. 2; Order LVII., r. 6.*

*The leave of the court to join another cause of action with an action for the recovery of land under Order XVII., r. 2, must be obtained before the writ is served.*

(a) Reported by E. S. ROCHE, Esq., Barrister-at-L.

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*Order LVII., r. 6, which enables the court to enlarge or abridge the time appointed for doing any act or taking any proceeding, has no application where one act is ordered by the rules to be done before another act.*

*Decision of Fry, J. affirmed.*

This was an appeal from a decision of Fry, J., dismissing a summons taken out for leave to join a cause of action for the administration of the trusts of a will, with an action for the recovery of land. The indorsement of the writ claimed the administration of the trusts of the will of Thomas Piloher, deceased, an account of rents and profits, and possession of certain messuages and tenements. The writ was served on the defendants, and the plaintiffs then took out a summons for leave to "continue the action in the present form." The facts and arguments are reported *ante*, p. 422.

On the appeal by the plaintiffs,

*Oswald*, for the appellants, relied upon

*Whetstone v. Davis*, 33 L. T. Rep. N. S. 501; L. Rep. 1 Ch. Div. 99;

*Cook v. Enchmarch*, L. Rep. 2 Ch. Div. 111;

*Re Jones, Eyre v. Coz*, W. N. 1877, p. 88.

*Stallard*, for the defendants, was not called upon.

JESSEL, M.R.—This is an application for indulgence. By the Act of Parliament no cause of action shall, unless by leave of the court or judge, be joined with an action for the recovery of land, except as in the rule mentioned. This was put in advisedly. Before this Act it could not be done at all, and it was thought unadvisable that, as a general rule, any such joinder of other causes of action with an action for the recovery of land should be made; but the rule in question did give the court or a judge a discretion to be exercised where the causes of action are proper to be joined. But the leave of the court must be given before the causes of action are joined. The proper practice is to ask for leave before the writ is issued. I am aware that leave has been granted after issue of the writ, and before service; but in that case no one is injured. In my opinion rule 6 of *Order LVII.*, which gives the court power to enlarge or abridge the time appointed by the rules for doing any act or taking any proceeding, does not affect this case. That rule only refers to a period of time, and was not intended to apply where one act is directed to be done before another act.

JAMES and BRETT, L.JJ. concurred.

*Appeal dismissed with costs.*

Solicitor for the plaintiffs, *E. Kimber*.

Solicitors for the defendants, *Duncan, Warren, and Gardner*.

## COURT OF BANKRUPTCY.

Monday, June 30.

(Before the CHIEF JUDGE.)

*Ex parte* TAYLOR; *Re* GRASON. (a)

*Proof—Lender—Share of profits by—Partnership Law Amendment Act 1865 (28 & 29 Vict. c. 86), ss. 1 and 5.*

*By agreement in writing, A., a trader, in consideration of an advance by B., agreed to allow him one-half of the profits arising out of his business, and also to execute an agreement whereby B. was not to be considered a partner.*

*Upon the bankruptcy of A., the executrix of B. sought to prove for the amount so advanced by way of loan:*

*Held, that the money so advanced came within the meaning of the Partnership Law Amendment Act (28 & 29 Vict. c. 86. s. 1), and that B. was not entitled to prove until all the other creditors had been satisfied.*

This was an appeal from a decision of the judge of the County Court of Yorkshire holden at Barnsley, whereby he directed that the decision of the registrar admitting a proof, and refusing to register the resolutions in a liquidation, should be reversed.

The debtor, Henry Parker Grason, in 1871 carried on business at Manchester as a commission agent under the style of H. P. Grason and Co.

By a memorandum of agreement, dated the 10th July 1871, Joseph Taylor, of Levenshulme, in Lancashire, agreed to advance to H. P. Grason the sum of 4500*l.* to be invested in his business of a merchant and commission agent. The agreement was as follows:

Manchester, July 10th, 1871.

Memorandum, that Joseph Taylor, Esq., has this day lent to me the sum of four thousand five hundred pounds, in consideration of which I hereby agree to allow him one-half of the profits arising out of my business as merchant and commission agent carried on at 3, Marsden-street, Manchester. The said profits to be ascertained after deducting working expenses and losses, including also special arrangement of interest in the business to be paid to my manager, Mr. Joseph Rhodes. All contracts entered into from this date shall be participated in by Mr. Taylor, and a proportionate interest in all existing contracts according to the use I have to make of the above loan.

I also agree to sign an agreement according to Act of Parliament whereby the lender is not considered a partner.

H. P. GRASON.

JOSEPH TAYLOR.

Received four thousand five hundred pounds.  
4500*l.*

July 10th.

H. P. GRASON.

In order to put an end to certain disputes which had arisen between the parties in connection with this agreement, and also to procure the withdrawal of a bankruptcy petition which had been filed against him, H. P. Grason, on the 24th Dec. 1872, executed a deed by which he assigned substantially the whole of his property to Edward Lees, upon trust for sale and distribution amongst his creditors other than Joseph Taylor, and whereby it was declared that the surplus, after satisfying the debts of all the other creditors, should be applied in satisfaction of the debt owing to Joseph Taylor, or such part thereof as should remain unsatisfied, with interest at 10*l.* per cent.

(a) Reported by A. A. DORIA, Esq., Barrister-at-Law.

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*Ex parte TAYLOR; Re GRASON.*

[BANK.]

In pursuance of a power contained in the deed, H. Lees employed H. P. Grason in realising the estate, but such realisation did not amount to a sum sufficient to pay the creditors in full.

By an indenture indorsed on the above deed and dated the 15th March 1875, to which Grason was not a party, after reciting that there remained in the hands of Mr. Lees, the trustee, a sum of 478*l.* 16*s.* 8*d.* divisible amongst the creditors other than Mr. Taylor, and that the total debts amounted to 1590*l.* 12*s.*, sufficient only to pay a dividend of 8*s.* 0*½d.* in the pound, it was witnessed that the creditors released and discharged Edward Lees and James Hinchliffe, the inspector, from all liabilities, claims, and demands in respect of the debtor's estate, but without prejudice to the rights of the creditors and of Joseph Taylor as against the debtor.

Early in the year 1877 the debtor commenced business as a dyer at Barnsley, and ceased to reside in Manchester, but he stated in evidence that he still carried on business as a commission agent at Manchester until the end of 1878.

On the 16th Nov. 1877 J. Taylor commenced an action against the debtor in the Queen's Bench Division for 4500*l.*, the amount of his advance and interest. Mr. Taylor having died on the 3rd Jan. 1878, the action was continued by his widow and executrix, Jane Elizabeth Taylor, the appellant. Upon the trial of the action at the Manchester Summer Assizes, on the 22nd July 1878, a verdict for the plaintiff was entered by arrangement, but execution was stayed upon an appeal being lodged by the debtor.

On the 4th Feb. 1879, before the appeal came on for hearing, the debtor filed a liquidation petition in which he described himself as a dyer at Barnsley, late of Manchester.

At the first meeting, held on the 25th Feb., Mrs. Taylor, as executrix under the will of her late husband, tendered a proof for 4500*l.* as the amount due to his estate. The proof was objected to by the debtor and also by the creditors, upon the ground of the pending appeal, and also that the claim was void. Resolutions for liquidation by arrangement having been passed at the meeting, an objection was lodged on behalf of Mrs. Taylor against the filing of the resolutions, and the whole matter was adjourned pending the appeal as to Mrs. Taylor's debt.

On the 7th April 1879 the decision of the court below was confirmed, and it was decided that the advance made by J. Taylor to the debtor was by way of loan within the meaning of the Partnership Amendment Act (28 & 29 Vict. c. 86), s. 1.

Upon the 19th April 1879 the registrar of the Barnsley County Court refused to register the resolutions upon the ground that Mrs. Taylor's proof was good, and that consequently the resolutions had not been carried by the requisite majority.

On the 3rd May this decision of the registrar was reversed by the County Court judge, who referred the matter back to the registrar with a direction to register the resolutions.

From this decision Mrs. Taylor appealed.

*Winslow*, Q.C. and *B. T. Reid*, for the appellant, contended that the deed of the 15th March 1875, although not in terms a release by the creditors to the debtor, in equity amounted to a release to him by all the creditors except Taylor, by reason

of the express proviso reserving his rights. The debtor's business in Manchester had come to an end in 1872, when the deed of assignment for the benefit of creditors was executed, and his employment by the trustees for the purpose of realising the estate was in no sense a carrying on of the old business. Subsequently he commenced an entirely new business at Barnsley, and this it was that distinguished the present case from

*Ex parte Mills; Re Tew*, 28 L. T. Rep. N. S. 606; L. Rep. 8 Ch. App. 589.

They also referred to

*Whitmore v. Turguand*, 4 L. T. Rep. N. S. 38; 3 De G. F. & J. 107.

*Aspland*, for the respondents, submitted that the advance by Taylor to the debtor being an advance by way of loan under sect. 1 of the Partnership Amendment Act 1865, under the 5th section of that Act Mrs. Taylor had no right to demand or recover payment of her debt, until all the other creditors of the debtor had been settled with, or received 20*s.* in the pound. Upon the other point it was quite clear that the debtor carried on the old business as well as the new one, until shortly before he filed his petition. He relied upon

*Ex parte Mills; Re Tew* (*ubi sup.*).

*Winslow*, Q.C., in reply, referred to the Partnership Amendment Act 1865, ss. 1 and 5, as entirely governing the case.

The CHIEF JUDGE expressed his opinion that the case of *Ex parte Mills, Re Tew* applied, and governed the present case. It was not disputed that the loan in question came within the Act of 28 & 29 Vict. c. 86; the original memorandum of agreement was clearly within the mischief which the Act was intended to prevent, and the lender could not prove in competition with any creditors who had become creditors during the continuance of the agreement. The release of 15th March 1875, which was merely a release of the trustee by all the creditors, did not operate to release the debtor, the rights of the creditors and Taylor being expressly reserved. The fact that a new business had been commenced, and new debts incurred by the debtor, did not in his Lordship's opinion interfere with the rights of either the original or the subsequent creditors. In *Ex parte Mills, Re Tew*, Mellish, L.J. said: "It was urged, in answer, that the intention of the statute was to alter the law of partnership for the benefit of persons advancing money to traders, and that it cannot have been intended to put a person so advancing money in a worse position than if he had been a partner; and it was said that, if he had been a partner, and the accounts of the partnership had been settled, and all its debts paid, he could have proved against his former partner in competition with subsequent creditors, and that therefore the statute ought to be so construed as to admit a proof in the present case. But it would require very strong reasons to convince me that I ought to depart from the words of the statute, which, as it seems to me, are quite clear. I am not sure that, if the attention of the Legislature had been called to this precise point, it would have modified the enactment in the sense contended for by the appellants." Those remarks exactly applied to the present case, and although in the present case there was the fact that the business had been wound-up, and not continued as was the

[BANK.]

*Ex parte* THOMAS; *Re* FREES.

[BANK.]

case in *Ex parte Mills*, yet that made no difference. The debt had been contracted within the Act 28 & 29 Vict. c. 86, and the judgment of the court below was right, and must be affirmed.

*Appeal dismissed with costs.*

Solicitors for appellant, *Lambert, Petch, and Shakespeare*, for *Henry Snowden*, Leeds.

Solicitors for respondent, *Torr and Co.*, for *Dibb, Raley, and Olegg*, Barnsley.

July 7 and 14.

(Before the CHIEF JUDGE.)

*Ex parte* THOMAS; *Re* FREES. (a)

*Composition—Small amount of assets—Bona fides—Second petition—Bankruptcy Rules 1870, r. 284.*

A debtor filed a petition for liquidation, but his statement showed no available assets. The creditors nevertheless passed a resolution for a composition of one shilling in the pound, which was accordingly paid to them. The resolution not having been filed within the three days limited by the 284th rule, the debtor presented a second petition under which the creditors passed a similar resolution.

Held, that the presentation of the second petition was regular, and that the resolution to accept the composition ought to be registered.

Where there has been actual payment of a composition no security is necessary.

THIS was an appeal from a decision of the Judge of the County Court of Glamorganshire holden at Chesterfield, whereby he reversed an order of the registrar, who refused to register a resolution for a composition under the following circumstances:

On the 2nd Dec. 1878 William Frees, the debtor, presented a petition for liquidation, and at the first meeting, held on the 31st Dec., the creditors resolved to accept a composition of one shilling in the pound, and Edward Frees was appointed trustee.

At a second meeting, held on the 10th Jan. 1879, the resolution was confirmed, and the composition was then and there paid to and accepted by the creditors. The solicitor who was then acting for the debtor neglected to file the resolutions within the time limited by the Bankruptcy Rules 1870, r. 284, whereupon the registrar declined to register them.

The debtor then, on the 28th Feb., presented a second petition under which the creditors at the first meeting held on the 20th March resolved to accept a composition of one shilling in the pound payable within fourteen days without any security, and Mr. Frees was again appointed trustee. The resolution was duly confirmed at the second meeting held on the 29th March. From the statement filed by the debtor, the debtor stated his liabilities as amounting to 353*l.* 0*s.* 7*d.*, including preferential debts amounting to 78*l.* 5*s.*, whilst the assets were estimated at 55*l.* The appellant accepted the composition payable under the first petition, but at the second proceeding, at which he represented creditors to the extent of 63*l.* 0*s.* 6*d.*, he proposed that the debtor's affairs should be liquidated by arrangement, and that he should be appointed trustee. This proposal was

negatived, and the composition of one shilling in the pound was within fourteen days tendered to, but refused by the appellant on behalf of the creditors whom he represented. He then lodged an objection to the registration of the resolution upon the ground that the due payment of the composition was not secured. At the hearing the registrar declined to register the resolution. The County Court judge reversed this decision of his registrar, and ordered registration. From this decision the present appeal was brought.

*E. Cooper Willis*, for the appellant, contended that the debtor had filed two liquidation petitions, upon which practically nothing had been done. Under the first there was no registration, and therefore the proceedings were rendered null and void; and under the second petition no security was taken. There was a resolution for composition a shilling in the pound, but no security was required, and none offered or given. By the debtor's own statement, whilst his preferential debts alone amounted to 78*l.* 5*s.*, his assets were only 55*l.* The cases showed that where there were no available assets, the debtor was not entitled to apply to the court to be released from his debts. Under such circumstances it would be a gross abuse of the process of the court that the resolution should be registered. He cited

*Ex parte Blworthy*; *Re Blworthy*, 32 L. T. Rep. N. S. 690; L. Rep. 20 Eq. 742;

*Ex parte Staff*; *Re Staff*, 33 L. T. Rep. N. S. 40; L. Rep. 20 Eq. 775;

*Ex parte Aaronson*; *Re Aaronson*, 38 L. T. Rep. N. S. 243; L. Rep. 7 Ch. Div. 713;

*Ex parte Terrell*; *Re Terrell*, 35 L. T. Rep. N. S. 648; L. Rep. 4 Ch. Div. 296.

*Winslow, Q.C.* and *W. D. Benson* appeared for the respondent.—This was an appeal by a person who had proposed, as an alternative to the wishes of the majority of the creditors, that the estate should be liquidated by arrangement, and that he should be appointed trustee. Moreover the appellant was present at the different meetings held under the first petition, and had accepted the composition, and such acceptance amounted to accord and satisfaction. The cases cited on the other side related to transactions *malâ fide*, and had no application to the present case. The shilling was paid and accepted under the first petition, and tendered in the second, and therefore no security was requisite.

*Cooper Willis* in reply.—The court could only have regard to the proceedings under the second petition. If the creditors had accord and satisfaction under the first proceedings, they ceased to be creditors, and were not entitled to vote or pass any resolution under the second. Something might have been done under the first petition, but, unless the proceedings under that petition were registered, it was to no purpose; and in neither case ought the debtor, having no estate, and giving no security for the due payment of the composition, to be allowed to use the process of the court for his own purposes.

The CHIEF JUDGE.—I do not think that the right of the debtor to file the two petitions for liquidation can be inquired into. If a debtor said, "I have practically no estate, but am willing to divide what I have," that would come within the authorities mentioned in the arguments. Here,

(a) Reported by A. A. DORR, Esq., Barrister-at-Law.

[BANK.]

*Ex parte WITT; Re ARMSTRONG.*

[BANK.]

however, the debtor makes a statement showing how small his assets are, and the creditors having inquired about it, have agreed *bond fide* to accept a composition of a shilling in the pound. There is in this case no abuse, nothing unreasonable, no partiality nor favour shown to the debtor. The creditors simply agree to take a shilling in composition, and it is paid to them. What would be the use of security when the composition is actually paid? Nothing therefore can be urged against the resolution, but that by the neglect of the solicitor the 284th rule was not complied with. What was the debtor to do? He might perhaps have instituted an action against the solicitor. What he does is to present another petition, and another resolution is made, and agreed to by all the creditors except perhaps the appellant. In consequence of the appellant's objection, the registrar declined to register the resolutions, and upon his order being reversed by the County Court judge, the appellant has thought fit to bring this appeal. The case was argued well enough as if there had been a charge of fraud, but that has no application here. If I listened to it, I should be shutting my eyes to justice. The appeal is an idle and unreasonable one. The debtor did everything he could, and I feel bound to express my disapprobation that the matter was brought before me.

*Appeal dismissed with costs.*

Solicitors for appellant, *John Davies*, for *J. A. Thomas*, Swansea.

Solicitor for respondent, *E. G. Jellicoe*, Swansea.

*Monday, July 14.*

(Before the CHIEF JUDGE.)

*Ex parte WITT; Re ARMSTRONG. (a)*

*Liquidation—Release of trustee—Property undistributed—Bankruptcy Act 1869, ss. 51 and 125, sub-sections 5, 7, 9—Bankruptcy Rules 1870, r. 124.*

*All the property of a debtor which is vested in the trustee at the time of his liquidation continues vested in him, notwithstanding his release and the discharge of the debtor.*

THIS was an appeal from an order of the judge of the County Court of Derbyshire, holden at Chesterfield.

John Armstrong, by his will dated the 13th Aug. 1867, devised and bequeathed certain real estate and the residue of his personal estate unto Richard Armstrong since deceased and William Godber, trustees, whom he also appointed executors, upon trusts therein declared for sale and conversion, and out of the proceeds thereof, after payment of certain expenses and legacies, he directed the trustees, *inter alia*, to pay one half of the residue to his nephew Benjamin Armstrong the debtor. The testator died on the 4th Jan. 1868, and his will was duly proved by the executors therein named. On the 27th Jan. 1871 the debtor filed his petition for liquidation, and at the first meeting of creditors, held on the 21st Feb., liquidation by arrangement was resolved upon, and William Fisher Tasker was appointed trustee. At the date of the petition the debtor was entitled to a vested interest in the above residuary bequest, which, however, was not disclosed by him in his statement of affairs.

All the property of the debtor, other than this residuary bequest, had been distributed amongst the creditors, and on the 17th Sept. 1872 W. F. Tasker the trustee was released, and on the 29th April 1873 a resolution was passed granting to the debtor his discharge. At the time of the liquidation Benjamin Armstrong was indebted to the Chesterfield and North Derbyshire Banking Company, upon his overdrawn account, to the extent of 1394l. 10s., for which sum they proved under the liquidation and received a dividend of 63l. 18s. 4d. thereon. In 1878 the Chesterfield and North Derbyshire Banking Company went into a voluntary winding-up, and Mr. Tinsley Witt was appointed liquidator. It was then for the first time discovered that William Godber, as the surviving executor and trustee of the will of John Armstrong, had not paid over to the debtor the amount coming to him under the residuary bequest. Upon making this discovery Mr. Witt requested Mr. Tasker to apply to the court for directions, and, upon refusal, he caused application to be made to the County Court judge for an order declaring that the amount of the bequest to the debtor still in the hands of Mr. Godber formed part of the property divisible amongst his creditors under the liquidation, and that Mr. Godber might be directed to pay the same, after deducting legacy duty and costs, to W. F. Tasker, the trustee under the liquidation.

The application was heard on the 22nd May 1879, and dismissed with costs. From this decision Mr. Witt appealed.

*Winslow, Q.C. and Robson* appeared for the appellant.—The principal question raised was, what became of the estate of the debtor which was vested in the trustee under a liquidation by arrangement after the trustee had obtained his release? The provisions of the 47th section of the Act relating to the close of a bankruptcy, and of the 51st section relating to the release of the trustee, did not apply to a liquidation by arrangement (sect. 125, cl. 9). In the case of bankruptcy, by rule 124, upon the release of the trustee, any outstanding estate of the bankrupt vests in the registrar. Sect. 125, cl. 9, expressly prevented the release of the trustee from operating under rule 124 as in bankruptcy. There was nothing in the rules relating to liquidations to show in whom the outstanding estate of the debtor vested. The court below seemed to have been of opinion that the property was vested in the debtor and not in the creditors.

*W. P. Beale* for Mr. Godber.

*F. Whinney*, for Tasker, submitted to the direction of the court.

THE CHIEF JUDGE.—In a liquidation proceeding all the property of the debtor vests in the trustee by virtue of sect. 125, sub-sect. 5, and is distributed by him amongst the creditors. When the trustee is released, he has no further active duties to perform; but how can an estate which is vested in him be divested out of him? There is nothing in the Act to take it out of him. The estate remains in him still, and it is the duty of the trustee, under the direction of the court, to distribute any outstanding property amongst the creditors. In this case the executor of the testator raises no difficulty. He is ready to pay the money over, and is entitled to have a proper receipt. The trustee is competent to give him one, and must do

so. The order of the court below must be discharged. Costs of all parties out of the estate.

Solicitors for the appellant, *Linklater and Co., for Broomhead, Wightman, and Moore*, Sheffield.

Solicitors for the respondent, *Sharp and Ulithorne*, for *J. Bunting*, Chesterfield.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

*Friday, May 9.*

(Before FRY, J.)

CROSTHWAITHE v. DEAN. (a)

*Construction of will—Time of vesting—Tenants in common or joint tenants.*

*A testator by his will gave the interest on a sum of stock to his niece, J. L., only so long as she continued unmarried; but in case she married or died unmarried, he declared that the stock was then "to be divided between the brothers and sisters of the said J. L. or their children." J. L. had six brothers and sisters living at the testator's death, one of whom, E. M., died in the lifetime of J. L., leaving two children, only one of whom died in the lifetime of J. L. J. L. died unmarried.*

*Held, that the two children of E. M. at her death took vested interests in one-sixth of the fund, subject to the life interest of J. L., and that they took as tenants in common.*

JAMES LEE, by his will dated the 18th July 1849, gave the following legacy:

I give and bequeath to my niece Jane Lee the yearly interest of 1000*l.* Bank Stock, free of legacy duty, only so long as she continues unmarried; but, in case she marry or die unmarried, then the said sum of 1000*l.* Bank Stock is to be divided between the brothers and sisters of the said Jane Lee or their children.

The testator died on the 23rd Dec. 1850, and his will was proved on the 3rd Jan. 1851.

On the 24th July 1856 a bill was filed for the administration of the testator's estate and the execution of the trusts of his will, under the direction of the Court of Chancery; and on the 5th Dec. 1856 a decree was made directing certain accounts and inquiries, in answer to which the chief clerk made his certificate, dated the 1st July 1857, from which it appeared that the person the testator meant by the description of his niece, Jane Lee, was Jane Dean, otherwise Lee, the daughter of Henry Lee, the testator's brother, who had assumed the name of Dean instead of that of Lee; that Jane Dean had never been married; that Henry Dean died in June 1851; that he had seven children, of whom one named Hannah died in the testator's lifetime, without having been married, and the remaining six—Henry, George, Ann, Mary Ann Wright (widow), Elizabeth Masters (wife of William Masters), and Edward—survived the testator; that Henry, the younger, died on the 11th Feb. 1854, leaving one child only, Henry George Dean, his personal representative.

By an order made on further consideration on the 18th June 1858, it was ordered that 1000*l.* New Three per Cent. Annuities, part of a larger sum of like annuities standing in the name of the accountant-general in trust in the cause, should be

carried over to a separate account, and that the income thereof should be paid to Jane Dean during her life, so long as she should continue unmarried. Jane Dean died, without having been married, on the 16th June 1878, having received the income up to a short time before her death.

The remainder of such income was paid out on petition to her administratrix, and three-sixths of the fund in court were in Jan. 1879 transferred out of court to Henry George Dean, Ann Dean, and Edward Dean. Elizabeth Masters, who was entitled to one-sixth part of the 1000*l.* Three per Cent. Annuities in court, subject to Jane Dean's life interest, died in Jan. 1864, leaving two children only, Henry Masters and Thomas Masters.

Thomas Masters died on the 20th Feb. 1878, having by his will appointed Mary Ann Masters his executrix.

A petition was now presented for payment out of three-sixths of the fund remaining in court, to Henry Masters, George Dean, and Mary Ann Wright, Henry Masters claiming the one-sixth which would have gone to his mother had she lived, to the exclusion of Mary Ann Masters, his brother's executrix, who was the respondent to the petition.

*H. M. Mills*, for the petitioner, Henry Masters, contended that Henry Masters was entitled to the whole of one-sixth of the fund. The class to take was to be ascertained at the death of the tenant for life. The respondent could not take by substitution. As between themselves, Thomas and Henry Masters were joint tenants, and Thomas Masters having died before the period of distribution, Henry Masters was entitled to the whole of the share which would have gone to Elizabeth Masters if she had survived. He cited

*Penny v. Clarke*, 1 L. T. Rep. N. S. 537; 1 De G. F. & J. 425;

*Re Sibley's Trusts*, 37 L. T. Rep. N. S. 180; L. Rep. 5 Ch. Div. 484;

*Hobgen v. Neale*, 23 L. T. Rep. N. S. 681; L. Rep. 11 Eq. 48;

*Timins v. Stackhouse*, 27 Beav. 434.

*William Barber*, for the respondent, contended that Thomas Masters and Henry Masters took vested interests as tenants in common in the share which would have gone to their mother had she survived the tenant for life. He relied on

*Martin v. Holgate*, L. Rep. 1 E. & I. App. 175.

FRY, J. (after reading the clause in the will and stating the facts).—The question is, who is entitled to the sixth share of Elizabeth Masters in the original fund paid into court? Does it go among her children equally, or was it necessary that Thomas Masters should survive Jane Lee or Dean in order that he might participate in the share of Elizabeth Masters? I think it was not. *Martin v. Holgate* is not a direct authority on the point, the gift there being to nephews and nieces, or their issue—not, as in this case, to brothers and sisters, or their children; but it is indirectly an authority, for "issue" in that case was held to mean children, and a trust to divide amongst the issue of the nephews and nieces was held to be an original gift to the children, and to extend to a daughter of one of the nephews who had died in the lifetime of the tenant for life, although such daughter had also died before the tenant for life. I think that on the death of Elizabeth Masters her two children took a vested interest

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

CHAN. DIV.]

Re THE ALBION LIFE ASSURANCE SOCIETY; WINSTONE'S CASE.

[CHAN. DIV.]

in one-sixth of the fund, subject to the life interest of Jane Lea. The second question is, whether the children of Elizabeth Masters—viz., Henry and Thomas Masters—take as joint tenants or as tenants in common. I am of opinion that the term "divide" applies not only to the brothers and sisters, but to the children of brothers and sisters, and that Henry and Thomas Masters took as tenants in common. One-third therefore of the funds remaining in court will be transferred to Henry Masters and Mary Ann Masters, another third will be transferred to the account of George Dean or his children, and the remaining third will be transferred to the account of Mary Ann Wright or her children.

Solicitors: Monckton, Long, and Co.

June 10, 11, and 12.

(Before FRY, J.)

Re THE ALBION LIFE ASSURANCE SOCIETY;  
WINSTONE'S CASE. (a)

*Company—Winding-up—Share capital and unlimited liability—Members—Liability of members not shareholders—Variation of memorandum of association by articles—Rectification of register by inserting name—Companies Act 1862, ss. 23, 35, 38, 98.*

The memorandum of association of a life assurance company provided that the liability of the members should be unlimited, and that the capital should be 50,000*l.* in 5000 shares of 10*l.* each. The articles of association, after defining "assurance member" as a person holding a subsisting policy for the whole term of life on the terms of participating in the profits and duly registered as a member of the company, and defining "shareholder" as every person duly registered as a holder of a share in the subscription capital (the temporary subscription capital actually paid up by the shareholders), provided that the company should consist of two classes of members, the shareholders and assurance members, so long as there should be any shareholders, and afterwards of the assurance members only; that a register should be kept of the members (both shareholders and assurance members); that one-fourth share of the profits should be paid to the shareholders, and the other three-fourths, by way of bonus, to the assurance members; that both classes of members should have votes; and that the payment of a premium on a policy which would entitle the holder, if registered, to be an assurance member, should be deemed an agreement to become a member in respect thereof. W. signed and sent to the company a proposal for a policy of 1000*l.* with profits, concluding as follows: "I further agree to execute the articles of association, or any deed of covenant in conformity therewith, when required." The proposal was accepted, and a policy was granted, which assured to W. the sum of 1000*l.*, and such further sums as should, in pursuance of the articles of association, rules, and regulations, be appropriated by way of bonus, and provided that the policy of assurance thereby made should be subject to the articles, rules, and regulations applicable, as if they had been repeated in the policy. The company was

ordered to be wound-up, and up to the date of the order W. had paid all premiums on the policy, but neither her name nor that of any of the assurance members had been entered on the register of members of the company, or included in the return of members' names made to the Registrar of Joint Stock Companies.

Held, that W. had become a member of the company within the meaning of sect. 23 of the Companies Act 1862, and that the court had power under ss. 35 and 98 to rectify the register of members by inserting W.'s name therein, and to settle her on the list of contributories.

When the liability of members of a company is unlimited, and its capital is divided into shares, it does not necessarily follow that the shareholders are the only persons liable as members of the company.

There is nothing in the Companies Act 1862 inconsistent with the existence of a company which has both a share capital and members who are not shareholders, but have constituted themselves members by agreement.

Seem, that where a memorandum of association embodies particulars not required by the statute, those particulars may be varied by the articles of association.

THE Albion Life Assurance Society was incorporated on the 18th Nov. 1863 under the Companies Act 1862, as a company with unlimited liability. The objects for which the company was established, as set forth in the memorandum of association, were: The granting assurances on a single life, or joint lives, and on survivorships, or for limited terms, or contingently determinable, and either with or without participation in the profits of the company; the purchase and sale of annuities, and the granting of endowments and other periodical payments; the advance of moneys on personal securities on contracts, whether further secured by assurances effected with the company or not, and on such terms as the directors shall think fit; and all other business whatsoever usually effected by companies or societies of the like nature, and the doing of all such matters and things as are or may appear to the company to be incident or conducive to the objects aforesaid, or any of them, and also such additional and extended objects as the company may, from time to time, by a resolution passed by a majority of not less than two-thirds of such members of the company for the time being entitled to vote as may be present, in person or by proxy, at an extraordinary general meeting of the company to be called for that purpose, determine and resolve upon.

The 4th and 5th clauses of the memorandum of association were as follows:

4th. The liability of members is unlimited.

5th. The capital of the company is 50,000*l.*, divided into 5000 shares of 10*l.* each.

In the 1st clause of the articles of association the term "assurance member" was defined as meaning "every person for the time being holding a subsisting policy of assurance with the company for the whole term of life on the terms of participating in the profits of the company, and duly registered as a member of the company."

"Shareholder" was defined as meaning "every person who is duly registered as a holder of a share or shares in the subscription capital;"

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.



CHAM. DIV.]

Re THE ALMON LIFE ASSURANCE SOCIETY; WINSTONE'S CASE.

[CHAM. DIV.]

and "subscription capital" was defined as meaning "the temporary subscription capital actually paid up by the shareholders."

The other clauses of the articles of association, which are material, were as follows:

2. The company shall consist of two classes of members, namely, the shareholders and assurance members for the time being, so long as there shall be any shareholders, and afterwards of the assurance members for the time being only, and the directors shall cause a register of the members of the company (both shareholders and assurance members) to be kept in one or more books, in accordance with the Companies Act 1862, sect. 25, and the other requirements of the statutes.

5. The subscription capital shall be the sum of 50,000*l.*, subject to be increased as hereinafter mentioned, and shall be divisible into 5000 shares of 10*l.* each, and shall be subject to be paid off as hereinafter provided, and in the meantime shall be deemed a "guarantee fund," over and above the accumulations from or in respect of profits, and the amount of all the subscription capital from time to time actually paid up shall be carried to a distinct account, and be called the "guarantee fund."

11. The general funds of the company other than the "subscription capital" shall be called the "assurance fund," and shall consist of all premiums, fines, and other moneys to be received by the company in respect of policies of assurance, annuities, or endowments originally granted or undertaken by the company, and of premiums on the issue, re-issue, or sale of shares in the subscription capital, and of the profits and interest arising from the subscription capital or guarantee fund, and of all bonuses allotted, but payable in reversion with the sum assured, and of all other moneys to be received by the company in the course of their business, and of all accumulations of interest or otherwise, and the assurance fund shall be the fund applicable for the payment of interest on the shares in the subscription capital, and of such other engagements and liabilities of the company as the directors from time to time think fit to pay thereout.

12. . . . The directors shall declare the amount which . . . may (at certain periods) be safely dealt with as net profits of the "assurance fund."

13. The amount of net profits so declared shall be appropriated as follows, viz., one-fourth part thereof among the shareholders (if any), and the three-fourth parts, or the whole (if the subscription capital shall have been paid off) by way of bonus among the holders of such policies issued or undertaken by the company on the terms of participating in profits as shall be subsisting at the period fixed for each periodical account, and on which at least five years' premiums shall be paid in full, according to a calculation to be made by the actuary of the company, either alone or together with such other person or persons as the directors shall appoint, and to be approved by the directors, regard being had to the dates of the policies, the ages of the lives thereby assured, and the other circumstances of the several cases.

14. At any time after it shall have been ascertained on any investigation of the affairs of the company that the amount of net profits standing to the credit of the "assurance fund" is equal to double the amount of the bonuses which will be payable to the shareholders if this clause is acted upon, the directors shall (but not without the previous sanction of an extraordinary general meeting . . .) repay to each shareholder the amount of capital actually paid up, or treated as paid up, in respect of his shares, with a bonus of 50 per cent. on the amount actually paid up, or treated as paid up thereon . . .

15. In case the subscription capital shall be so paid off, the "guarantee fund" shall thereupon be discontinued, and the shareholders shall be discharged, as respects the company, and indemnified by the company, as respects strangers, from all further obligations and liabilities in respect of their shares, and from all the rules and regulations of the company, except as to any past breaches thereof, and the clauses and provisions in these presents contained shall be considered at an end, so far as the same apply to the shareholders. And the balance then standing to the credit of the "assurance fund" shall, together with all accumulations and additions thereto, thenceforth be the only fund for receiving and

paying all moneys in respect of the transactions of the company.

22. . . . An application for shares signed by the applicant, or the payment . . . of the deposit in respect of any shares, shall be deemed to be an acceptance by him of such number of shares . . . as shall be allotted . . . and shall also be deemed to be an agreement on his part to become a member of the company in respect of such shares.

52. An extraordinary general meeting shall be called by the board whenever any members of the company, not less than five in number, holding in the aggregate not less than 500 shares or assurances in the company to the amount of 5000*l.*, or not less than 250 shares, and also assurances to the amount of 2500*l.*, shall deliver to the manager, or secretary, or leave at the chief office, a requisition stating fully the object of the meeting, and signed by the requisitionists.

53. Whenever the board shall neglect for fourteen days after such delivery or leaving of any such requisition, to call a meeting in accordance therewith, the requisitionists or any other members of such number and qualification as aforesaid may call the meeting by notice to the members.

76. On every question to be decided by a poll, every shareholder entitled to vote thereat shall have one vote in respect of his share or shares if not exceeding five, and an additional vote for every five additional shares, but so as not in any case to exceed ten votes in respect of his shares, and every assurance member entitled to vote thereat shall have one vote, if the policy or policies entitling him amount to 100*l.* and do not exceed 500*l.*; two votes if such policy or policies amount to more than 500*l.* and do not exceed 1000*l.*; and three votes if such policy or policies amount to more than 1000*l.*; but no assurance member shall be entitled to vote in respect of any policy until at least two years' premiums have been paid thereon. In the meantime, however, he shall be entitled to be present at general meetings.

80. Whenever the same person shall be both a shareholder and assurance member he shall be entitled to vote in right of his qualification in each of those characters. . . .

91. The qualification of a director shall be his holding in his own right fifty shares or an assurance with the company for the whole term of life in the sum of 1000*l.* or upwards. . . .

92. Every director shall, except as regards the first directors, and except as regards any candidate or candidates who may be recommended by the board for election, have been the holder of his qualifying shares, policy, or policies for at least six months next preceding the day of election.

144. Every policy . . . shall contain a proviso to the effect that it is to take effect and be satisfied only out of the funds and property of the company, and expressly negating any personal liability on the part of the shareholders or other members.

153. No person shall be entitled to be registered as a member of the company in respect of any policy until he shall (if required by the directors so to do) have signed an agreement to become a member of the company. The payment of a premium on a policy which would entitle the holder, if registered, to be an assurance member, shall be deemed to be an agreement to become a member in respect thereof.

The company kept a register containing the list of shareholders in the usual form, and in another book or other books a list of all the policyholders was kept with full particulars respecting them, whether participating in profits or not. The company made a return to the Registrar of Joint-Stock Companies of the shareholders, but not of the assurance members. At the foot of the printed tables of the rate of assurance there was a statement that the company was founded on the purely mutual principle, with a guarantee fund for the security of its members, but that the members had the power to pay it off, after which the company would be entirely mutual, and the whole profits belong to the assured.

Miss Susanna Mary Winstone, in May 1873,

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signed a written proposal for an assurance on her life with the company for 1000*l.*, with profits. At the foot of this proposal were the following words: "And I further agree to execute the articles of association, or any deed of covenant in conformity thereto, when required."

On the 11th June 1873 a policy, executed by the company, but not executed by Miss Winstone, was issued to her, which, so far as material, was as follows:

*Single Life.*

Whereas, Susanna Mary Winstone . . . spinster (hereinafter called the assured) has signed a proposal, dated the 17th May 1873, to become a member of and to effect an assurance with the above-named society in the sum of 1000*l.*, upon the life of herself, for the term of such life, and has delivered to the said society a declaration in writing, dated the 20th May 1873, signed by the said assured, touching the age, health, and other circumstances and habits of life of the said assured, and it has been agreed that such proposal and declaration shall form the basis of the contract between the said assured and the said society. And whereas the said society has agreed to effect the said proposed assurance (subject to such proposal and declaration, and to the stipulations and conditions hereinafter contained and referred to), at the premium of 36*l.* yearly, payable on the 7th June, and has received from the said assured the sum of 36*l.*, as the premium for such assurance up to the 7th June 1874 inclusive. Now, these presents witness that, if the said assured shall die before or upon the 7th June 1874, or if she shall survive that day, and the said assured, or her executors, administrators, or assigns, shall on or before the 7th June in every year, commencing from the said 7th June, during the life of the said assured, pay unto the society at the office of the said society the like annual premium of 36*l.*, then the subscription capital, guarantee and assurance funds, and other property of the said society shall, after proof of the death of the said assured, be subject and liable, according to the provisions of the articles of association, rules and regulations of the said society, to pay to the said assured, her executors, administrators, or assigns, within three calendar months after such satisfactory evidence as provided by the conditions printed on the back hereof shall have been received at the office of the said society, the sum of 1000*l.* of lawful British money, and such further sum or sums (if any) as shall, in pursuance of the said articles of association, rules, and regulations, be appropriated by the way of bonus or addition to this policy. But no member, director, or shareholder of or in the said society, nor his or her heirs, executors, or administrators, shall be in any wise, individually or personally, liable or subject to any claim or demand whatsoever by virtue or in respect of his policy. Provided, nevertheless, that this policy and the assurance hereby made shall be subject and liable to the several terms, conditions, and regulations printed and written on the back hereof, and to the said articles of association, rules, and regulations of the said society, so far as the same can be applicable, in the same manner as if the same were respectively repeated and incorporated in this policy.

Miss Winstone kept up this policy, and paid all premiums in respect thereof up to the 1st March 1878, when a compulsory order was made, on petition, to wind-up the company on the ground of insolvency.

The shareholders having been settled on the list of contributories company, a summons was taken out to settle the assurance members (including Miss Winstone) on such list, and for leave to rectify the register of members of the company by including therein the assurance members whose names had not been registered in accordance with clause 2 of the articles of association. This summons, in the case of Miss Winstone, was adjourned to be heard by Fry, J. in chambers, and by him adjourned into court.

J. H. Boome (Glasses, Q.C. with him) for the official liquidator.—Persons who, like Miss Win-

stone, have taken policies in the company and subscribed the proposal have become assured members of the company, and are liable to be placed on the list of contributories. The fact that the names of such assured members have not been placed on the register of shareholders makes no difference. The register can be rectified under sect. 35 of the Companies Act 1862. This can be done whether the company is limited or unlimited:

*Portal v. Emmens*, 34 L. T. Rep. N. S. 318; 35 L. T. Rep. N. S. 882; L. Rep. 1 C. P. Div. 201, 664.

Under sect. 11 of the Companies Act the memorandum of association when registered binds the company and the members as if each member had executed it, and thereby covenanted to observe all its conditions. In *Re The English and Irish Church and University Assurance Society* (8 L. T. Rep. N. S. 724; 1 Hem. & Mil. 85) it was held that the policy-holders who participated in profits were not liable as partners; but in that case the amount of the bonuses was dependent on the decision of the shareholders. [Fry, J. referred to *Re Professional Life Assurance Company* (17 L. T. Rep. N. S. 631; L. Rep. 3 Eq. 668; 1b. 3 Ch. App. 167.) That case is distinguishable, for here the members have the right of voting and the entire control and management of the company.

*Higgins, Q.C. and W. Hatfield Green*, for certain persons having liberty to attend, referred to the Companies Act 1862, sects. 10, 22, 23, and 38, and to clause 153 of the articles of association.

*Fischer, Q.C. and Hadley*, for Miss Winstone, contended that she was not liable, and cited

The Companies Act 1862, sects. 11, 12, 14, 25, 26, 27, 35, 38;

*Ashbury Company v. Riche*, 33 L. T. Rep. N. S. 450; L. Rep. 7 E. & L. App. 653;

*Druke's case*, 34 L. T. Rep. N. S. 713; L. Rep. 1 Ch. Div. 620;

*Hutton v. Scarborough Hotel Company*, 12 L. T. Rep. N. S. 228, 289; 2 Dr. & Sm. 514;

*Sichell's case*, 17 L. T. Rep. N. S. 363; L. Rep. 3 Ch. App. 119;

*Lindley on Partnerships*, bk. 1, ch. 1, s. 5.

Their arguments are sufficiently noticed in the judgment.

No reply was called for.

Fry, J.—The question which I have to decide is, whether Miss Winstone is or is not a contributory of the Albion Life Assurance Society, which is being wound-up. The 38th section of the Companies Act 1862 provides that "in the event of a company formed under this Act being wound-up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of contributories among themselves," subject to certain qualifications. If Miss Winstone be liable to contribute to any one of these three matters, and is a member of the company, then she will be a contributory. The question therefore is simply whether she is or is not a member of the company. Now, to answer that question I must go back to the 23rd section of the Act, which contains a definition for the purposes of the Act of members of the company, and it provides that the subscribers of the memorandum of association of the company and "every other person who has agreed to become a member

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of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company." Miss Winstone did not subscribe the memorandum of association, and therefore I have to ask myself with regard to her, first, has she agreed to become a member of the company? and, secondly, is her name entered on the register of members? Now, has she agreed to become a member of the company? That is a question of fact. What she has done is this: On the 1st May 1873 she signed and sent to the company a paper which is called a life proposal, and which is indorsed outside "The Albion Life Assurance Society, on the mutual principle." By that proposal she stated certain particulars with regard to her life, which were important, with a view to the policy intended to be issued. She applied for a policy of 1000*l.* yearly, with profits, and she signed a declaration with regard to the truth of the preceding particulars. It winds up in these words: "I further agree to execute the articles of association or any deed of covenant in conformity thereto when required." It is, in my judgment, impossible to consider that to be anything else than an acquiescence on the part of Miss Winstone in the articles of association of the company. Her proposal was accepted by the society, and accordingly a policy was issued to her, which bears date the 11th June 1873, which describes the society as being on the mutual principle. [His Lordship read the policy.] Upon that policy Miss Winstone has acted in this sense, that she has from the time of its grant down to the winding-up of the company paid the premiums upon the policy. That document, acted upon in that way by her, appears to me to be a second accession by her to the terms of the articles of association of the company. It therefore becomes necessary to consider what those articles are. Now, in the first clause they define "assurance members" and "shareholders." [His Lordship read the first clause of the articles.] The second article then states the classes of members. [His Lordship read the second article.] Nothing can be plainer therefore than the intention that every person holding a policy such as that held by Miss Winstone shall be a member of the company. Then the 13th article provides for the division of the profits of the company in this manner, that one-fourth is to go to the shareholders and three-fourths are to be divided by way of bonus, giving the holder the right to participate in the profits. Then the 76th article gives votes to shareholders and to assurance members. The 80th provides for the case of an assurance member being also a shareholder; and the 153rd article provides that the payment of a premium upon the policy which would entitle the holder, if registered, to be an assurance member, shall be deemed to be an agreement to become a member in respect thereof. Now, looking at the articles of association, and having come to the conclusion I have already expressed, that Miss Winstone had acceded to them, it appears to me impossible to contend that she had not agreed to become an assurance member of the company, and that that proposal on her part had not been accepted by the company. I hold therefore that she had agreed to become a member of the company. The next question arises upon the last words of the 23rd section of the Act, namely, those which require that the person

who is to be a member shall be one whose name is entered on the register of members. It is admitted that Miss Winstone's name was not on the register of members, and if matters rested there of course the definition would not be satisfactory. That appears to me, under the circumstances, immaterial, and for this reason, that the 35th section of the Act gives a power to correct or to rectify the register. The 98th section provides that "as soon as may be after making an order for winding-up the company the court shall settle a list of contributories," which is the very operation I am now concerned in, "with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act." Now, I understand that to refer to the 35th section, and the 35th section requires the rectification of the register "where the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act." It appears to me that in this case, if the name, as I understood was the case, has been omitted from the register, it has been omitted without sufficient cause, and therefore I think it is my duty to require that the register be rectified, if it be necessary. It has been argued before me that this is not a case in which the court ought to or can rectify the register. It is said it is immaterial to the creditors whether the register be rectified or not. I confess I have listened to that argument with some surprise. The authority cited in support of it was *Sichell's case (sup.)*, where the official liquidator of the company *mero motu* applied to substitute A. for B., it not being shown whether A. or B. was the contributory; but that it is immaterial to the creditors whether a contributory is put on, or somebody is put on, in the place of that contributory, seems to me rather a remarkable proposition. The argument has been supported by the observation that Miss Winstone's name has not been returned to the Registrar of Joint Stock Companies. That may well be; yet, if the creditors of the company are entitled to the contribution of the contributory, it cannot be immaterial to them that her name should be left off entirely. It is then said that the policy-holders may have no right against them. That may or may not be the case. That is a point which I cannot now determine. The 98th section requires me to enter Miss Winstone as a contributory if she be liable in respect of any one of the three classes of liabilities to which I have referred. I think therefore this lady in terms satisfies all the definitions of a member contained in the 23rd section of the Act. But then two arguments have been addressed to me—one based upon the memorandum of association, and the other upon the structure of the Act of 1862. The first of those arguments is this, that the articles of association cannot modify or vary the conditions of the memorandum of association, and that the memorandum of association in this case provides, in effect, that the shareholders, and shareholders only, shall be members of the present company. Now, in the first place, in my judgment, the memorandum of association does not say that. The fourth clause of the memorandum says that the liabilities of the members are unlimited. The fifth clause provides that the capital of the company is to be 50,000*l.*, divided into 5000 shares of 10*l.* each, and is totally silent as to who the members are to be. It is said that you may

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infer that the members are to be shareholders only. Why, I do not know. There is the silence of the memorandum and the fact that it is possible that other persons than shareholders may combine to become members of the society. It appears to me that observation is somewhat corroborated by this fact, that the memorandum of association, which defines the objects of the company, mentions as one of the objects the granting of the policy with participation in the profits of the company. It might well be that the participating policy-holder might be intended to be a member, as was in fact the case in this instance. One further observation remains to be made on the argument. The argument has assumed that everything which is in the memorandum of association is immutable. I am not convinced that that is the case, where, as in this instance, the memorandum of association embodies particulars not required by the statute. In the case of an unlimited company such as this is, the statute does not require the amount of capital or the definition of membership to be expressed in the memorandum, and if then we frame the memorandum so to introduce into it particulars not required by the statute, I am not convinced that those particulars are immutable. I may add that the observation of the Master of the Rolls in *Duke's case* (sup.) expresses exactly the same view. For those reasons therefore I think the argument which is based upon the memorandum of association, and the alleged inconsistency between it and the articles of association fails. The next argument is this: it is said that the Act of 1862, although it defines a member in the manner I have pointed out contains other sections which impose a third condition or predicate upon members of an unlimited company where there is a share capital. It is said that the Act contemplates a primary division of companies into limited and unlimited, and a division of the unlimited companies into those which have and those which have not share capital, and that as the result of that it excludes the possibility of a company existing where there is both a share capital and members, who are members, not as shareholders, but in some other character. Now, of course, if I found that prohibition in the Act I should be bound to give effect to it. It is quite true, as has been pointed out, that there are many clauses which provide for the registration of shares, the return of shares, and so forth, where the shareholders are members of a company; but I am bound to say that, having attended to the very able arguments which have been addressed to me, I do not find in the Act anything which is inconsistent with the existence of a company which has both a share capital and members who have constituted themselves such by agreement and who do not hold shares. Now, this observation must also be made on that part of the case. Before the passing of the Act, it appears to me to be incapable of doubt but that a number of persons, might have associated themselves together in a partnership on the terms of certain of them contributing capital of the company, and of others of them being liable to the debts of the partnership, though not contributing to the capital—in other words, that a partnership might have been formed which would have consisted of those persons, holders of shares in the capital, and other persons liable to debts of the partnership, not holders of those shares, and

that such partnership might have been formed to give effect to the scheme of this association, and might have consisted of holders of participating policies who had contracted to become partners and other persons contributing as a guarantee fund, and subscribing on the footing of receiving a share of the profits. That would be perfectly legal. Now, the Act has prohibited the formation, after the passing of the Act, of any association consisting of more than ten persons, for the purpose of carrying on banking, and it has further prohibited the formation of any association consisting of more than twenty persons for the purpose of carrying on any other business than banking, that has for its objects the acquisition of gain to the company, association, or partnership, or by the individual members thereof, unless it be registered under the Act (sect. 4.) In my judgment the scheme of this company would have brought it within the definition of a company which has for its object the acquisition of gain, having regard to the decisions which have been come to on the meaning of the word "gain." The result would be therefore that if this company should have been formed at common law before the passing of the Act, but should not carry on business, except as a registered company, after the passing of the Act, and could not be registered because it had the two classes of members, the Act would be indirectly permitting a species of partnership which was perfectly legitimate before. That is a conclusion which clear words would undoubtedly lead to, if such words had been found, but which, in my judgment, I ought not to arrive at unless the Act is clear in requiring it. Further than that I must add that the 23rd section containing in itself a definition which is intended to be final and conclusive upon a member, I do not think I ought, without being clear upon the general structure of the Act, to add any condition or predicate to the condition and predicate therein expressed. I have already pointed out that I do not find anything which appears to me clear to show that the company cannot be constituted of the two classes of members, and therefore I hold that that argument also fails. The result therefore is, in my judgment, that Miss Winstone was a member of the company, and she therefore is a contributory, and must be placed on the list accordingly, and if necessary the register of members must be amended; but, considering that questions will undoubtedly arise between the two classes of members, I think it desirable that in placing her on the list of contributories it should be indicated that she is placed there in respect of the policy. Probably the better way would be that the chief clerk should, if necessary, divide the list of contributories into three classes—those coming there as shareholders, those who are there as holders of policies, and those who are there in both characters. The costs will come out of the estate.

Solicitor for the official liquidator, *G. Blagden*.

Solicitors for Miss Winstone, *Randall and Augier*.

Solicitors for other parties, *V. I. Chamberlain, W. H. Bennett, H. W. Woodforde*.

QUEEN'S BENCH DIVISION.

Tuesday, April 1.

(Before COCKBURN, C.J. and MELLOR, J.)

COLLINS v. THE VESTRY OF PADDINGTON. (a)

*Metropolis Local Management Act (18 & 19 Vict. c. 120), sects. 125-127—Vestry, duty of, to remove rubbish—"Rubbish" and "refuse," what—Tots—Construction of contract.*

*A vestry is only bound under sects. 125 to 127 of the Metropolis Local Management Act to remove such things as are or might be injurious to the health of the inhabitants. The vestry of P. sold to the plaintiff "all the breeze, dust, cinders, ashes, dirt, offal, garbage, filth, and refuse, which shall be collected and received by them within the parish of P. during one year" to be collected by the vestry and delivered to plaintiff. During the collection the servants of the vestry appropriated various articles called "tots" which had been thrown into the dust-bins by the owners, in order to be got rid of. The plaintiff now claimed damages under his contract for the value of the tots so appropriated.*

*Held, that the plaintiff could not recover, as the terms of the contract applied only to such refuse as the vestry were bound to remove under the Act. That there was no duty cast upon the vestry to remove "tots," but only such things as might be injurious to health.*

*This was a special case stated by an arbitrator.*

CASE.

1. On the 15th Feb. 1876 the plaintiff entered into a contract with the defendant, of which the following are the material portions :

Whereas the vestry have offered to sell and dispose of all the breeze, dust, cinders, ashes, dirt, offal, garbage, filth, and refuse, which shall be collected and received by them, their contractors, agents, and servants, within the parish of Paddington during the period of one year to be computed from the 25th day of March 1876 unto Edward Collins for the sum of sixpence for every cart load of such breeze, dust, cinders, ashes, dirt, offal, garbage, and refuse, and the said Edward Collins has accepted such offer, and agreed to purchase and take the said breeze, dust, cinders, ashes, dirt, offal, garbage, and refuse, at such price accordingly . . . . Now, therefore, these presents witness that . . . the said vestry do hereby bargain and sell unto the said Edward Collins, his executors and administrators, all and every part of the said breeze, dust, cinders, ashes, dirt, offal, garbage, filth, and refuse, which shall and may during the period of twelve calendar months to be computed from the 25th day of March 1876 be collected, gathered, and received by the said vestry, or their contractors, servants, and agents, from all and every the houses and other premises situate and being in all and every of the roads, squares, streets, lanes, courts, mews, and other places within the said parish of Paddington. And the said vestry . . . do hereby, as far as they lawfully can or may covenant with the said Edward Collins, his executors and administrators, that the said vestry will, at their own expense, deliver and deposit the said breeze, dust, cinders, ashes, dirt, offal, garbage, filth, and refuse in, to, or upon the brickfield belonging to the said Edward Collins, situate and being in Wood-lane, Shepherd's Bush . . . in such quantities and on such days in every week (Sundays excepted), and at such seasonable times in the daytime as the said vestry . . . may think fit.

2. The deed contained covenants on the part of the said Edward Collins for the payment of the amounts to become due in respect of the deliveries of dust, &c., the accounts to be adjusted on the footing of a payment by him of sixpence a load.

3. Either party is to be at liberty to refer to

(a) Reported by A. H. POSEY, Esq., Barrister-at-Law.

the contract itself, but it is not necessary to set out any more of it.

4. The manner in which the dust the subject of contract was collected by the vestry was as follows :

5. In each house or other premises to which this contract refers, there was a receptacle called a dust-bin, into which were put all the ordinary refuse of the house or premises. The vestry sent carts under the charge of their servants to collect the contents of these dust-bins. It was the duty of such servants of the defendants to take the contents of the dust-bins in baskets or otherwise out of the bins and put them into the carts sent by the vestry for the purpose of collection, and as soon as a cart was full to conduct it to the brick-field of the plaintiff in Wood-lane aforesaid.

6. The contents of the dust-bins consisted chiefly of cinders and ashes and the sweepings of houses, but they also contained a number of articles of more or less value thrown away by the occupiers of the houses or their servants or other members of their household and put into the dust-bin for the purpose of being taken away from the premises by the dust carts as refuse and got rid of. The dust heap accumulated in the brick-field would at some time or other be sifted in order to separate the cinders, breeze, and ashes, which are used in brick making. In the course of this process the articles in question, which in the business are known as "tots," are separated, and those of the same kind being collected together are saleable, and upon a large contract like the present the tots are of considerable value. The articles are of a very miscellaneous kind, but amongst the most valuable are broken white glass, bones, articles of iron, lead, and other metals, and knife handles.

7. Throughout the period covered by the contract, the servants of the vestry employed in collecting the contents of the bins were more or less in the habit of picking over the contents of the bins and abstracting portions of the more valuable articles, of putting them into sacks of their own, and of selling the articles so abstracted for their own benefit. This process of selection was generally (though not exclusively) carried on upon the premises upon which they entered for the purpose of collecting the contents of the dust-bins, and in these instances the men so acting either took the articles in question from the dust-bin itself or from the baskets used for carrying the refuse from the bins to the carts or as the refuse was in the act of being transferred from the bin to the baskets. They also took such articles from the carts themselves when opportunity offered, and dealt with them in the same manner.

8. The question for the opinion of the court is : whether the plaintiff is entitled to damages for the abstraction under the circumstances mentioned of "tots" by the servants of the vestry.

By 18 & 19 Vict. c. 120 :

Sect. 125. It shall be lawful for every vestry, and they are hereby required to appoint and employ a sufficient number of persons . . . for collecting and removing all dirt, ashes, rubbish, ice, snow, and filth, and for the cleansing out and emptying of privies and cess-pools, sewers and drains . . . within their parish.

Sect. 126. Any occupier of any house or land, or other person, who refuses or does not permit any soil, dirt,

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ashes or filth to be taken away by the scavengers shall forfeit and pay a sum not exceeding five pounds.

Sect. 127. All dirt, dust, night soil, ashes and rubbish collected as aforesaid shall be the property of such vestry, and such vestry shall have full power to sell and dispose of the same for the purposes of this Act as they shall think proper, and the person purchasing shall have full power to take, carry away, and dispose of the same, for his own use.

*Croome (Digby Seymour, Q.C. with him) for the plaintiff.*—Under the terms of this contract the plaintiff is entitled to recover for these tots—he was bound to remove all “rubbish” that was thrown into the dust-bins, which then became his property. The vestry had sold all “rubbish,” and that would include any property abandoned by the owner as valueless; articles so abandoned were called “tots.” They would therefore be included in the contract, and the plaintiff is entitled to have them or their value. *Filbey v. Combe* (2 M. and W. 677.)

*Harrison, Q.C. (J. Robins with him).*—The vestry have only contracted to sell that which by the terms of 18 & 19 Vict. c. 120, they were bound to collect, and by the sections of that Act they were only bound to collect such refuse as might be injurious to health; the word “rubbish” only applies to such things as are *ejusdem generis*, with soil, dirt, ashes and filth, with which it is connected both in the Act and in the contract:

*Law v. Dodd*, 1 Ex. 845, 10 L. T. Rep. O. S. 286.

*COCKBURN, C.J.*—Our judgment must be in favour of the defendants. In the first place it is necessary for us to consider what duty is imposed upon the vestry by the 125th, 126th, and 127th sections of the Metropolis Local Management Act. I think that what was intended by the Legislature will at once suggest itself to everyone's mind, since the sections do not refer to the convenience of each householder, but to sanitary considerations and sanitary considerations alone. They are to remove filth, garbage, and other things which are refuse in that sense, and which might be injurious to health, but because it is their statutory duty to collect and remove such refuse which finds its way properly into the dustbins, it by no means follows that they are bound to take away that which comes into the dust-bins improperly, and which is not within the scope of the Act. The words in the three sections to which I have referred are curiously changed, for in the first of the three they are “dirt, ashes, rubbish, ice, snow, and filth.” Now the word rubbish there gives us a key to what the Legislature meant; it clearly has no reference to anything of the kind which is the subject-matter of this discussion; but by rubbish in this section is meant anything of the same description as the words with which it is coupled, which apply to things that would be mischievous to remain in a house with a view to the sanitary conditions of that house, or of the neighbourhood, but not things which it would be merely convenient for the householder to get rid of. In the next section the word rubbish is omitted, which shows that ashes, and filth, and things *ejusdem generis* were alone contemplated by the Legislature. In the 127th section the words are “dirt, dust, night soil, ashes, and rubbish,” where the word rubbish is again used in connection with words of a similar description to those in the preceding sections. The duty of the vestry therefore is to remove anything which might be injurious from

a sanitary point of view. Now I think we must construe this contract in accordance with the duty cast on the vestry by the statute, and as co-extensive with that duty, and the words of the contract will bear that construction. When we look at the words *in extenso* we find they are “breeze, dust, cinders, ashes, dirt, offal, garbage, filth and refuse,” but not one of these words is applicable to these “tots.” Mr. Croome contends that they would be included in the term “refuse,” but it seems to me that that word must be interpreted by those that have gone before, and by the duty it was evidently the intention of the Legislature to cast upon the vestry. I do not think that it is the duty of the vestry to take away everything which gets into the dust-bin; it may be very convenient to get rid of old shoes, bits of tin and broken bottles, but these are not things which the vestry are bound to remove. The scavenger may have no objection to take these things away and dispose of them on his own account, but in so doing he is not acting as a servant of the vestry, but to oblige the householder and for his own profit. It is not incumbent on the vestry to take them away, and they do not therefore, in my opinion, come within the terms of the contract.

*MELLOR, J.*—I am of the same opinion. I have had very great difficulty in coming to a conclusion upon this point, but I think that the interpretation put upon this Act by my Lord is the only one we can safely adopt. If the plaintiff's contention were right, a dust-bin might become the receptacle for old shoes and broken bottles, and other articles of that description which it was clearly never contemplated that the vestry should be bound to remove. But no real difficulty arises in disposing of things of this nature, as the collectors are generally willing to take them and dispose of them for what they are worth. I can see no other method of interpreting this contract which so thoroughly reconciles all points at issue as that of my Lord. I do therefore *ex animo* adopt the views he propounds.

*Judgment for the defendants.*

Solicitor for plaintiff, *Macmullen*.

Solicitor for Defendants, *J. H. Horton*.

*Saturday, May 17.*

(Before COCKBURN, C.J.)

THE GUARDIANS OF THE CLUTTON UNION v.  
POINTING. (a)

*Public Health Act 1875 (38 & 39 Vict. c. 55) ss. 35, 39—New building—“Sufficient” privy accommodation—One privy for two houses.*

*The 35th section of the Public Health Act 1875 does not require a separate water-closet, earth-closet, or privy for every newly-built house.*

*The respondent had pulled down two cottages and entirely rebuilt them, erecting one new privy for the use of both cottages. He was charged under sect. 35 of the Public Health Act 1875, with not providing sufficient privy accommodation for one of the cottages.*

*The justices were of opinion that the accommodation was sufficient, and dismissed the information. The sessions confirmed this decision.*

(a) Reported by A. H. FOSBER, Esq., Barrister-at-Law.



Q.B. Div.]

THE GUARDIANS OF THE CLUTTON UNION v. POINTING.

[Q.B. Div.]

*Held (upon appeal), that the justices were right, as sect. 35 of the Act had been sufficiently complied with.*

THIS was a special case stated by the justices assembled at and for the Court of Quarter Sessions, in and for the county of Somerset, holden at Wells, on the 15th Oct. 1878.

1. The appellants are the guardians of the poor of the Clutton Union, being the local authority for the said union.

2. The respondent is a person who has caused two cottages within such district, which have been pulled down to the ground there, to be rebuilt.

3. The said two cottages are in the same ownership, and are rebuilt adjoining one another, and are semi-detached.

4. When the respondent rebuilt the said cottages an old privy in a garden at the back of the said cottages was discarded; such privy had hitherto been used in common by the occupiers of the said cottages.

5. The respondent on rebuilding the cottages, built a new privy to be used in common by the occupiers of both cottages on the spot indicated on the plan annexed hereto.

6. The two cottages are let to, and are occupied by different tenants—John Price occupying one and Charles Price the other, and each tenant has the right to use in common with the other tenant the new privy.

7. The new privy afforded, and is capable of affording, sufficient accommodation to the occupiers of the cottages, using the same in common as aforesaid.

8. The appellants summoned the respondent before the justices at petty sessions, on the complaint that he being the owner did cause to be rebuilt from the ground floor a certain house in the occupation of John Price, without a sufficient water-closet, earth closet, or privy, contrary to the provisions in that behalf of the Public Health Act 1875.

9. The complaint was dismissed by such justices, and thereupon an appeal was brought to quarter sessions.

10. The appellants contended (*inter alia*) that sect. 35 of the Public Health Act 1875 requires that every house pulled down to or below the ground floor shall have a separate sufficient water-closet, earth-closet, or privy.

11. The respondent, on the other hand, contended that the above section did not require him on rebuilding, as aforesaid, to provide a separate water-closet, earth-closet, or privy for each house, but that the requirements of the section had been met by providing sufficient accommodation in one privy for the use of the occupiers of the two houses.

The Court of Quarter Sessions dismissed the appeal with costs, subject to the opinion of the Queen's Bench Division upon the above contentions.

If that of the appellant is right, then the order of sessions to be quashed.

By 38 & 39 Vict. c. 55, s. 35,

It shall not be lawful newly to erect any house, or to rebuild any house pulled down to or below the ground floor, without a sufficient water-closet, earth-closet, or privy, and an ashpit furnished with proper doors and coverings. Any person who causes any house to be erected or rebuilt in contravention of this enactment shall be liable to a penalty not exceeding twenty pounds.

# Sect. 36 :

If a house within the district of a local authority appears to such authority by the report of their surveyor or inspector of nuisances to be without a sufficient water-closet, earth-closet, or privy, and an ashpit furnished with proper doors and coverings, the local authority shall, by written notice, require the owner or occupier of the house within a reasonable time therein specified to provide a sufficient water-closet, earth-closet, or privy . . . as the case may require. If such notice is not complied with, the authority may do the work and charge for it. Provided that where a water-closet, earth-closet, or privy has been, &c., used in common by the inmates of two or more houses, or if, in the opinion of the local authority, a water-closet, earth-closet, or privy may be so used, they need not require the same to be provided for each house.

*Poole* for the respondent.—The justices have determined that in this case there is sufficient accommodation. The 35th section of the Act is fully complied with. There is nothing in the section which requires that every house should have a separate privy or water-closet.

*Charles, Q.C. (Vigor with him)* for the appellants.—Sects. 35 and 36 must be read together. The local authority and they alone are to decide what accommodation is to be sufficient. [COCKBURN, C.J.—The local authority is not introduced at all in sect. 35.] The 36th section explains the 35th, which must apply to a water-closet sufficient for each house, and therefore separate.

COCKBURN, C.J.—I think the order of sessions which rejected this appeal must be affirmed, and the 35th & 36th sections of this Act are, in my opinion, entirely distinct, and with specific objects of an entirely different character. The 35th section relates to the building and rebuilding of houses without a sufficient water-closet or privy, and imposes a penalty for contravening the section, once and for all. If the justices find that there is not a sufficient water-closet accommodation they may impose a penalty not exceeding 20*l.*, and the builder cannot be charged again for that offence. In section 36 there is no reference to a penalty at all, but certain powers are given to the local authority which they may exercise, whether the owner has been fined or not, "if it appears to the local authority by the request of their surveyor that there is not sufficient water-closet accommodation. And if the owner neglects to provide such accommodation" the local authority may do the work themselves, and charge the owner with it. The two sections are entirely distinct, giving different powers; one relates to the act of building, the other to the condition of the premises. I cannot see my way to the conclusion that the Legislature intended that there must be a separate water-closet attached to each particular house. It would have been so easy to insert a word which would have given so obvious a meaning to the section, and finding no such word I feel bound to assume such a construction was not intended. The justices are of opinion that in this case there is sufficient water-closet accommodation, and as this is a penal clause which must be construed strictly, and into which, therefore, we cannot import words or a word which would considerably extend its operation, the decision of the justices must be affirmed.

MANISTY, J. concurred.

*Order of sessions affirmed.*

Solicitors: For the appellants, *Nutt and Savery*, for *Perrin*, Bristol; for the respondent, *Clifton*.



EX. DIV.] THE WARWICK, &amp; C., NAVIGATION v. THE BIRMINGHAM CANAL NAVIGATION, &amp; C. [EX. DIV.]

## EXCHEQUER DIVISION.

June 16, 17, and 18.

(Before KELLY, C.B., POLLOCK, B., and HAWKINS, J.)

Re AN APPLICATION OF THE COMPANY OF PROPRIETORS OF THE WARWICK AND BIRMINGHAM CANAL NAVIGATION AND THE COMPANY OF PROPRIETORS OF THE WARWICK AND NAPTON CANAL NAVIGATION v. THE COMPANY OF PROPRIETORS OF THE BIRMINGHAM CANAL NAVIGATION AND OTHERS. (a)

*Railway and canal traffic—Regulation of Railways Act of 1878—Jurisdiction of commissioners to alter tolls fixed by Act of Parliament by the imposition of a through rate—Absence of party interested in the proceedings—Prohibition.*

Certain canal companies whose canals formed an intermediate link in a large system of canals, applied to the Railway Commissioners under the provisions of the Regulation of Railways Act 1873 for the establishment of through rates or tolls for the carriage of goods over the whole system. The application was opposed by one of the canal companies forming the system, on the ground that, by an Act of Parliament of 1846, confirming an arrangement between the canal company and a railway company, the former was not entitled to take tolls lower than a certain amount in respect of traffic carried by them; while the railway company guaranteed to them a minimum dividend of a certain amount on their capital. The through rates applied for would have reduced the said canal company's tolls below the amount stipulated by the statutory arrangement. The railway company was not properly summoned, and did not appear before the commissioners. The commissioners made the order for through rates applied for. On an application by the railway company and the canal company for a writ of prohibition to prevent their enforcing the said order:

*Held*, that the commissioners had no jurisdiction to make an order which would have the effect of overriding or repealing the provisions of the arrangement Act; and, per Kelly, C.B., that they were not entitled to exercise that jurisdiction if they possessed it, in the absence of a party interested in the question to be determined by them.

A RULE nisi had been obtained for a writ of prohibition to the Railway Commissioners to restrain them from enforcing a certain order made by them under the following circumstances.

The several canal companies who were parties to the proceedings before the commissioners are the proprietors of various canals which together form a system of navigation connecting the coal and iron districts to the north-west of Birmingham with the metropolis. The Birmingham Canal Navigation Company are the proprietors of a network of canals lying principally to the north-west of Birmingham, connecting the various parts of the said districts with each other and with Birmingham, and forming, so to speak, the north-western terminus of the above-mentioned system. The Warwick and Birmingham and Warwick and Napton Canal Companies, which are jointly worked by the same engineer and manager, and acted conjointly in these proceedings, are the proprietors of canals connected, at their north-

western extremity, with the Birmingham canal and running from the point of junction in a south-easterly direction to Napton, whence they are ultimately connected with the Grand Junction Canal, and so with London. These Warwick canal companies are thus the proprietors of an intermediate link in the Birmingham and London system. The Warwick and Birmingham and Warwick and Napton Canal Companies, by notices in writing, pursuant to sect. 11 of the Regulation of Railways Act of 1873 (36 & 37 Vict. c. 43), proposed certain through rates or tolls for traffic passing over the canal system between Birmingham and London, and a certain apportionment of such rates or tolls among the various canal companies interested.

Sect. 11 of the Regulation of Railways Act, so far as it is material to this question, is as follows:

Whereas by sect. 2 of the Railway and Canal Traffic Act 1854, it is enacted that every railway company and canal company and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivery of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, &c. . . . And every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway, and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, &c. . . . so that no obstruction may be offered to the public desirous of using such railways or canals, or railways and canals, as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf.

And whereas it is expedient to explain and amend the said enactment: Be it therefore enacted that,

Subject as hereinafter mentioned, the said facilities so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding, and delivering by every railway company and canal company, and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls, or fares (in this Act referred to as through rates).

Provided as follows:

1. The company requiring the traffic to be forwarded shall give written notice of the proposed through rate to each forwarding company, stating both its amount and its apportionment, and the route by which the traffic is proposed to be forwarded.

2. Each forwarding company shall within the prescribed period after the receipt of such notice, by written notice inform the company requiring the traffic to be forwarded whether they agree to the rate and route; and, if they object to either, the grounds of the objection.

3. If at the expiration of the prescribed period no such objection has been sent by any forwarding company, the rate shall come into operation at such expiration.

4. If an objection to the rate or route has been sent within the prescribed period, the matter shall be referred to the commissioners for their decision.

5. If an objection be made to the granting of the rate or to the route, the commissioners shall consider whether the granting of the rate is a due and reasonable facility in the interest of the public, and whether having regard to the circumstances the route proposed is a reasonable route, and shall allow or refuse the rate accordingly.

The 12th section is as follows:

Subject to the provisions in the last preceding section contained the commissioners shall have full power to decide that any proposed through rate is due and reasonable, notwithstanding that a less amount may be allotted

(a) Reported by W. WILLS, Esq., Barrister-at-Law.

## EX. DIV.] THE WARWICK &amp; C., NAVIGATION v. THE BIRMINGHAM CANAL NAVIGATION, &amp; C. [EX. DIV.]

to any forwarding company out of such through rate than the maximum rate such company is entitled to charge, and to allow and apportion such through rate accordingly.

The Birmingham Canal Company and certain other canal companies, all connected with the said system, objected to the proposed through rate or toll, and to the proposed apportionment of the same, and duly gave notice of their objections. The matter was accordingly referred to the commissioners, who, after having considered the same on the 20th June 1877, gave judgment ordering that the proposed through rate and apportionment (with certain modifications) should be adopted and come into force. The Birmingham Canal Company, being dissatisfied with the order of the commissioners, applied to them to have a case stated on certain points of law for the opinion of a superior court; and the commissioners accordingly stated a case for the opinion of the court.

The canal company, however, being dissatisfied with the statement of the case, determined to move this court for a writ of prohibition to restrain the commissioners from enforcing, or in any way proceeding on their order, or so much of it as related to that company, and accordingly on the 22nd Feb. 1878,

*H. Matthews, Q.C.* (for the Birmingham Canal Company) moved the court for a rule *nisi* for a writ of prohibition, on the grounds, amongst others, that in 1846, after the railway system between London and Birmingham had come into operation, an Act was passed (9 & 10 Vict. c. 244), by which an arrangement was sanctioned between the London and North-Western (then the London and Birmingham) Railway Company and the Birmingham Canal Navigation Company, which arrangement provided that the railway company should guarantee to the canal company a dividend of 4 per cent. on the share capital as it then stood of the latter company, in consideration of which the railway company had under the Act the power to appoint five members to the committee of management of the canal company, and further provided that "the several and respective powers, authorities, acts, matters, and things respectively mentioned or referred to in this present clause or provision shall not be exercised, acted on, done, or performed by the Birmingham Canal Company without in each case the previous consent of the London and Birmingham Railway Company," following which was the provision that "the canal company shall not hereafter, without such consent, make any order to reduce, advance, or otherwise vary all or any of the tolls, rates, or dues for the time being payable or to become payable under the recited Acts, any or either of them, or otherwise howsoever upon or in respect of the canals and other works of the said company, or the use or enjoyment thereof respectively, within the respective powers for those purposes which are or for the time being shall be subsisting, nor without the like consent enter into any arrangement or agreement which now is or for the time being shall be subsisting," &c. A subsequent section provided that the said consent should be given in writing in one of certain specified modes. The order of the commissioners had the effect of reducing very considerably the tolls of the Birmingham Canal Company, and it was stated, as the fact was, that not only was the consent of the London and North-Western Railway

Company never given, but it was never applied for, and they were not present before the commissioners, having objected altogether to the jurisdiction of the commissioners in the matter; and it was argued that the Birmingham Canal Company had no power to reduce its tolls, the railway company refusing to consent; and that the railway commissioners in such case could not compel the canal company to come in and consent to accept other and different rates than those they were charging; and that they could not in any case have acted without the railway company being consulted or heard upon the matter; that such an order was an excess of their statutory powers, and would amount to a repeal of the arrangement act between the companies. The commissioners could only impose such terms on any companies "according to their respective powers" (see sect. 11 of the Act of 1873), and here there was by statute no independent power in the canal company to vary their tolls; they could only do it under certain conditions, with the consent of the railway company, which had not been obtained.

A rule *nisi* was granted accordingly, and a similar rule was also granted on the application of *W. G. Harrison, Q.C.* on behalf of the London and North-Western Railway Company.

It appeared that the London and North-Western Railway Company had not been properly served with notice of the application for the through rate, and they were not summoned, nor did they appear before the commissioners.

*Alfred Wills, Q.C., Pember, Q.C., and Webster, Q.C.* for the applicant companies; and *Sir J. Holker* (Attorney-General) and *Potter* for the Railway Commissioners, showed cause against the rule.

*Matthews, Q.C., Sir H. James, Q.C., and Jelf,* for the Birmingham Canal Navigation; and *Pope, Q.C., Harrison, Q.C., and E. S. Wright* for the London and North-Western Railway Company, supported the rule.

*KELLY, C.B.*—It appears that there are a number of canal companies whose canals stretch from the north-west of Birmingham or Wolverhampton to the river Thames in London, and which have certain interests in the traffic passing between those extremities. Two of these companies, the Warwick and Birmingham and Warwick and Napton Companies, considering it to their own advantage, and possibly to that of the other companies and of the public, that a through rate should be established by the Railway Commissioners, make their application to the commissioners. Thereupon all the companies interested in the canals along this route appear in due course before the commissioners; but the London and North-Western Railway Company, which is also interested in the question, is not called on by them to appear, and does not in fact come before them. The commissioners are thereupon called on to determine whether it is expedient, and whether it is a reasonable facility for the public and just as between these several companies that such a through rate shall be established. One of the companies which appear before them to oppose the application, the Birmingham Canal Navigation Company, being well acquainted with the arrangement existing between itself and the London and North-Western Railway Company, brings the same fully and in detail before the commissioners. The effect of that arrangement, effected by a public

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Act of Parliament passed in 1846, is this—that the Birmingham Canal Company had no power whatever to be a party to any measure which would have the effect of lowering their rates, and that that company is disqualified altogether from giving any consent or withdrawing any objection, or in fact in any way dealing with the question of whether an Act should be done, which might have the effect of very considerably interfering with the canal and diminishing its profits; they had no power to consent or to be parties to any measure for diminishing the profits of their canal, and therefore had no power to consent to such a measure as that which has resulted in the order made on them by the commissioners, since by Act of Parliament they were forbidden to give their consent. But, further, under this arrangement not only have the Birmingham Canal Company no power to consent to any measure which will have the effect of thus diminishing their annual profits or their annual income arising from their rates, but the railway company have in explicit terms, in this Act, guaranteed 4 per cent. on their capital as long as the arrangement should subsist between them. Therefore, if this order be carried into effect, and if it should chance to happen that it causes a reduction of the annual profits of this company not only below what they may have heretofore amounted to and may now amount to, but below the 4 per cent. guaranteed by the London and North-Western Railway Company, the effect will be that the latter must for all time make good the amount of that dividend of 4 per cent. Now, when the commissioners became aware of this arrangement, which altogether disqualified the Birmingham Canal Company from giving any consent or withdrawing any objection or otherwise dealing with the question, I consider that it was their duty in law and in equity to say that there was a party not then before the court just as deeply interested, if not more deeply interested than any other of these companies in the question of the establishment of these through rates, and to summon that party to appear before them. I think they were bound under the circumstances to cause notice to be given to the London and North-Western Railway Company to appear before them, so that that might have been urged by their counsel before the commissioners on their behalf, which has satisfied me that this order ought never to have been made, and which might have convinced the Railway Commissioners that not only would it be unjust to make this order, but that they had no power to make it. For what is the effect of this order if it is to stand? It sets aside at once an agreement entered into in the most solemn form and sanctioned by Parliament, as if it had never been made, or as if the railway company had under their seal, or in one of the other ways provided, sanctioned the new state of things. What power have the railway commissioners to do that? to break, or to set aside, or to set at naught an agreement for valuable consideration, deliberately entered into between these companies? They have none. If they had had such power it could not at least have been exercised without having both companies before them and hearing the objections of the railway company. Again, if this order be enforced, and if it should have the effect of reducing the profits of the canal company below the 4 per cent. guaranteed them by the railway company, the latter would be obliged

so long as that order was in force with that effect, to make good to the canal company its dividend of 4 per cent. What power have the Railway Commissioners to make such an order? I do not say—for we are not now called on to determine any such question—that if the London and North-Western Railway Company had been before them, and the whole of the facts before them, I do not say whether they would or would not have had jurisdiction to make this order on certain conditions. They might have said “We will make this order if the companies who desire the order will obtain the consent of the canal company to discharge the guarantee of the railway company.” But what they have done is this: with a full knowledge of all the circumstances and of the injurious consequences that may result to the railway company, they have made this order, which would have the effect I have described. It is not indeed necessary to decide as to what the exact powers of the Railway Commissioners would have been in dealing with this question had they had the railway company before them; it is quite sufficient to say that with full knowledge of the rights and claims of that body to be heard and to have their case fully considered before the order in question was pronounced, without calling that company before them, and without entering into any question of their rights and claims and liabilities, they made this order against law, against justice, and without jurisdiction. I think therefore that the writ of prohibition must be issued.

POLLOCK, B.—The Railway Commissioners have found that the through rate applied for in this case is a due and reasonable facility in the interests of the public, and they have granted and allowed the several rates and through rates. The finding of the commissioners in this respect is one strictly within their jurisdiction, and we have no right to express an opinion on it. But in dealing with this question they have had to deal with the Birmingham Canal Company, which is one link in this chain of canals, and have allowed to that company certain rates in respect of the through traffic. The question that has come before us is whether they have any power or jurisdiction to do so. It is contended that they have no power to reduce these rates, inasmuch as they are governed by a previous Act of Parliament passed in 1846, which was the joint act of the then London and Birmingham Railway Company and the Birmingham Canal Company, and that they were under this further disability to deal with the question that the interests of the railway company were not represented before the Railway Commissioners. To refer to the history of legislation on this subject, the first Act, that of 1854, contained provisions for the receiving and forwarding of goods by companies forming part of a continuous line of railway or canal communication. I am clearly of opinion that if any company had been called on to do some act under that provision of the statute, and had declined to do it, and then an application had been made to the court, that the company against which that application was made would have had a perfect answer if they had shown that what they were called on to do was not within their powers. This section, which is recited in the Act of 1873, contains indeed words to that very effect. The establishment of through rates is first dealt with by the Act of 1873; but there is no power given to any person

merely as a member of the public or as one of the carrying customers of the railway or canal to make any application whatever to the Railway Commissioners to enforce through rates upon a line of railway (see sect. 11 of that Act, sub-sects. 1, 2, and 5). From these sections it appears that all the power they have is to consider when a proposal has been made by one company and rejected by another whether that which is proposed is a due and reasonable facility in the interest of the public. Then we further infer the right limitation of their powers from sect. 13. By that section power is given to them to reduce and deal with the rate so as to require any or each company respectively to receive something less than their maximum amount. Now, seeing that the authority of the Railway Commissioners is a limited one, and that we do not find them authorised to deal with the rights of third parties, or with statutes that have been passed before, regulating the rights of different railway and canal companies; the very omission of such powers as these is a very strong ground, to my mind, for inferring that it was not the intention of this statute to give the power that is asked for by those who have been heard in support of the Railway Commissioners' order in this case. I do not think that it was ever intended to create a tribunal with such wide powers as those contended for. By the Act of 1846, passed on the joint application of the Birmingham Canal Company and the London and North-Western Railway Company, an arrangement was sanctioned by Parliament, which regulated the tolls which might be received by the Birmingham Canal Company, and further enacted that these tolls should not be varied or diminished except with the solemn consent of the railway company given in prescribed form; and by sect. 28 it was further enacted, in case at any future time the arrangement should become prejudicial to the interests of the public, that the Board of Trade should have the power to call upon the canal company to apply to Parliament to amend the Act. Now, I cannot discover in the Act of 1873, nor indeed in any of the statutes which preceded it and dealt with this subject-matter, any power whatever generally or specially expressed, to deal with such an arrangement as this sanctioned by Parliament in previous years, and I cannot conceive anything more inequitable than that the Railway Commissioners should be able to make such an order as they have made here, and yet not deal with or call before them parties whose interests would be largely affected financially by such an order. There is no decision governing this case; but there is a somewhat analogous case of *Re Toomer v. The London, Chatham, and Dover and South-Eastern Railway Companies* (2 Ex. Div. 450). Upon the grounds I have stated, I think this order, so far as it affects the London and North-Western Railway Company, is in excess of the jurisdiction committed to the Railway Commissioners, and inasmuch as the through rate they have sanctioned is an entire matter which cannot be severed, the order, being bad in part, is bad altogether. For these reasons I think the rule must be made absolute.

HAWKINS, J.—The objection made to the order of the commissioners is that the Birmingham Canal Company have no power or authority of their own to alter these tolls, or that it must be done, if at all, by the consent of the

London and North-Western Railway Company, which consent has not been obtained; and that the railway company have not been made parties to these proceedings. By the Arrangement Act of 1846 it is perfectly clear that the Birmingham Canal Company were forbidden, without the consent of the railway company, to make any variation or reduction of their tolls or rates. That being so, the Legislature had it in its power by subsequent enactment to vary those tolls, or to put it in the power of any other person or body of persons to vary them. It is contended that the Act of 1873 vested in the commissioners power to make alterations, though the assent of the railway company were never given at all. Now, the Act of 1854 had in view, among other things, the affording of reasonable facilities in respect of various matters mentioned in the 2nd section, but nothing is said in the Act with regard to through traffic or through tolls or rates. By the Act of 1873, which recites this section of the Act of 1854, provision is made for such through traffic and through rates. Then follows in the sub-sections the machinery for bringing into operation such through rates and tolls. In this case it is conceded that the applicant companies did give the proper notice to the Birmingham Canal Company, but it does not appear that they made the London and North-Western Railway Company a party to the requirement. Now, the words of sub-sect. 2 seem to me to point expressly to cases in which the party required to do the act has the power to do it. It says that they shall be asked whether they agree to the rate and route, and if they object to either, the ground of the objection. I think that a more solid objection could not be made to the requisition to agree to a particular course than this: that the party so required had not the power to do so. That seems to me a conclusive objection. Then comes the 3rd sub-section, the terms of which are most important. Applying this provision to the case before us; assuming that proper notice had been served on the Birmingham Canal Company, and they had simply remained silent, sending in no objection, then, according to this sub-section, the through rate would have come into operation at the expiration of the prescribed period without any order of the commissioners at all. So that by making a mere request to the Birmingham Canal Company to make the through rate the applicant companies would have had power to alter their tolls according to the through rate without any order of the commissioners at all, although it is admitted and is clear that they could not assent to its being altered. Again, the words "due and reasonable facility," occurring in sub-sect. 5 must, I think, be construed by reference to the former Act of 1854, which says that the companies shall afford all reasonable facilities "according to their respective powers." The short ground, therefore, on which I base my judgment is this: that the railway commissioners have by their order virtually ordered the Birmingham Canal Company to do something which they had no power to do, and which they had no power to agree to without the sanction and consent of the London and North-Western Railway Company.

*Rule absolute, with costs against applicant companies.*

[Ex. Div.]

LEFTLY v. MONNINGTON.

[Ex. Div.]

Solicitors for the Warwick Canal Companies, Taylor, Hoare, and Taylor, for H. C. Heath, Birmingham.

Solicitors for the Railway Commissioners, Hare and Fell, for Solicitor to the Treasury.

Solicitors for the Birmingham Canal Navigation, Tucker and Lake, for Wragge, Evans, and Co., Birmingham.

Solicitor for the London and North-Western Railway Company, B. F. Roberts.

Thursday, July 3.

(Before KELLY, C.B. and STEPHENS, J.)

LEFTLY v. MONNINGTON. (a)

*Churchwarden — Vestrymen — Bankruptcy of Churchwarden — Penalty — Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), ss. 2, 54.*

*Sect. 2 of this Act enacts that the vestry in every parish coming within its operation shall consist of a certain number of persons, qualified and elected as therein provided. . . . Also, that the incumbent and churchwardens of every such parish shall constitute a part of the vestry, and shall vote therein, in addition to the elected vestrymen.*

*Sect. 54 enacts that in case any member of any vestry for any parish to which this Act applies be declared bankrupt . . . in every such case such person shall cease to be such member. . . . And any person who acts as a member of any such vestry, after ceasing to be such member, shall, for every such offence, be liable to a penalty of 50*l.*, which may be recovered by any person who may sue for the same in any of the Superior Courts of law, with full costs of suit.*

*The defendant was, on the 20th Aug. 1878, and for some months prior thereto, a churchwarden of the parish of Plumstead, and, by virtue of his office of churchwarden, and not otherwise, was a part of the vestry of the said parish.*

*On the 14th June 1878 the defendant was adjudged a bankrupt. On the 20th Aug. 1878 the defendant (being still a bankrupt) attended a meeting of the said vestry, and acted at such meeting by voting on a resolution submitted to the said meeting.*

*Held, that the defendant was, by sect. 2, a part of the vestry, and, consequently, a member of it, and that by sect. 54 he ceased to be a member of it on being made bankrupt, and, as he had acted and voted at a meeting of the vestry after ceasing to be a member, he was liable to the penalty of 50*l.**

This was an action to recover a penalty of 50*l.* and full costs of suit, on the ground that the defendant, after being adjudged a bankrupt, voted at a meeting of the parish of Plumstead contrary to the provisions of the Metropolis Local Management Act of 1855 (18 & 19 Vict. c. 120), whereby, in accordance with the provisions of that Act, he became liable for the payment of such penalty, together with full costs of suit. A special case was stated by consent of the parties, in accordance with the provisions of the Judicature Acts. The case was as follows:

On the 20th Aug. 1878, and for some months prior thereto, the defendant was churchwarden of the parish of Plumstead, and, by virtue of his

office of churchwarden, and not otherwise, was a part of the vestry of the said parish.

On the 14th June 1878 the defendant was adjudged a bankrupt.

On the 20th Aug. 1878 the defendant attended a meeting of the said vestry, and acted at such meeting by voting on a resolution submitted to the said meeting.

The 2nd section of the Metropolis Local Management Act 1855 provides that the incumbent and churchwardens of each of the parishes mentioned in the schedules of the Act (of which Plumstead is one) shall constitute a part of the vestry, and vote therein, in addition to the elected vestrymen; and the 54th section of the said Act provides that any member of any vestry for any parish mentioned in the said schedules who shall be declared bankrupt shall thereupon cease to be such member, and shall, if he acts as a member of such vestry after ceasing to be such member as aforesaid, be liable to a penalty of 50*l.*, which may be recovered by any person who may sue for the same, with full costs of suit.

The question for the opinion of the court is, whether the defendant, being a part of the vestry only by virtue of his office of churchwarden, is liable, under the circumstances aforesaid, to pay to the plaintiff the penalty of 50*l.*, with full costs of suit.

Baylis, for the plaintiff, was stopped by the Court.

T. Willis Chitty for the defendant.—There are two classes of persons entitled to act and vote at meetings of the vestry, namely, elected members, who are required to have a certain property qualification, and *ex officio* members, such as the incumbent and churchwardens. The elected members only are subject to the penalty clause of sect. 54, and the Act could never have intended that the *ex officio* members should be subject to this penalty. The incumbent and churchwardens are placed in precisely the same position in this respect, and the Legislature could not have intended that every incumbent in the metropolis should be liable to this penalty. The churchwarden is *ex officio* a part, but not a member, of the vestry; and, therefore, is not within the operation of sect. 54.

KELLY, C.B.—It appears to me that, on a true construction of this Act, there can be no question about the point before us. Is it possible to contend that the incumbent and churchwardens, who, under sect. 2, become a "part" of the vestry, do not become "members" of it? It is clearly impossible; and, passing to sect. 54, we find that, if any member of any vestry for any parish mentioned in the schedules of this Act become bankrupt, he shall cease to be a member; and the section goes on to say that any person who acts as a member of such vestry after ceasing to be such member shall, for every such offence, be liable to a penalty of 50*l.*, which may be recovered by any person who may sue for the same, in any of the Superior Courts of law, with full costs of suit. It seems to me, therefore, that a churchwarden becomes a "part" of the vestry, and so a "member" of it, and, as such, liable to the penalty under sect. 54. Accordingly, the judgment must be for the plaintiff.

STEPHEN, J.—I am of the same opinion. It is exceedingly probable that, when this Act was

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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passed, the Legislature did not contemplate what might happen to incumbents under certain possible circumstances. But, leaving this consideration aside altogether, the question here is, whether a man who is a part of the vestry, and who has a right to vote therein, is or is not a member thereof? A member of a vestry simply means a man who is a part of it and votes in it. This being so, we go on to sect. 54, which declares that any member of a vestry becoming bankrupt shall cease to be such member, and any person ceasing to be such member, and afterwards voting, shall be liable to certain consequences. I am, therefore, of opinion that our judgment in this case ought to be for the plaintiff.

*Judgment for the plaintiff.*

Solicitor for the plaintiff, E. Kimber.

Solicitor for the defendant, T. Kipping.

May 12 and 13.

(Before KELLY, C.B. and POLLOCK, B.)

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*Costs—Claim and counter-claim*—"Action and counter-claim" referred to arbitration—"Costs of the cause and counter-claim to follow the event"—Award in favour of plaintiffs for 371l. of their claim, and of defendants for 375l. of their counter-claim—Award for balance of 4l. to be paid by plaintiffs to defendants—Proper order as to costs in such a case—Judicature Act 1873, sect. 67—Orders XIX., r. 3; XXII., r. 10; XXX., r. 1; and L.V.—County Courts Act 1867 (30 & 31 Vict. c. 142), ss. 5 and 7.

By their statement of claim the plaintiffs claimed (1) 8l. 11s. for goods sold and delivered; (2) 103l. 7s. 9d. for work and labour done and material supplied; and (3), 300l. for making, delivering, and fixing certain machinery, which the plaintiffs agreed to make, deliver, and fix for a certain steam-engine of the defendants on certain terms therein stated; and after giving credit for 7l. odd for goods sold and delivered to them by the defendants, they claimed the sum of 404l. 17s. 9d. and interest at the rate of 5 per cent. till judgment. The defendants by their statement of defence and counter-claim set up as a defence, (1) payment into court of 8l. 11s.; (2), a denial that the work, labour, and materials had been done and supplied, and an allegation that the work had been imperfectly done, and with improper materials; and (3) they counter-claimed for loss of profits of trade accruing and expenses and outlay incurred by reason of the defects in the said machinery supplied by the plaintiffs, and warranted by them to do certain things which it failed to do. Both "the action and counter-claim" were, before trial, referred by the order of a district registrar to an arbitrator, and the order of reference provided that "the costs of the cause and the counter-claim should follow the event," and also that the party or parties in whose favour the award should be made should be at liberty, ten days after service of a copy of the award on the other party, to sign judgment for any sum found due to him or them by the award, and for all costs he or they might

be entitled to under the order of reference and the award, with costs of the judgment.

Before the arbitrator the plaintiffs proved their claim to the extent of 371l., and the defendants their counter-claim to the amount of 375l., and the arbitrator awarded as follows: "I do hereby award that the plaintiffs are entitled to recover from the defendants the sum of 371l. in respect of their claim in this action, and that the defendants are entitled to recover from the plaintiffs the sum of 375l. in respect of their counter-claim, and I hereby award that the plaintiffs do and shall pay to the defendants the balance, that is to say, the sum of 4l. accordingly."

On an application to the district registrar to sign final judgment, he made an order "that judgment be signed in this action and counter-claim for the defendants for the sum of 4l., being the balance directed by the arbitrator to be paid by the plaintiffs to the defendants, and for the costs of the action, counter-claim, and reference to be taxed."

On motion by the defendants to rescind, alter, or vary this order, it was

Held by the Exchequer Division (Kelly, C.B. and Pollock, B.), that the registrar had no authority to make an order giving "the costs of the action" to the defendants, and that the order should be amended by striking out the words relating to the costs, and inserting the following in their place, "The costs of and relating to the plaintiffs' claim and the proof thereof to be paid by the defendants, and the costs of and relating to the defendants counter-claim and the proof thereof to be paid by the plaintiffs."

Staples v. Young (L. Rep. 2 Ex. Div. 324); Blake v. Appleyard (Ib. 3 Ex. Div. 195; 47 L. J. 407, Ex.); Potter v. Chambers (L. Rep. 4 C. P. Div. 69; s. c. in Q. B. 48 L. J. 274, Q. B.); and Davison v. Gray (40 L. T. Rep. N. S. 192) discussed, considered, distinguished, and approved respectively.

This was an appeal from an order of the district registrar of the Bradford Registry directing "judgment to be signed in the action and counter-claim for the defendants for the sum of 4l., being the balance directed by the award of the arbitrator in the action to be paid by the plaintiffs to the defendants, and for costs of the action, counter-claim, and reference to be taxed, and that the costs of and occasioned by this order be costs in the cause."

The action was brought by the plaintiffs to recover a sum of money for work and labour done, and also for a certain machine made and supplied to the defendants, and by their statement of claim the plaintiffs claimed that the following sums of money were due and owing from the defendants to them, viz.: (1) the sum of 8l. 11s. for goods sold and delivered; (2) the sum of 103l. 7s. 9d. for work and labour done and materials supplied at the defendants' request, full and detailed particulars whereof had been delivered to the defendants; and (3) the sum of 300l. for making, delivering, and fixing for the defendants a certain cylinder and connections, and a new fly and spur wheels for a certain steam engine, which the plaintiffs agreed to make and deliver and fix for the defendants at the price of 300l., exclusive of masons', joiners', and plumbers' work; and after giving credit to the defendants for 7l. 1s. 6d. for goods sold and delivered by the defendants to them, the plaintiffs

(a) Reported by HENRY L. LION, Esq., Barrister-at-Law.

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claimed the sum of 404*l.* 17*s.* 9*d.* and interest at 5*l.* per cent. till judgment.

By their statement of defence and counter-claim the defendants (1) brought into court 8*l.* 11*s.* in satisfaction of the first claim of the plaintiffs; (2) they did not admit the claim for work and labour and materials, or that 103*l.* 7*s.* 9*d.*, or any other sum, was due in respect thereof, and alleged that part of the said work and materials was included in the work and materials to be done and provided under the agreement referred to, but not correctly stated in the statement of claim. They then stated the agreement, and alleged that the plaintiffs had not fitted and erected the said cylinder, &c., in a good and substantial and workmanlike manner, or used first-class materials or workmanship, or left the work in good working order, all which it was, by the said agreement, a condition precedent to the payment of the said 300*l.* or any part of it should be the case, and by reason of the defective materials and inferior workmanship, and the condition in which the work was left, the engine very shortly broke down entirely and failed to work.

By way of counter-claim, the defendants set out at length a certain agreement by the plaintiffs to make and fix for the defendants, for the purposes of their mill, with which purposes the plaintiffs were fully acquainted, a cylinder and connections, &c., that the plaintiffs did the work in an unsubstantial, inferior, and unworkmanlike manner, and used inferior materials, not sufficient or fit for the purpose, and failed to use due care and skill in making, fitting, and erecting the said cylinder, in consequence whereof the work broke down, and the defendants' engine was rendered useless and damaged, and the work of their mill and their trade carried on therein stopped, whereby loss of trade profits and in wages of work people accrued and expense in repairing the damage and completing the work which ought to have been completed by the plaintiffs under the said agreement, was incurred by the defendants. The counter-claim then set out in detail the defects in the cylinder, &c., supplied by the plaintiffs, and claimed (1) 480*l.* damages, (2) such further or other relief as the case might require.

The plaintiffs, in reply and defence to the counter-claim, joined issue upon the defence, and alleged that, if the agreement were as stated by the defendants (which the defendants were required to prove), the plaintiffs had complied therewith. And by way of defence to the counter-claim, they repudiated the defendants to prove that the agreement was in the terms stated in the counter-claim, which the plaintiffs did not admit; and they denied various matters alleged in the counter-claim, and said that they had duly carried out and completed all their agreements with the defendants, and that the whole of the work agreed to be done by them for the defendants was done and carried out according to contract, and in a good and substantial and workmanlike manner, and with good materials, and was left in good working order; and if the defendants' engine broke down (which the plaintiffs did not admit), it was not in consequence of any acts or defaults of the plaintiffs in relation to their contract or otherwise as alleged.

The action did not proceed to trial, but was referred to arbitration by order of the registrar of the Bradford District Registry, as follows:

"14th Jan. 1879: Upon hearing the solicitors or agents on both sides, and by their consent, I do order . . . that the *action and counter-claim* be referred to the award, &c., of John Waugh, of Bradford, in the county of York, civil engineer, who shall have all the powers as to certifying and amending of a judge at Nisi Prius . . . and that the said parties shall in all things abide by, perform, fulfil, and keep such award so to be made as aforesaid; and that the *costs of the said cause and counter-claim shall follow the event*, and that the costs of the reference and award shall be in the discretion of the arbitrator . . . and that, unless restrained by any rule or order of the Exchequer Division of the High Court of Justice, or of any judge of the said High Court, the party or parties in whose favour the said award shall be made shall be at liberty, 13*n* days after service of a copy of the said award on the solicitor or agents of the other party, to sign judgment for any sum or sums of money found due to him or them by the said award, and for all costs that he or they may be entitled to under this order and under the said award, together with the costs of the said judgment."

The reference was accordingly entered upon, and the arbitrator, having heard and duly considered all the allegations and evidence of the parties on each side, made his award in writing on the 7th March 1879, and thereby awarded as follows: "I do hereby award that the plaintiffs are entitled to recover from the defendants the sum of 371*l.* in respect of their claim in this action, and that the defendants are entitled to recover from the plaintiffs the sum of 375*l.* in respect of their counter-claim, and I do hereby award, order, and direct that the plaintiffs do and shall pay to the defendants *the balance*, that is to say, the sum of 4*l.* accordingly. And I do hereby further award that the plaintiffs do and shall bear and pay the costs of the said reference and of this my award, and that in case the defendants shall in the first place pay the costs of this my award, the plaintiffs shall forthwith repay the same to the defendants."

On the publication of the award, an application to sign final judgment was made to the registrar of the Bradford District Registry, where the proceedings had all hitherto been conducted, whereupon the registrar, on the 16th April 1879, made the following order: "Upon reading the order of reference herein dated the 14th Jan. 1879, and the award of the arbitrator, made on the 17th March 1879, and upon hearing the solicitors for both parties, I do order that judgment be signed in *this action and counter-claim* for the defendants for the sum of 4*l.*, being the balance directed by the arbitrator appointed herein to be paid by the plaintiffs to the defendants, and for costs of the *action, counter-claim, and reference* to be taxed; and that the costs of and occasioned by this order be costs in the cause."

Thereupon a summons was taken out by the plaintiffs, calling upon the defendants to show cause why the above-mentioned order of the district registrar should not be rescinded, altered, or varied, and upon the same being attended before Field, J., at chambers, that learned judge, thinking that the point was an important one, and that the practice upon the subject ought to be definitively settled by the court, referred the summons to the Exchequer Division of the High Court.

Sec. 67 of the Judicature Act 1875, Order XIX.,



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r. 3; Order XXII., r. 1; Order XXX., r. 1; Order LV., and sects. 5 and 7 of the County Courts Act 1867 (30 & 31 Vict. c. 142) are set out in the arguments of counsel and judgments of the court.

*R. O. B. Lane*, for the plaintiffs, now moved to rescind, alter, or vary the said order accordingly. Practically, what the plaintiffs want is an allocatur to the defendants for the difference between the two sums, 371*l.* recovered by the plaintiffs and 375*l.* recovered by the defendants. By the order of reference "the costs of the cause and counter-claim are to follow the event." It will no doubt be considered on the part of the defendants that "the event" is the award or judgment of the arbitrator for the balance of 4*l.* in favour of the defendants. In *Staples v. Young* (L. Rep. 2 Ex. Div. 324) the Exchequer Division held, following the words of rule 3, Order XIX., that "the event" was the final event or balance, and judgment to be entered in the action for that balance, and that that being the sum only recovered, the plaintiff was not, under the County Courts Act, entitled to have his costs. In the present case the arbitrator has found practically for the plaintiffs to the amount of their claim, and practically also for the defendants to the amount of their counter-claim. There have been, as it were, two independent actions, and each party has "recovered." *Staples v. Young* was followed by the case of *Blake v. Appleyard*, also in that court (L. Rep. 3 Ex. Div. 195; 47 L. J. 407, Ex.), in which it was held that, the defendant having proved a counter-claim exceeding in amount the sum claimed by the plaintiff in the action, was entitled, in the absence of any order as to costs, to the costs of proving his counter-claim, and of the issues so far as they related thereto. Kelly, C.B., in his judgment in that case, says: "The defendant has raised this counter-claim, and by Order XIX., r. 3, it is to have the same effect as a statement of claim or cross action; but that provision is governed by the succeeding words 'so as to enable the court to pronounce final judgment in the same action, both on the original and on the cross claim.' Then it is said by Order LV., 'costs are to follow the event unless the judge otherwise orders.' Now what was done in that case is what the plaintiffs seek to have done here. Although it may be that the final judgment will have to be entered for the final sum or balance due to the defendants, yet each party is entitled to the costs of so much of the amounts in dispute or in, other words, of the issues as each of them succeeds upon. Then came the recent case of *Potter v. Chambers* in the Common Pleas Division (L. Rep. 4 O. P. Div. 69). There the plaintiff claimed a balance of 114*l.* 8*s.*, and the defendant established a counter-claim to the amount of 10*l.* 16*s.*, whereupon the judge (Thesiger, L.J.) directed the jury (as the result of their answers to certain questions put to them) to find a verdict for the plaintiff for the balance 4*l.* 12*s.*, and he gave judgment for the plaintiff for that sum. The court (Denman and Lopes, JJ.) refused to alter the finding of the jury (the judge being unable to do so) for the purpose of giving the defendant the costs upon his counter-claim, and the above-mentioned cases of *Staples v. Young* and *Blake v. Appleyard* were cited and considered. The learned judges there seem to have decided as they did rather on the ground that to decide otherwise would work injustice towards the plaintiff, who would be thereby

subjected to the operation of the County Courts Act, whilst the defendants would escape from it. With great deference and respect it is submitted that that was an erroneous view and assumption. *Potter v. Chambers* subsequently came in another form before Cockburn, C.J. and Pollock, B. in the Queen's Bench Division (48 L. J. 274, Q. B.) The Common Pleas Division having refused the application to enter separate verdicts, the costs were taxed, and the defendant moved the Queen's Bench Division for an order to reverse and disallow the taxation, when Cockburn, C.J. distinguished the case of *Staples v. Young* (*ubi sup.*), as the Lord Chief Baron has already done in the present case, on the ground that the original claim there was below 50*l.* The Lord Chief Justice then went on to say: "The 67th section of the Judicature Act 1873 has no application to the present case, for the relief sought was not such as could be afforded in a County Court. It was never intended by the Legislature to give jurisdiction to an inferior court where the sums in dispute on each side were large and the difference only was small. The plaintiff was compelled to come to a superior court in order to establish his original claim. He did not know for certain that the defendant would raise the defence of set-off and counter-claim. Why should he be placed in a worse position because that defence had been pleaded? It was not an admitted set-off. As a matter of fact he has established his claim to the full amount, though it was afterwards cut down by the amount of the counter-claim." Another case, also in the Queen's Bench Division (*Daivson v. Gray*, 40 L. T. Rep. N. S. 192) is strongly in point in favour of the contention of the plaintiffs here. The cases cited establish, it is submitted, this as the rule or principle in these matters, that each party is to have the costs of proving that portion of the case on which he succeeds or "recovers." The order should be amended by entering judgment for the plaintiffs for their claim, and for the defendants for their counter-claim. He referred also to *Garnett v. Bradley* in the House of Lords, and the judgment of Lord Blackburn therein (39 L. T. Rep. N. S. 261; L. Rep. 3 App. Cas. 944; 48 L. J. 186, Q. B., C.P., and Ex.)

*A. Wills*, Q.C. (with him was Cyril Dodd), for the defendants *contra*, contended that the order of the registrar as it stood was right and just, and should be upheld by the court. Let us consider what has happened. The plaintiffs have established their claim in the action to 371*l.* The defendants say, "We have two answers to the plaintiffs' claim: first, never indebted, and the whole work done by the plaintiffs was worthless; secondly, we have a claim overtopping the claim of the plaintiffs." With regard to the plea of never indebted the plaintiffs succeeded in proving that their work was not worthless, and that for it they were entitled to the sum of 371*l.* The defendants, on the other hand, established and showed that the action ought never to have been brought, for they succeeded in proving their claim to 375*l.*, thus overtopping the plaintiffs' claim by 4*l.* The effect and operation of the Judicature Act is to put or to substitute a counter-claim in lieu of a set-off. In substance the plaintiffs here have succeeded in displacing the defendants' plea of "never indebted"—I use the old language with which we are all familiar, and will translate it into the language of the Judicature Act presently—and are entitled to the costs

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of that issue, but they are not entitled to the costs of the action, because the defendants by their set-off or counter-claim have overtopped the plaintiffs' claim. Suppose this had been a counter-claim or set-off for a liquidated sum. The Statute of Set-off (2 Geo. 2, c. 22, s. 13) says, "Where there are mutual debts between the plaintiff and the defendant. . . one debt may be set off against the other." The Judicature Act, Order XIX., r. 3, says, "A defendant in an action may set off or set up by way of counter-claim against the claim of the plaintiff any right or claim, whether sounding in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the court to pronounce a final judgment in the same action both on the original and on the cross claim." Both the original claim and the counter-claim therefore arise in the action. Now the courts have held, under the Statute of Set-off, that, if a defendant succeeded in establishing a sum equal to the plaintiff's claim he succeeded in the action, and if in establishing a larger sum, that then he had an allocatur for the balance; and the Judicature Act has not altered, and was not intended to alter, the practice in that respect. The rule applies, and was intended to apply, to both liquidated and unliquidated damages. But the court is now asked by the plaintiffs to say that all the cases since the Judicature Act are wrong, or that a different rule should be applied to cases of liquidated and cases of unliquidated damages. The plaintiffs have failed in their action, and the compound result is that the defendants get judgment in the action. It is one and the same action in which the plaintiffs are the unsuccessful parties. Both parties cannot be successful in the action. The plaintiffs, no doubt, have been successful in what, in old days, would have been called certain issues, but which now, I suppose, would be called certain questions; but the defendants have succeeded in the action, and are therefore entitled to costs of it. The judgment of Cleasby B., in *Staples v. Young* (*ubi sup.*) is an express decision in favour of the present defendants on this question. The learned Baron says: "Can we say, here, looking at these rules (Order XIX., r. 3, and Order XXII., r. 10), that the plaintiff has recovered the full amount of the claim that he proved, and that the defendant has recovered the amount of the counter-claim that he set up, or must we say that the plaintiff recovered the balance? It seems to me that the latter view is the right one, and that by it only can we give to the counter-claim the same effect as a statement of claim in a cross action, and give final judgment both on the original and cross claim. By Order XXII., r. 10, the defendant, if the balance is in his favour, may have judgment for such balance. The intention and words of the rule are that the final judgment is to be founded on the result of both the original and cross claim taken together and treated as arising in the same action, and Order XXII., r. 10, (a) provides, for the opposite case where the balance is in favour of the defendant, for in such cases the

court may give judgment for the defendant for such balance. That judgment would be a judgment in the action, and the defendant would recover, not on his counter-claim, but in the action to the extent of his balance." Pollock, B. also in the same case, says: "It is clear that set off was always treated as a reduction of damages, one of the best proofs thereof being that a plaintiff, if he chose, might elect to deduct the set-off and take a verdict for the balance, whereby the defendant would be barred in respect of his claim on the set-off. The Legislature, it seems to me, intended, with regard to the trial and result of it in the matter of costs, to place counter-claim and set-off on the same footing. *There is one judgment, and that is for the balance.*" The case of *Blake v. Appleyard* (*ubi sup.*) takes and supports the same view. Under the old statute the defendants would be entitled, and I submit that under the Judicature Act they are entitled, to the costs as directed by the registrar's order.

KELLY, C.B.—It is unnecessary to pronounce any opinion as to what order it might have been the duty of the court to make if the case now before us had arisen under the Statute of Set-off (2 Geo. 2, c. 22), under which, if a defendant in answer to an action for a sum of money pleaded a set-off and proved it, he was entitled, if the amount of the set-off overtopped the plaintiff's demand, to claim a verdict or judgment in his favour, and in such a case there was not only no difficulty, but no injustice of any kind, because the plaintiff, at the time he brought his action, could easily have anticipated what the defendant might possibly plead, and the amount that it was likely, or indeed almost certain, that he would recover. For example, to take the simplest case, an action might be brought, say for 400*l.* more or less, and if the defendant had repaid 300*l.* of the loan, it would be quite unnecessary that he should be put upon a plea and proof of payment. The plaintiff might at once give credit for the sum paid, and in his particulars of demand, if not in his declaration, demand only the balance; and so where there had been such dealings between the parties as resulted in an account stated, or where there had been mutual credits between them, a plaintiff might be taken to know what defences would be set up against him, and that if there should be a plea of payment or a set-off, if it overtopped his demand, the result would be that the cause would be decided against him. Nor do I pronounce any opinion as to how this case would have stood, and what order the court would have felt called upon to make, if the action had been tried before a judge and a jury, where, upon the different issues (for they really are different issues) in the case, it would have been necessary for the plaintiff to prove his demand, and then to await the evidence of the defendant in support of his defence or counter-claim, particularly if in such a case the judge who should have tried the case should have thought it fit to enter or direct the particular findings of the jury, in support of the plaintiff's claim or of the defendant's claim, to be entered upon the *postea*, and where the natural and legal effect would be given to that entry in the form in which it was made. The present case, however, has not been so tried, or the judge who might have tried it would have been able to do full justice to both parties by directing special findings and making an entry upon the *postea* in conformity therewith, namely, of 37*l.* in favour of the plain-

(a) Order XXII., r. 10, is as follows: "Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case."

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tiffs, and 375*l.* in favour of the defendants, whatever ultimately might have been the form of the judgment which the court would have authorised. I decide this case upon the facts as they are now before us, and I am of opinion that the order which the court ought to make should be in substance an order that the plaintiffs are entitled to their costs in respect of their claim of 371*l.*, to which they have by evidence established their right, and that the defendants are entitled to have their costs taxed in respect of their counter-claim of 375*l.*, together with any costs, if such there be, by reason of their right to obtain under the award the balance of 4*l.* It is not necessary to determine here which of these two parties, if either, is entitled to the costs of the trial, or what are generally called the "costs of the cause," because, if the plaintiffs shall have their costs taxed in their favour in respect of their demand of 371*l.* which was disputed upon the pleadings by the defendants, and which therefore at considerable cost no doubt to themselves the plaintiffs have established; and if the defendants, on the other hand, be entitled to the costs which they have necessarily incurred in establishing their counter-claim, I apprehend that the costs of the cause will really be so small and trifling that it would scarcely be worth the while of either party to come to the court for its opinion as to which of them might be entitled thereto. The case being an entirely new one requires, I think, a special order. Looking at the facts of the case, the nature of the pleadings, the evidence, and the course of the proceedings before the arbitrator, I think it would be an act of gross and glaring injustice to have compelled the plaintiffs, who have not the gift of prophecy, to guess or to determine upon speculation beforehand what would be the ultimate result of the cause. First of all, that determination must have been formed at the time that the writ was issued, because therein must be set forth what the cause of action really is. The plaintiffs set it forth correctly when they claimed 400*l.*, although, as it ultimately turned out, it would have been more correct to have claimed 371*l.*; but they claimed 400*l.* and odd on the grounds which appear at considerable length in the pleadings, and which the defendants have from beginning to end contested. Is it to be said that the plaintiffs were to forbear to bring their action at all because of the possibility that the defendants might set up a defence in which they would recover, in the form of a counter-claim, something more than the amount of the plaintiff's original claim? To say that a plaintiff upon issuing his writ is to be bound to consider not only whether any counter-claim at all will or will not be made against him, but also what, if, as it may now be, it should be a claim for unliquidated damages, the amount of such damages may ultimately prove to be, would, in my opinion, be to put upon him an impossible task, and one requiring him to be possessed, as I have before observed, with the gift of prophecy. To show, as I believe it does show, that the Legislature, by the Judicature Act, never intended anything of that kind, I may observe that we find in Order XXX., r. 1, a most salutary provision, that, "Where any action is brought to recover a debt or damages, any defendant may at any time after service of the writ, and before or at the time of delivering his defence, or by leave of the court or a judge at any later time, pay into

court a sum of money by way of satisfaction or amends." That is, when a plaintiff brings an action for unliquidated damages, the defendant may pay money into court; but there is no such counter-provision in favour of a plaintiff upon a defendant's setting up a counter-claim for unliquidated damages; though there is nothing to prevent the Lord Chancellor and the judges, should they think fit so to do, making such an order in addition to the numerous orders already existing. It was said in argument that in practice money has been *de facto* paid into court under the Judicature Act where there is a counter-claim for unliquidated damages. It may be so. But all I can say is, that there is nothing in the Judicature Act to authorise any such proceeding, and until there is I cannot help thinking that this is a very strong argument to show that it never can have been intended to impose upon a plaintiff, on bringing an action for a sum of money, the obligation of anticipating that a counter-claim will be made for unliquidated damages not merely in matters not altogether unconnected with his own claim in the action, but it may be, as has been suggested at the bar in the course of the argument, for breach of promise of marriage, or the seduction of a daughter, or for any other unexpected and extraordinary cause. Be that as it may, I do not think we are bound to give the same effect to the proceedings in this case as if there had been any such counter-provision enabling a plaintiff to pay in money in satisfaction of a defendant's counter-claim. So much for the actual provisions of the law under the Judicature Act, with the exception of that which has been referred to by Mr. Wills in his very able argument, which I must say has raised difficulties in my mind that I do not feel quite easy in finally dealing with, namely, rule 3 of Order XIX. But, first, let me observe with respect to the authorities, that no case has been cited parallel to the case now before the court, nor even, as it seems to me, resembling it in principle. Whatever expressions may have been used in any of the cases, and although in *Potter v. Chambers* (*ubi sup.*) Thesiger, L.J. made an entry upon the postea which seemed to dispose of certain questions not unlike one or two which have arisen here, yet no case has decided that, when under a counter-claim for unliquidated damages the defendant has established his claim to a larger amount than that which the plaintiff in the action has established his right to recover, the general costs of the cause shall thereupon belong to the defendant. Let us now look at the language of rule 3 of Order XIX., upon which Mr. Wills so strongly relies. It is this: "A defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as"—what?—"as a statement of claim in a cross action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross claim." That does not go to show that the plaintiff or the defendant is entitled to the general costs of the cause, but would seem rather to refer to cases tried before a judge and jury than to an award, and especially to an award in the form of the present one, and no doubt it was intended that, so far as might be possible, justice should be done to both

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parties in one action. I do not see that it at all follows that it would be by one judgment in the ordinary sense of the word; but if it be so in the case of a trial before a judge and jury, yet in the present case other doubts and other questions arise which seem to me to make this entirely a new case, and one which it would be unjust to decide under this section alone, as if it were the sole provision of the Judicature Act which was to determine the right to costs in all cases which may arise. First of all, if this had been a case where the verdict had been for the plaintiffs, and they had recovered 4*l.* only, it is quite clear that under sect. 67 of the Judicature Act of 1873, which has been referred to in some of the cited cases, the case would not have been within the County Courts Act, because that section is clearly not applicable to the present case; its words are, "The provisions contained in the 5th, 7th, 8th, and 10th sections of the County Courts Act 1867, (a) shall apply to all actions commenced or pending in the High Court of Justice in which any relief is sought which can be given in a County Court." If this action had to be determined by virtue of that section, it clearly is not an action in which relief could have been obtained in a County Court, because, at the very outset, inasmuch as the claim of the plaintiffs amounted to some 37*l.* at the least, the County Court would immediately find that it had no jurisdiction, and the same observation would apply to the counter-claim. But the question is whether this case is within Order XIX., r. 3. Had it been a case tried before a judge and jury, it might, for aught I know, be contended that, as one object of this rule was to enable the court to pronounce final judgment in

(a) The following are the 5th and 7th sections of the County Courts 1867 (30 & 31 Vict. c. 142): Sect. 5: "If in any action commenced after the passing of this Act in any of Her Majesty's Superior Courts of record, the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such Superior Court, or unless the court or a judge at chambers shall by rule or order allow such costs." Sect. 7: "Where in any action of contract brought or commenced in any of Her Majesty's Superior Courts of common law, the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment on admitted set-off or otherwise, to a sum not exceeding 50*l.*, it shall be lawful for the defendant in the action within eight days from the day upon which the writ shall have been served upon him, if the whole or part of the demand of the plaintiff be contested, to apply to a judge at chambers for a summons to the plaintiff to show cause why such action should not be tried in the County Court, or one of the County Courts in which the action might have been commenced; and on the hearing of such summons the judge shall, unless there be good cause to the contrary, order such action to be tried accordingly, and thereupon the plaintiff shall lodge the original writ and the order with the registrar of the County Court mentioned in the order, who shall appoint a day for the hearing of the cause, notice whereof shall be sent, by post or otherwise, by the registrar to both parties or their attorneys, and the cause and all proceedings therein shall be heard and taken in such County Court, as if the action had been originally commenced in such County Court, and the costs of the parties in respect of proceedings subsequent to the order of the judge of the Superior Court shall be allowed according to the scale of costs in use in such County Court, and the costs of the proceedings previously had in the Superior Court shall be allowed according to the scale in use in such latter court."

the same action, the court would look only to the result of the action, which, had the plaintiffs' claim exceeded the defendants' counter-claim by 4*l.*, would have been that the plaintiffs would have been entitled only to a verdict or judgment for that sum; and, on the other hand, had the defendants' counter-claim exceeded the plaintiffs' claim by that same small sum, they would have been entitled only to a verdict and judgment for that amount. But we must look, not at what might have been the verdict of a jury, and the entry of that verdict or the findings of the jury upon the *postea*, or to any form of judgment that would result from a trial by jury, but we must see whether this a case of the same nature and subject to the same provisions. Now, it appears to me that this award does not bring this case within the meaning, and certainly not within the expressions used in rule 3. It is not a case in which the defendants have recovered a verdict for 4*l.* beyond the amount recovered by the plaintiffs, but we find by the order of reference and the terms of the award that the action or claim and the counter-claim are entirely distinct. First of all, the order of reference is that *the action and counter-claim* be referred to the order, and so forth, of the arbitrator in question. Here the distinction is made between the actions. It is not "this action shall be referred, and this action only;" but "the action and counter-claim," distinguishing therefore between the two, and really treating them as two different cases, and raising two different questions. The same thing appears further on in the order of reference, thus, "The costs of the *said cause and counter-claim* shall follow the event." Here, again, the cause or the action is one thing, the counter-claim is another; and I do not at all see why the costs of the cause or action should not be treated as determined in favour of the plaintiffs, so far as they have recovered any sum of money, viz. 37*l.*, and why the counter-claim should not be treated as what it is—a claim under which the defendants have recovered the larger sum of 375*l.* And further on we find the provision, which I do not further refer to at this moment, as to the judgment which is to be entered. On looking to the award, it appears that the arbitrator has expressly treated this as two causes and two recoveries, and therefore entitling each of the respective parties to a judgment, or, in other words, to two judgments; for, after reciting the terms of the reference, the arbitrator proceeds: "And I do hereby award that the plaintiffs," not have established their right to so much money, but "are entitled to recover from the defendants the sum of 37*l.* in respect of their claim in this action, and that the defendants are entitled to recover from the plaintiffs the sum of 375*l.* in respect of their counter-claim." Now that really is the foundation of two judgments. It is not merely that the plaintiffs have established their claim to 37*l.*, but the technical word, the signification of which is well known, and which has been a part and parcel of the law of England for centuries, the word "recover" is here used, a word which creates and constitutes a judgment. It seems to me, therefore, that this is in effect the same thing as if the arbitrator had said, "I award that the plaintiffs shall recover and obtain judgment for the sum of 37*l.*," and then in the same finding had said, "and that the defendants shall recover

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and shall be entitled to judgment for the sum of 375*l*." He further awards, "I do hereby award, order, and direct that the plaintiffs do and shall pay to the defendants the balance, that is to say, the sum of 4*l*." That was necessary; and this is a pronouncing, on the part of the arbitrator, of two judgments, one for the 371*l*, and another for the 375*l*, and a direction—which may entitle the defendants to a judgment also for aught I know—that the balance, the 4*l*, be paid by the plaintiffs to the defendants. This, therefore, is not a case in which a jury have found a verdict for the one party or the other. Had it been so the verdict would only have been entered for the balance of 4*l*, unless the jury had expressed it to be by virtue of the counter-claim, and at the same time had indicated and specified the amount to which the plaintiffs were entitled in respect of their claim of 371*l*. But such are the terms of the findings of the arbitrator. Stripping the case of all technical terms and particular expressions, and looking to the substance of it, it really is this, that the plaintiffs who brought their action for a sum of between 300*l*. and 400*l*., and were ignorant of what, if any, counter-claim would be set up against them, and still more so that it would be a demand the amount of which they would be unable to estimate or to protect themselves against by setting off one claim against the other, are entitled to the benefit of the sum they have recovered; while, on the other hand, the defendants are entitled to the benefit of any sum they have recovered; and looking once again to rule 3, it may be quite true, as applied to a trial before a judge and jury, that the "set-off or counter-claim shall have the same effect as a statement of claim in a cross action so as to enable the court to pronounce final judgment in such action." There may be a final judgment, but I do not know why there should not, even under this rule, be a judgment specially expressed that the plaintiffs do recover 371*l*., that the defendants do recover 375*l*., and that the defendants shall have judgment against the plaintiffs for the balance of 4*l*. That would meet all that here is required, all that is specially enacted by this 3rd rule. It has been said, however, that there is a power or a direction in the order of reference, that the party or parties in whose favour the said award shall be made shall be at liberty, ten days after service of a copy of the award on the solicitor or agent of the other party, to sign final judgment for any sum or sums of money found due to him or them by the said award. I do not know why that should not entitle the plaintiffs to a final judgment for 371*l*. and the defendants to a final judgment for 375*l*., and I do not see that there would be any objection to the making up the record in such a form, or pronouncing a judgment as here provided by this order of reference, that the defendants should also have a judgment that the plaintiffs pay to the defendants the sum of 4*l*. Now, that brings me to what has actually been done. We find that the registrar has made an order that "judgment be signed in this action and counter-claim for the sum of 4*l*." I think it would have been better if he had said that judgment should be signed for the plaintiffs for 371*l*., and for the defendants for 375*l*., and that the defendants should have judgment for the sum of 4*l*., but that may be a mere matter of form; he goes on, moreover, to say, "being the balance directed by the arbitrator

appointed herein to be paid by the plaintiffs to the defendants, and for costs of the action," &c. I think he had no authority whatever to make the latter part of that order with reference to "the costs of the action," and that his order, therefore, should be amended or varied by striking out the words "and for costs of the action." Thus the defendants will have judgment for the 4*l*. to which they are entitled, and for the costs of the counter-claim and reference to be taxed; and I think that thus justice will be done to both parties, if the order be amended so that the plaintiffs shall be entitled to the costs incurred by them in respect of their claim of 371*l*., and the defendants to their costs in respect of their counter-claim of 375*l*., including, of course, the small balance of 4*l*. As to the "costs of the action," it will be competent for either party, after the costs are taxed in respect of the claim and counter-claim respectively, if really anything shall then remain which makes it the interest of either of them so to do, to apply to the court for an order to tax the general costs of the action, and it is without prejudice to any such application that I now pronounce my judgment, that the order should be amended in the way and to the extent which I have stated.

POLLOCK, B.—This case has come before the court on an application by Mr. Lane, on the part of the plaintiffs, to rescind or vary an order which was made by the district registrar in this cause, which directed how the judgment should be signed, and also how the costs should be dealt with; and, in my judgment, Mr. Lane is entitled to that which he has asked for to the extent which my Lord has stated. The question arises upon a claim made by the plaintiffs for 103*l*. 7*s*. 9*d*. for work and labour and materials, and also a further claim of 300*l*. for making, delivering, and fixing a certain machine, and for work and labour and other things supplied. The defendants by their counter-claim set up, first, that the work had been improperly and imperfectly done, which they might have done under the old law before the Judicature Act, giving it in evidence in diminution of the plaintiffs' claim; and they also set up what is strictly a counter-claim under the new statute, claiming the loss of profit in their business and expenses and outlay incurred by reason of the defects in an engine which was supplied by the plaintiffs, and warranted by them to do certain things; which counter-claim, if proved, would diminish the damage which the plaintiffs otherwise would have sustained. That claim and that counter-claim were referred by order to a civil engineer, and the order of reference provided that "the costs of the cause and the counter-claim should follow the event." That is the common clause in references of this kind, and it produces no doubt very much the same effect as if there had been findings of the jury upon these two things, the claim and the counter-claim. Now, in the result the plaintiffs proved, not the whole of their claim, but to the extent of 371*l*., the major part of it, and for that the arbitrator has made his award, saying that they are entitled to recover that amount from the defendants. The defendants proved on their counter-claim the sum of 375*l*., and the arbitrator by his award awarded that the defendants are entitled to recover that sum from the plaintiffs; the result being that there is a balance of 4*l*. due to the defendants. Now, the first question that would seem to arise is, how

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upon this award the judgment of the court should be entered, it being one of the terms of the order of reference that a judgment should be entered. To my mind it is not material for us to determine that question now, because it is merely a question of form, though it may be right that we should say something upon it. It may be that the district registrar was entitled to say, "I do order that judgment be signed in this action and counter-claim for the defendants for the sum of 4*l.*, being the balance directed by the arbitrator," though I do not myself think that that is the proper form. I think that in a case like the present, if there had been a trial and a verdict, the verdict should have been entered for both parties—that is to say, that that which truly recorded what had taken place should have been entered upon the certificate which would have been made by the associate in the court, so that it should have appeared that there had been a verdict upon the claim for so much, and a verdict upon the counter-claim for so much; and that the judgment should have been for the balance. That is what was done in the case of *Potter v. Chambers* (*ubi sup.*) by Thesiger, L.J., and was approved of by the Common Pleas Division, except as to this: that in *Potter v. Chambers* the Lord Justice entered the verdict for the balance, not merely the judgment. Probably that was not called to his attention at the time, or he might have adopted the suggestion which I make now; but that is immaterial, because the question which we have now to deal with is, How should the costs be awarded? In this case the district registrar has directed judgment to be entered for the defendant for the 4*l.*; and has added, "*and for costs of the action, counter-claim, and reference to be taxed.*" Now, the result of that is that the costs—what are called the costs of the action—would be given to the defendants, because they have recovered the balance. Let us see whether there is anything to prevent this court from doing that which they think to be material and substantial justice in this case with regard to those costs. Had the case been tried in court it would have come within the provision of Order LV.(a) as to costs, and doubtless some application would have been made to the learned judge who might have tried the case, and who would have exercised his discretion upon good cause shown thereon. One need not put various positions to show what a learned judge might or might not think to be a good ground for giving costs to one party or to the other; but the present case unfortunately is not within that section, because there is no discretion whatever now, and we are bound by the language that is used in the award and in the order of reference; the order of reference saying that "the costs are to follow the event." Broadly the question is raised, what is the meaning of that when applied to a counter-claim? Now, a counter-claim is a thing which is new to the law of England. There has been, as I ventured before

to say—not appealing to mere pedantic views on the subject, but to the principle upon which these questions have been dealt with—a principle that is thoroughly understood in all law, and that is the difference between that which is called a *compensatio* and that which is called *recompensatio*, which civilians have always considered to be a separate and distinct matter. The statute which for the first time gives the defendant the power to resort to that in England is the Judicature Act, and it is under Order XIX., r. 3, that we find provision made for that purpose, and that provision is as follows. [The learned Judge read the rule.] It was said by Mr. Wills that we must take the whole of that rule together, and, as was said by my Lord in the case of *Baker v. Appleyard* (*ubi sup.*), effect must be given to the latter part of it. To a certain extent it is as one action; on the other hand, the rule distinctly says that a counter-claim is to have "the same effect as a statement of claim in a cross action." Whatever may be the proper construction of the rule, it really is not worth while considering with any great nicety now, because it is quite clear that it is open to us, when we come to deal with the costs, to give effect to those words in such a way as may carry out what we apprehend to be the spirit and intention of the enactment. In the first place are we fettered by any decision? Far from it. The decisions which have gone before, namely, those in the cases of *Staples v. Young* (*ubi sup.*), *Blake v. Appleyard* (*ubi sup.*), and *Potter v. Chambers* (*ubi sup.*), are decisions in cases in which the court had to consider partly the question which we are considering, but partly also the question of the County Courts statutes; and the question then arose as to the distinction between the County Courts Acts, which say, when they deprive a plaintiff of costs when he brings his action in a superior court when he could have brought it in an inferior court, that the test is to be arrived at by the amount recovered. Those are the words used, and upon those words there can be very little doubt whatever. On the other hand, when those sections come to be applied to the Superior Courts, the Judicature Act of 1873, by sect. 67, expressly provides that those sections shall apply only to those actions pending in the High Court of Justice in which the relief that is sought can be given in a County Court. That cannot apply to the present case. In all those cases a real desire has been shown by the judges so to mete out the law as to effect what they believe to be an equitable adjustment of costs. The case of *Davison v. Gray*, in the Queen's Bench Division (40 L. T. Rep. N.S. 192), is in substance very like the present one. The plaintiff there brought an action for 51*l.* freight of cargo, and immediately after service of the writ the defendants paid 41*l.* 2*s.* 11*d.* into court, and by their statement of defence admitted the plaintiff's claim of 50*l.*, and counter-claimed a sum of 9*l.* 17*s.* 1*d.* for damage to the cargo, and said that the money paid into court, together with the amount counter-claimed, was enough to satisfy the plaintiff's claim. The amount in dispute being then reduced, the case was remitted to the County Court for trial, and the registrar certified the result to be a verdict for the plaintiff for 16*s.*, upon which the plaintiff got from a master a judgment signed for that sum, together with costs. On application by the defendants to the master to tax the costs according to the issues, of which

(a) Order LV. of the Rules of Court, under the Judicature Act 1875, is as follows: "Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the court. . . . Provided, that when any action or issue is tried by a jury the costs shall follow the event, unless upon application made at the trial for good cause shown the judge, before whom such action or issue is tried, or the court, shall otherwise order."



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they contended they had won all those raised by the counter-claim, and that, the plaintiff's claim being admitted, there was no issue found for the plaintiff at all, the master declined to tax the costs upon the certificate as it stood, but stayed the action to enable the defendants to apply to the court to amend the certificate by distributing the findings upon the issues; and the Queen's Bench Division, upon motion by the defendants, altered the registrar's certificate by distributing the findings accordingly, so as to enable the defendants to be allowed the costs of their counter-claim, although the amount which was recovered was a verdict for the plaintiff for 16s. The only remark to be made upon that case is this, that there seems to have been no question as to the costs of the cause, which I suppose was owing to the proceedings having been in the County Court. Now, is there anything which should prevent us from making the costs in the present case follow the result of the claim and counter-claim respectively, according as the plaintiffs have succeeded upon the one and the defendants have succeeded upon the other? Mr. Wills put, in clear and forcible language, the analogy between this case and a case of set-off under the statute of George II. The rule, of course, arose under that statute, before which there could be no set-off. If a plaintiff commenced his action and the defendant put in a defence—it may have been an action for goods sold and delivered, plea never indebted and payment, or in the old days, never indebted—upon that state of things the parties put themselves at issue upon the single event, and the thing could not well be otherwise; but even there the defendant was protected with regard to any particular issues which were found in his favour, and the costs in that case would merely be the expense of the pleadings, the expenses of the witnesses, and of proving the particular issue. That would leave out interlocutory matters, which I take it in those days were very much smaller, at least, than they are now, and there still would be some fringe of costs to be given to the successful litigant—whether the plaintiff or the defendant would depend upon the fate of the cause. That was not perfect justice, but it was as near to it as circumstances would then admit of. Then came the statute 2 Geo. 2, and it cannot be said that any great injustice would arise if the same rule was applied, although possibly that injustice, whatever it was, might be incurred. But now we come to a new state of facts—to the means given to the defendant to establish, if he can, that which is a completely new cross action, his pleadings, his claim, his means of evidence, and all the interlocutory matters which nowadays are gone into, such as inspection of documents, interrogatories, and other matters which in most cases are totally independent of the plaintiff's case on the one hand, or the defendant's case on the other—they may, it is true, be intermixed in some cases—all those are matters which are perfectly settled, and which therefore, according to all rules of justice and equity, ought to follow and be given in favour of the party who succeeds in his claim or counter-claim. In the present case the plaintiffs have been at considerable expense in proving their claim. They have proved it for a substantial and considerable amount, and it is not to my mind true in fact, or right and just, to say that they ought to have

predicted coming events to the extent of saying before action, "If we give or tender to the defendants 4*l.*, justice will be done; therefore it is our duty to do that, and no more." It was impossible for them to know what claim would be set up by the defendants. The result in this case has been that the plaintiffs have proved a certain amount in their favour, and the defendants have proved a certain amount of independent facts in their favour. Under these circumstances I see no difficulty in the present case in saying that our order should be so made that we may get over and avoid the old difficulty as to "costs of the cause," and that we may make the rule costs of the plaintiffs and the rule costs of the defendants properly incurred to be paid according as each has succeeded. I think we may leave the question of the mode in which the judgment is to be entered by the registrar, and when the question of the costs comes to be dealt with let his order be amended by striking out that which relates to the costs, and inserting this in its place, "the costs of and relating to the plaintiffs' claim and the proof thereof to be paid by the defendants, and the costs of and relating to the defendants' counter-claim and the proof thereof to be paid by plaintiffs." By doing so I think we avoid all difficulty with regard to the proper construction of the Act or the proper mode of dealing with it as laid down by the cases. It is quite true that this decision only deals with this particular case. No doubt the principle is important, and may govern other cases; but it will be enough to say that we have come to this conclusion upon these facts, and we believe that the rule we have laid down is the true rule which should govern in future, and should be a guide to the officers of the court, and to all parties who have to deal with the taxation of costs. Upon these grounds I think Mr. Lane has succeeded, and that the order which he has asked for should be made absolute to amend or vary the registrar's order in the manner indicated, and with costs.

*Order absolute to amend the registrar's order accordingly, and with costs.*

Solicitors for the plaintiffs, *Leytton and Jacques*, agents for *Watson and Dickens*, Bradford.

Solicitors for the defendants, Messrs. *Flower and Nussey*, agents for *Wood, Hillick, and Hutton*, Bradford.

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT LINCOLN'S INN.

*Thursday, April 24.*

(Before JAMES, BRETT, and COTTON, L.JJ.)

*Ex parte BLAKE; Re MCEWAN. (a)*

*Landlord and tenant—Bankruptcy of tenant—Disclaimer by trustee in bankruptcy—Lease for term determinable by lessee—Measure of damages—Bankruptcy Act 1869, s. 23.*

*The lessee of a house for a term of twenty-one years determinable by him at the end of the first seven years of the term, on his giving six months' pre-*

(a) Reported by H. FRAY, Esq., Barrister-at-Law.



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vious notice in writing to the lessor, filed a liquidation petition at the end of the sixth year of the term, and the trustee in the liquidation disclaimed the lease. The lease contained a covenant by the lessee to keep the house in repair. There was evidence that the house could not be re-let at so high a rent.

*Held, that the lessor was entitled to prove in the liquidation for the difference between the rent he could get and that reserved by the lease up to the end of the seventh year, and also for the amount required to put the house in repair.*

THIS was an appeal from a decision of Mr. Registrar Hazlitt, sitting as Chief Judge in Bankruptcy.

The facts of the case were as follows:

McEwan was lessee of a house known as No. 3, Stanley-gardens, Notting Hill, for a term of twenty-one years from the 25th Dec. 1872, at the yearly rent of 130*l*. The lease contained a covenant by the lessee to keep the premises in repair, and a proviso that it should be lawful for him, his executors, administrators, or permitted assigns, to determine the demise at the expiration of the first seven or fourteen years of the term by giving six calendar months' previous notice in writing to that effect unto the lessors, their heirs or assigns, and on paying the rent thereinbefore reserved, and performing and observing the several covenants and agreements by the lessee therein contained up to the day of the term being so determined.

In Sept. 1878 McEwan filed a liquidation petition, and on the 7th Oct. 1878 his creditors resolved upon a liquidation by arrangement, and appointed a trustee.

On the 4th Dec. 1878 the trustee in the liquidation disclaimed the lease with the leave of the court.

The lessors tendered a proof in the liquidation for the following sums: 1. For 140*l*. due from the liquidating debtor's estate on account of a breach of the lessee's covenant to repair the premises, notice to repair having been given on the 15th Nov. 1878. 2. For 150*l*., being the loss caused to the lessors by the disclaimer of the lease, on the ground that the value of the house had diminished, and that the lessors could not then obtain for it upon a similar lease a higher rent than 120*l*., thus showing a depreciation in value of 10*l*. per annum. 3. For 22*l*. 0*s*. 4*d*., for two months' rent of the house from the 29th Sept. 1878 to the 29th Nov. 1878, the date of the order giving the trustee leave to disclaim.

The trustee admitted the first and third items of the proof, but rejected the second to the extent of 140*l*., "on the ground that the lease was determined by the lessee, his executors, administrators, or assigns, on the 25th Dec. 1879."

The Registrar having held that the trustee was right in rejecting the claim to that extent, the lessors appealed.

H. J. Lake for the appellants.—The disclaimer did not operate as a notice to determine the lease. On the contrary, the effect of the disclaimer is to render it impossible to give such notice. The lessee could not give the notice unless he had performed the covenants contained in the lease, and it is admitted that there has been a breach of the covenant to repair. The performance of the covenants of the lease is a condition precedent to

the existence of the lessee's power to surrender the lease:

*Grey v. Friar*, 4 H. L. Cas. 565;

*Porter v. Shepherd*, 6 T. R. 665.

R. V. Williams for the respondent.—All that the lessors have really lost by the disclaimer is the difference between the present letting value of the house and the rent reserved by the lease for the one year that remains of the first seven years of the term, plus the sum required to put the house in repair. Their proof has been admitted to that extent, and they are entitled to no more.

Lake in reply.

JAMES, L.J.—I think the registrar's order is right. We have to consider how this insolvent estate is to be fairly distributed among the different creditors, and therefore we must see to what extent the landlords are creditors. They have sustained damage by their tenant's non-compliance with the conditions of his lease. What would have been their position if the tenant had remained solvent, and had acted as a reasonable man? We must assume that when the landlord gave notice to put the premises in repair the tenant would have complied with it, so as to entitle himself to give notice to determine the lease at the end of the seventh year of the term. The landlords, therefore, have lost by the tenant's becoming bankrupt the benefit of his being under an obligation to spend 140*l*. in repairing the premises, and the amount of the depreciation of the value of the house to the end of the seventh year. That is the amount of the loss which the landlords have sustained, and to that extent they are entitled to share in the distribution of the debtor's assets.

BRETT, L.J.—The lessee could have put an end to the lease by paying the rent and performing the covenants up to the end of the first seven years of the term, and by putting the house in repair. What then have the lessors lost by the bankruptcy? Clearly the difference in the rent up to the end of the seven years and the 140*l*. necessary to put the house in repair.

COTTON, L.J.—The simple question is, what is the amount of the damage which has been sustained by the landlords? The lessee would not have been entitled to put an end to the lease without paying the rent up to the end of the seven years, and doing the necessary repairs, or paying the cost of them. By the operation of the trustee's disclaimer the landlords have got possession of the house earlier than they otherwise would, and they are entitled to prove for the difference in the letting value of the house up to the end of the seven years and the difference between the value of the house in repair and of the house out of repair.

*Appeal accordingly dismissed.*

Solicitors for the appellants, *Lake, Beaumont, and Lake*.

Solicitors for the respondent, *Ingle, Cooper, and Holmes*.

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STURLA v. FRECCIA; POLINI v. GRAY.

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July 4, 5, and 7.

(Before JAMES, BRETT, and COTTON, L.JJ.)

STURLA v. FRECCIA; POLINI v. GRAY. (a)

*Evidence—Public document—Admissibility—  
Report of public body.*

*A foreign Government appointed a committee to inquire into the fitness of A. for a certain post. The committee made a report declaring him to be fit for the post, and describing him as a native of a certain place and as being of a certain age.*

*Held (affirming the decision of Malins, V.C.), that the report was not admissible as evidence of A.'s birthplace and age.*

*This was an appeal from a decision of Malins, V.C.*

The hearing in the court below is reported in 40 L. T. Rep. N. S. 709, where the facts of the case are sufficiently stated.

The Vice-Chancellor having held that the report described in the above head-note was inadmissible as evidence of the birthplace and age of Antonio Mangini, the plaintiffs appealed from that decision.

*J. Pearson, Q.C. and E. Beaumont* for the appellants.—The report being made by a public body in fulfilment of a public duty, and the public body having no interest in stating what was not true, it is admissible as evidence of the facts stated in it:

*Chambers v. Bernasconi*, 1 Tyrwh. 335; 4 Tyrwh. 531;

*Smith v. Blakey*, L. Rep. 2 Q. B. 326;

*Stephen's Digest of the Law of Evidence*, p. 34.

*Bagshawe, Q.C. and Eyre* for the respondents.

—The report is not evidence of immaterial facts stated in it. The public documents which are admissible as evidence are, first, those made in performance of a public duty and for public use, such as parish registers; secondly, public proclamations; and thirdly, private Acts of Parliament:

*Roscoe's Evidence*, p. 192;

*Stephen's Digest, Introduction passim.*

In the present case the place of birth and age are immaterial for the purposes of the report, and therefore the report is no evidence of those facts.

*Higgins, Q.C. and Everitt* for other respondents.

*J. Pearson, Q.C. in reply.*—How can we tell now what was material for the purposes of the report? All the facts stated in it are *res gestæ* and all are material. The practice in the Committee of Privileges as exemplified in the *Nairne Peerage* (not reported), and in the *Wharton Peerage* (12 Cl. & F. 295) is in favour of our contention. [The argument on this point is so fully considered in the judgments of the court *infra* that it is needless to do more here than mention it.] He also cited

*Doe v. Robson*, 15 East, 32;

*Halcom on Private Bills*, p. 182.

*JAMES, L.J.*—We are of opinion that it is not possible to admit this document according to the rules of evidence as laid down in this country. Whether other countries act upon the same view as we do, it is probably not necessary for us to inquire, nor is it necessary to inquire whether our rules are too strict, or not strict enough; but, as I understand it, the universal rule (subject to certain special exceptions to which I will refer) in England is that evidence, to be admissible, must be given on oath by persons speaking to matters within their own knowledge, and liable to be

tested by cross-examination. Hearsay evidence, as a general rule, is not admissible; and it is not admissible because one knows to what extent people will lie, and are disposed to lie, even without any motive whatever; and one knows how little importance can be attached to any rumour or anything stated as mere hearsay. What the document which we are asked to admit in the present case comes to is this: it is a document written by certain gentlemen of Genoa, reciting the history of a person who had applied for an office under Government. How is that anything more than hearsay? They say that the gentleman who has applied for the office was a native of such and such a place, and was of a certain age. That is the purpose for which the document is tendered before us. They were somehow or other told so, or it may be they spoke of their own knowledge, or from what they had learnt there; but that is a statement which does not come within the exception that has been established as to the admissibility of documents. It has been established that such statements and such declarations made by deceased members of a family, and before any *lis* has been moved, are admissible; but then it is always laid down that such statements are only admissible when made by members of the family. No similar declarations made by the most intimate friends, or made by any person whomsoever except a legitimate member of the family, are admissible in evidence. Therefore this document does not come within that exception. Then, does it come within another exception, which is an entry made by a deceased person of something in the discharge of his duty? The principle of that exception is very well laid down in the case of *Chambers v. Bernasconi* (1 Tyrw. 335; 4 Tyrw. 531). There may have been a doubt as to whether the principle was accurately applied to the particular part of the entry which was rejected there, but the principle has never been questioned in any case, and it is this, that it must be an entry, not of something that was said, not of something that was learned, not of something that was ascertained by the person making the entry, but an entry of a business transaction done by him or to him, and of which he makes a contemporaneous entry. For nothing else was it admissible, and it was received only because it was the person's duty to make that entry at the time when the transaction took place, not to make an entry of something said, or ascertained by him at the time when the thing was done, but an entry of that very fact itself of which it was his duty to make an entry at the time. The exception is entirely confined to that. Then there is another exception, which is with regard to entries made against one's interest. Of course, it cannot be pretended that this document comes within the principle of an entry by a deceased person charging himself with something, or making some acknowledgment against his interest. Then what is it? It is a report made by some gentlemen filling a public office in Genoa. No doubt it is a report made by them in the discharge of their duty, and in answer to a reference to them on that matter. It is a report made by them to the Government. I have not heard anything to satisfy me that any such report made in this country by a similar department would be admissible in evidence, either on authority or on principle. Take the case of a

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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similar reference in this country. Suppose an application is made by some public officer to the Government, either for the appointment to an office, or for promotion, and the Queen is advised to refer that application to some State department, and the State department makes a confidential report to the Queen, giving a biography of the gentleman who has made the application for the office, or for promotion, no such report has ever yet, that I am aware of, been admitted as evidence, and I cannot conceive on what principle it would be admissible. We have not any notion in this case of what the gentleman making the report proceeded upon. They may have satisfied themselves by statements made, or by letters written, which we do not know of, but if the report had appended the letters and the statements made, those letters and those statements themselves would not be admissible in evidence on the ground that they were only made by contemporaries, and not by relatives; and if these statements themselves would not be admissible as evidence, then the conclusion at which the public department arrived from those statements cannot be put higher than the statements themselves, which are not admissible in evidence. It appears to me that that is sufficient to dispose of the matter. Some special cases have been referred to as to the practice in the House of Lords before the Committee of Privileges, where reports have been admitted for some purposes, but no decision of that committee has been given to us that all comes near this case. One case was given us of the report of the Attorney-General upon a previous Act of Parliament which reversed the attainder of the Nairne peerage; but the only thing I say with regard to that is, that the fact there was a fact wholly immaterial to support the claim of the claimant of the peerage, because the claimant was claiming from somebody anterior to the marriage mentioned in that report, and which was the material fact. There the complainant, in complying with the rules of the House of Lords, had to get rid of all the persons who would be nearer to the root of the descent than the claimant was. The claimant said, "By such and such a report, made at such and such a time, it appears that so and so was married; I admit that marriage, and I get rid of that marriage, and all the consequences of it, by showing that if that marriage took place, all the issue of that marriage have disappeared." That was the sole object in that case, to get rid of an obstacle which the House of Lords required to be removed. There was no question of proving the marriage as a fact, to make out the title of the claimant by means of that report. Then it was said that the recitals in private Bills have been admitted as evidence in peerage cases when they never would have been admitted in evidence elsewhere. According to the then practice such cases were referred to judges to take evidence. That seems to me to be very anomalous. Such recitals are not admitted now because no such reference is made to the judges, and the judges do not take evidence: but how evidence taken behind a man's back by judges can be made evidence against a person who is not a party to the inquiry, it is difficult for me to see. In matters relating to a peerage, the only persons to be satisfied are the Queen on the one side and the House of Lords on the other, as to whether the person is, or is not, entitled to take his seat there.

I cannot think that the fact that the recitals in a private Act were admitted as evidence in such a case, or that entries in the Visitation Book were admitted in peerage cases, which are very exceptional and peculiar cases, justifies us in saying that every report—for it must come to that unless you can draw a distinction—made by a public body to the executive or sovereign of the State, upon which that sovereign or executive acts in giving offices, or bestowing promotion, is evidence of the facts against persons who are not parties or privies to it. If I could have seen my way to assuming, or presuming, that the statements in this report were statements furnished by the gentleman himself, it might have been admissible on that ground; if the gentlemen who make the report had stated on the face of it that they had received the information from him, it might have been that that would be taken as an entry of what they had done in the course of their duty, having received that statement and taken it down. It might have been admissible under those circumstances, but in the absence of that it comes to nothing more than a statement made by contemporaries, who probably were likely to know what the truth of the case was, and who had no reason to state anything false; but that is not sufficient, as it appears to me, to let in hearsay evidence.

BRETT, L.J.—In determining whether anything we are offered in evidence is admissible, or not, we must always consider what it is offered as evidence of. Now, here the report made to the Giunta is offered as evidence of an alleged fact that Mangini, who was a consul in London, was of a family of Manginis at a village called Quarto, and was of a certain age. It was offered as evidence of those two facts, and the question before us is whether it is admissible. Now the document in question is a report of the result of inquiries made by certain persons. It is a report of the result of inquiries made by persons who had authority to make those inquiries, and the question, therefore, is whether the report of the result of authoritative inquiries is admissible to prove either of such facts as this report was offered in evidence to prove. Now it was supported, first of all, upon the allegation that it was an entry or report made by persons in the course of their duty, and by persons who had no interest at the time they made it to make a false report. Those two allegations are perfectly correct; but the question is whether these two alone, without something else, are sufficient to make such a report evidence of such facts. The principle of law relied upon is that which is stated first in the case of *Doe v. Turford* (3 B. & Ad. 890). Now I will refer to the principle of law there enunciated by Tindal, C.J. It was desired to prove that a particular notice had been served on a particular day, and the evidence to prove it was an indorsement on the notice by the person who had served the notice that he had served it on a particular day, he being dead; but Tindal, C.J., said: "This evidence was admissible on the ground that it was an entry made at the time"—that is the first condition—"of the transaction"—that is, of the transaction which according to the facts of the case had been done or effected by the person who made the entry—"and made in the usual course and routine of business by a person who had no interest to misstate what had occurred." There are, therefore, four conditions: (1) that it is

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an entry of a transaction effected or done by the person who makes the entry, (2) that it is an entry made at the time of such transaction, or near to it, (3) that it is made in the usual course and routine of that business by that person, and (4) that he was at that time a person who had no interest to misstate what had occurred. After that decision it was attempted in the case of *Chambers v. Bernasconi* (4 Tyrwh. Rep. 531) to put in such an entry, made by such a person, at such a time, not for the purpose of proving merely the transaction which had been done or effected by that person, but also as evidence of facts stated in the entry which were not the transaction, but which might be connected with it, and in that case of *Chambers v. Bernasconi* it was said that you really must confine the evidence in the entry to the transaction, and you must not extend it, although all the other conditions are fulfilled, to collateral matters other than the transaction which the person had effected himself, however cognate they might be to that transaction, and however naturally described in it. That was really no limitation of the doctrine laid down in *Doe v. Turford* (3 B. & Ad. 890) but it was a refusal to carry that doctrine further than the doctrine itself as laid down by Tindal, C.J., and that is conclusively pointed out in the case of *Smith v. Blakey* (L. Rep. 2 Q. B. 326), where both those cases are explained. Lord Blackburn there explains them thus: "The duty must be to do the very thing to which the entry relates and then to make a report or record of it." That is restating in other words the limitation or the refusal in *Chambers v. Bernasconi*, and interpreting Chief Justice Tindal's dictum or rule to be confined to the transaction, that is, the duty to do the very thing and then record it. Mellor, J. perhaps puts it even more clearly. He says: "As to an entry in the course of duty, that that must be made contemporaneously with the act done, and there must be a duty to do the particular act and at once to make a record of it." If you apply that doctrine to this case, then it was the duty of those who made this report to report the result of their inquiries, and it was their duty to make an entry, that is, to write the report directly they had come to that result. This report, therefore, might properly be given in evidence to show, if it were of any use, that that committee had come to a particular conclusion as the result of their inquiry. The only act which they did at the time was to come to a result or determination; but the question whether Mangini belonged to the family of Quarto was not material for anything which they themselves had to do, or which they affected to know. They came to a result with regard, not to that point but to something else, in truth, that he was a fit person to be appointed as consul. The fact of his ever having been at Quarto, or the fact of his being forty-four years of age at that time was not a thing which they knew, or which they had anything to do with, or as to which they were to make an entry. It seems to me, therefore, that you cannot bring this case within the principle laid down by Tindal, C. J., in *Doe v. Turford*, which is a recognised principle of the law of evidence, and if you could at all bring it within the principle of *Doe v. Turford*, it seems to me that these two particular facts would be excluded by the limitation or the refusal to carry that principle further in the case of *Chambers v.*

*Bernasconi*, because it would seem to me that these two facts were really not material to the purpose of the inquiry. Therefore, even if it could be brought in under *Doe v. Turford*, it would be shut out by the case of *Chambers v. Bernasconi*. But it seems to me that the objection goes higher than that taken upon the case of *Chambers v. Bernasconi*, and that you do not get it at all within the rule laid down in *Doe v. Turford*. That being so, it was very natural and to be expected that an argument would be adduced that this report could be admitted on another and distinct ground of the law of evidence, which is, that it is the report of a public authority. Now, in order to make it admissible on that ground, it was said to be a report, or conclusion, or decision of a public authority, and it was said that on that ground, and on that ground alone, it is admissible. Now, the authorities which have been cited in support of that argument are exclusively rulings before Committees of Privilege. First of all the case of the *Nairne Peerage* was cited by Mr. Pearson. I think that that case, if there were no other, would be answered by what my Lord (James, L.J.) has said, namely, that there the report was not offered as evidence of any fact, which it was material for the person who put it in to prove, but it was put in in order that he might, to satisfy the Committee of Privileges, get rid of difficulties that appeared on the face of that report. That would settle that case, I think, but it certainly does not settle the force of the cases of the *Shrewsbury Peerage* and the *Wharton Peerage* (12 Cl. & F. 295.) It becomes, therefore, necessary to examine those cases rather closely. In those cases recitals in a private Act of Parliament were admitted. I think, it cannot be denied that as a general rule, in ordinary courts of law, a recital of certain facts in a private Act of Parliament cannot be admitted as evidence of the truth of those facts against persons not parties to the private Act. That cannot be disputed; but in these cases of peerages, recitals in certain private Acts are admitted. Even there, recitals in other private Acts are not admitted. Then one must examine the ground on which these recitals are admitted. Now I will take that which was said by the Lord Chancellor in the *Wharton Peerage*: "It is very strong proof, for it is the well-known practice of this House not to allow the insertion of such a statement in the recitals of a private Act of Parliament, that is with regard to a peerage, unless the truth of that statement has been previously proved to the satisfaction of the judges to whom the Bill had been referred." Mr. Taylor, in his book on evidence, dealing with case, states the rule thus, and rightly states it. He construes the word "for" into "because," and he says that "In those cases before a Committee of Privileges recitals in a private Act with regard to a peerage are admitted because at that time"—that is, at a certain period—"no recital was allowed unless proved to the satisfaction of judges." Now, if that be laid down as a general principle, it seems to me that it would allow the giving in evidence of the evidence on a trial before the judge and jury in an action to which the person against whom the evidence is offered was no party, and was not privy. It is known law that you could not do that. You could not offer in evidence the facts that were proved to the satisfaction of the judge and jury, and which it was necessary to

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prove in order to obtain that judgment or conclusion. You cannot offer the fact of those facts having been accepted by the judge and jury as proved as evidence of the truth of those facts as against persons who were not privy to that action. The rule, therefore, which applies in the Committee of Privileges, cannot be a general rule, because it is stated in terms which would comprise cases in which it is known the courts would not admit the evidence. Then how is that rule to be dealt with? It seems to me that it must be dealt with as an exceptional case, and that it is a rule laid down to be observed before a committee of privileges, and in no other case, and before no other tribunal. If that be so, of course the rule is no authority for the purpose which we have in hand, which is a matter before an ordinary court of law. Then it is true that the visitation of Heralds under a Royal Commission has been admitted in cases of pedigree before a Committee of Privileges, but I cannot help thinking that that also is exceptional, and confined to that tribunal, and that a visitation of Heralds would not be admitted in any court of law as evidence of facts stated in the report of the Heralds, or stated in the Heralds' books. It seems to me that those authorities are confined to the tribunal of the Committee of Privileges, and that they obviously are not authorities for dealing with any document or with any head of evidence in courts of law, and that, therefore, this evidence, which is pressed upon us as evidence of the facts to which I have alluded, is not brought within any rule of evidence which is known to us, and we have no right to make a new rule at this time upon an entirely new principle, although we might apply an old and recognised principle to new facts. This would be to introduce a new principle. There is no authority for doing that, and therefore I think that this document, however interesting, ought to be rejected.

CORRIGAN, L.J.—I have come to the same conclusion. For the purpose of considering whether the document is admissible, of course it is necessary to consider for what purpose it is tendered in evidence. I am not at all prepared to say that circumstances might not exist under which it would be competent for us to look at this document. For instance, if it were desired to connect the person who was appointed diplomatic agent with the consul, it might be that this document would be admissible in evidence for the purpose of ascertaining whether or no they were the same person. But it is conceded and admitted as clear, as I understand it, that the person who was consul in London did apply to be appointed diplomatic agent, and it is not to prove the identity of the person appointed as diplomatic agent with the person who filled the position of consul that the document is tendered, but for the purpose of showing that the man who was consul, and who was afterwards diplomatic agent, had been born at a particular place, and was of a particular age in the year in which this report was made, in 1789 or 1790. Now, is the document admissible as evidence of a fact stated in the report? I will only deal—and I shall do that very shortly, after the full judgment which has been given by Brett, L.J., with which I entirely agree—with two points on which it is said we are to receive this document. It was first put by Mr. Pearson on the principle upon which contemporaneous entries of

facts made by persons, who have done an act in the discharge of their duty, and made an entry of the fact, are admissible in evidence. But here that principle clearly cannot apply. Mr. Pearson said that they were competent persons to make this report, and that the entry of the fact in the report would be admissible on that principle; but that really is a misapplication of the words "competent persons." When that expression is used it means that if a person in the discharge of his duty does an act, and it is part of his duty to make an entry of it, he is a competent person to make that entry, because he has himself done the act which he records, and it is part of his duty to make that entry; and it is that case to which the principle applies, which can have no application to the present case, when what is attempted to be proved by an entry in this report is not any official act done by these commissioners, or by this department of Government, but something which was the result of inquiries made by them as to a fact not within their knowledge, a fact not contemporaneous with their report, but something which they think they have ascertained from something, the nature of which we do not know. The more difficult question to my mind is this, whether or no this report could be admissible on the ground of being the result of an inquiry made by a public authority. But with regard to the admissibility of such a document, it cannot be said, in my opinion, that the rules of evidence established in England would entitle the court to look to every result of an inquiry directed by a public authority. The rule is stated by Mr. Phillips in his book on evidence in this way, and I think correctly: "The last species of judicial writings upon the admissibility of and effect of which it is necessary to advert with any particularity, are inquisitions. These contain the result of inquiries made under competent public authority concerning matters in which the public are concerned. In some cases indeed, such inquisitions relate to private affairs, as, for example, the particulars of the estate of a deceased individual, or of his pedigree. Still, if the inquiry has been made with a view to ascertain the rights of the Crown in regard to such private matters, the inquisition is to be considered as of a public nature for the purposes of evidence." It is not necessary to go through all the different kinds of documents to which he refers, but I may deal with one which is perhaps more difficult than any other, namely, Heralds' visitations. If those are admissible—because it seems to be rather an exceptional case in the House of Lords—in courts of law as evidence of such a fact as we are here asked to receive this report to prove, it must be on the ground that they were inquiries with reference to which the Crown was interested in this sense, for the purpose of seeing whether or no certain persons did rightfully claim to hold certain titles and dignities, or to hold certain estates to which the Crown would otherwise be entitled, or something of that sort. It is difficult to explain exactly on what principle they are admitted. Certainly this document cannot come within the principle enunciated there by Mr. Phillips as being a matter of inquiry relating to a subject of public interest, because, even although it was essential for the public interest to ascertain whether this gentleman was a Genoese subject or not, it can

hardly be said to be a matter of public interest to ascertain whether he was born at Quarto or at St. Ilario, two places, as I understand, equally within Genoese territory. Then there is another class of evidence which has been referred to particularly, the recitals in private Acts of Parliament. Those, no doubt, were received formerly in Peerage cases, as evidence of the statements contained in them, so far as they referred to the pedigree. As far as my experience has gone in Peerage cases, the Committee of Privileges were particularly strict in seeing that clear and direct evidence was given of everything to be established before them; but still one must recollect that they were really advising the Crown whether or no the Queen could confer a dignity on a particular claimant. There were no litigant parties, and the Committee of Privileges always refused to hear anyone who said, "I appear to oppose. I am the person interested in opposing." They do not recognise litigation between adverse claimants, but simply persons claiming may come there to call the attention of the committee to any link of evidence which, according to law, ought not to be considered as satisfactorily made out. It may well be in those cases that if there is a recital in the Act of Parliament, subject to the exception which I will mention, on which the Legislature has acted, that would be sufficient ground for justifying the Committee of Privileges in advising Her Majesty to act upon that in calling the claimant to the House of Lords as a peer. But it must be remembered that that is only done where the recitals in the Act are of a matter that has been referred to the judges—to our judges or to the Scotch judges—and where they have examined into the matter, receiving evidence on oath, and it is only where there has been that safeguard that the Committee of Privileges looks to the recital in the private Act of Parliament as sufficient to justify them in advising Her Majesty as to what is to be done as regards the claim of a particular person. But it was said by Mr. Pearson that in the case of the *Nairne Peerage* these was something more than that—there was the report of the Attorney-General finding that the recitals in an Act of Parliament reversing the attainder of Lord Nairne had been proved, and that fact had been admitted in evidence. There was the recital in the Act of Parliament on which the attainder was reversed, and a particular person, Colonel Nairne, I think, on that became entitled to the peerage. That was on the footing of a certain marriage of an ancestor of his. Then, that being so, and there having been an apparent failure of that family, another person, a collateral relation, a descendant of an uncle or great uncle of Colonel Nairne, came to the House and asked the Committee of Privileges to advise Her Majesty that he had made out his claim to the peerage. I take it that the report was put in in that case for the purpose of showing on what footing it was that Colonel Nairne had obtained that Act of Parliament, reversing the attainder, and it was not for the purpose of proving a link in the pedigree of the claimant, except by showing that that last peer was so and so. Then the claimant said, "Taking him to be the last peer, I am now entitled, because he became peer on the footing that he was descended from the elder brother of my ancestor through a particular marriage, and I show that all those who are said to be the issue of that particular marriage are gone,

and now, therefore, it goes down to the next stirps, the stirps of the next brother." Therefore the report of the Attorney-General was not admitted as establishing a link in the direct pedigree of the claimant, but for the purpose of showing, assuming the last peer to have been properly there, that all those who upon that footing stood in priority to the claimant, were out of the way, which distinguishes it entirely from the present case. In my opinion we should be introducing a novelty into the law of evidence if we were to admit this report; and therefore, although we should be desirous of receiving everything which could possibly give us information in this case as to which of the different claimants is entitled, in my opinion we should be acting contrary to the rules of evidence if we admitted this report, and I therefore agree that it must be rejected.

JAMES, L.J.—I wish it to be distinctly understood, in order that there may be no misapprehension on the part of the Italian Government, that we reject this document on exactly the same grounds as we should feel ourselves bound to reject a similar document emanating from a similar body in this country. I may observe that we are not allowed to look at the original document except with a reservation, which it is quite clear we could not comply with, unless we agreed to abdicate our duty, or not to do our duty in this case. I have a letter from an Italian official, which says, "I have therefore to request you will inform me at your earliest convenience whether the Court of Appeal will receive and take charge of the document, on the condition reserved by the Italian Government that the question of its authenticity, if raised, shall not be entered into and adjudicated upon by the court." It is obvious that we could not accept any document upon such a condition as that.

Solicitors: *Lawless and Co.*; *Foster and Spicer*; *G. L. P. Eyre and Co.*

Wednesday, June 25.

(Before JESSEL, M.R., and BAGGALLAY and THESIGEE, L.JJ.)

Re THE GOLD COMPANY LIMITED. (a)

*Companies Act 1862, ss. 115, 138, 165—Company in voluntary liquidation—Summoning witnesses deemed capable of giving information as to dealings of company—'Locus standi' of persons so summoned, to apply for discharge of order—Discretion of judge.*

A company being in voluntary liquidation, an order was made by Fry, J., upon an application by a contributory of the company, under sects. 115 and 138 of the Companies Act 1862, that certain former officers of the company, including the secretary, who was the voluntary liquidator, should attend for the purpose of giving information as to the dealings of the company. The persons thus summoned appealed.

Held, that the case was one in which the discretion of the judge of first instance ought not to be interfered with.

Per JESSEL, M.R., and BAGGALLAY, L.J.: Witnesses summoned under sect. 115 have no 'locus standi' to appeal from the order summoning them to be examined; the only difference between them and

(a) Reported by E. S. ROCKE, Esq., Barrister-at-Law.

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witnesses in an ordinary action being that while in an ordinary action a witness can be subpoenaed at the will of the suitor, under sect. 115 the subpoena can only issue by leave of the judge. A mere witness, however, will have a right to appeal where the process of the court has been abused for the purposes of extortion or otherwise.

THIS was an appeal from a decision of Fry, J.

The company was incorporated in 1873, and, having proved a failure, went into voluntary liquidation. Nine months afterwards a petition was presented for a compulsory order, alleging great irregularities in the formation of the company, and in the conduct of the directors, that no consideration had been paid for 22,000 shares which had been allotted as fully paid-up; that the 11th clause in the articles of association, which provided for the allotment of shares in special circumstances, was invalid, and that the voluntary winding-up had been improperly obtained. When the case came before the Court of Appeal in Jan. 1879 it was held that no compulsory order could be granted, and that the alleged fraud, or wrong, if any, was personal to those who were deluded into purchasing the shares, for which they had a personal remedy against the parties who had defrauded them, and it was suggested that if the alleged fraud could be proved the guilty parties could be indicted for conspiracy: (*ante*, p. 5.)

Application was then made by Mr. Carter, a contributory of the company, by a motion under the 138th section of the Companies Act 1862, enabling the court in a voluntary winding-up to exercise any of the powers which might be exercised if the company were being wound-up by the court, to order under sect. 115 of the Act, certain persons to be examined as witnesses, and to direct inquiries to be made into the conduct of the directors and officers of the company. The summons was to four persons therein named, former officers of the company, including the secretary, who was the voluntary liquidator, to attend before the ordinary examiner of the court for the purpose of giving information with respect to the alleged misfeasance of the said persons and the other directors of the company, in improperly allotting some or all of the 18,775 shares referred to in the agreement of the 31st Dec. 1873. The terms of the agreement are sufficiently shown in the judgment delivered in the court below.

Fry, J.—This is an application under the 138th section of the Companies Act which provides that where a company is being wound-up voluntarily, a contributory may apply to the court to determine any question arising in the matter of such winding-up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the court might exercise if the company were being wound-up by the court; and the court, if satisfied that the determination of such question or the required exercise of power will be just and beneficial, may accede wholly or partially to such application on such terms and subject to such conditions as the court thinks fit. Now the power I am asked to exercise is that given by the 115th section. That gives me power to summon before the court any officer of the company or any person supposed to be capable of giving information concerning the trans-

actions and the trade dealings, &c., of the company. There has been brought to my attention the agreement of the 31st Dec. 1873 under which certain shares are allotted upon the footing of a recital that moneys amounting to 18,775*l.* have been properly expended upon the property or otherwise for the legitimate purposes of the company. I have before me, in the affidavits, in the articles of association of the company, and in the books of the company, evidence about which I desire to say as little as possible; but I only say it satisfies me that there is a question that I think ought fairly and reasonably to be inquired into with regard to the truth of that recital in the instrument and with regard to the propriety of the allotment of shares made on the footing of the recital. Beyond that I do not desire to express the impression produced on my mind upon the evidence, because I am now merely permitting a step to be taken for the further investigation of that question. It appears to me in this case that it would be "just and beneficial" that I should exercise the power. In coming to the conclusion I do, it is right to bear in mind that I shall have full control over the costs of this application. Of course Mr. Higgins does not object to submit if necessary that the costs shall be dealt with in such manner as the court may think fit. I presume that I have the power of doing that. That being acceded to, I take the submission of the applicant that the costs should be dealt with in such manner as the court shall think fit. It will, therefore, follow, that if this application is unsuccessful in the result, there will be no serious injury to the company. I am not stopping the winding-up and I shall not be increasing, or certainly not to any extent increasing the costs of the liquidation. On the other hand if the applicant should succeed in the contention he has raised it may result in an increase to the assets of the company. Weighing the whole case, therefore, I think it is "just and beneficial" that I should exercise that power, reserving the whole of the other matters dealt with by this summons until after the information has been obtained from these gentlemen.

The voluntary liquidator and the other persons named in the summons appealed.

J. Pearson, Q.C., Bristowe, Q.C., and H. C. Deane, for the appellants, contended that there was no question that ought to be inquired into with regard to the propriety of the allotment of shares at the instance of a contributory. The liquidator was interested in and responsible for the conduct of the winding-up, and in his view any further investigation would only put the witnesses to great expense and inconvenience without any "just and beneficial" result. With regard to the *locus standi* of the appellants; in *Olemer's case* (18 L. T. Rep. N. S. 596; L. Rep. 13 Eq. 179n), where the appellant was a mere witness, no objection was taken to his *locus standi*; but here the appellants were more than mere witnesses, being the liquidator and directors of the company.

Higgins, Q.C. and Oswald, *contra*.

JESSEL, M.R.—We need not call upon you Mr. Higgins. This is an appeal from an order of Fry, J. made, as I understand it, under the 115th section of the Companies Act. It is made nominally under the 138th section, because it is an application by a contributory under a voluntary liquidation, and therefore he has to apply



under that section to put the powers of the 115th section into force; but the order can only be made under the 115th section. It is made for the purpose of an investigation to fix the directors with some responsibilities and liabilities under the 165th section on the face of the order. That is a proceeding which a liquidator, contributory, or creditor can take, with the leave of the court, if it is a voluntary winding-up. The order is, that certain persons who are alleged to be capable of giving information as to the affairs of the company, and who, it is not denied, can give the information (and it is not suggested that anything of the kind is untrue alleged) should be examined as witnesses. It is not suggested in this case that Mr. Carter's application is otherwise than *bonâ fide*, by which I mean that he intends to prosecute the claim against the directors and the secretary, and that he thinks these witnesses are material to help him to prosecute the case if he can make one out. In cases where the process of the court is abused I agree, that any person who is affected by such an abuse may bring the case before the court. But it appears to me that a mere witness ordered to be summoned under the 115th section has no right to apply to the court to discharge that order. He is not more or less than a mere witness as in any other case, with this protection that in an ordinary action the subpoena issues as a matter of right at the option of the litigant, whereas in this case it cannot be issued without the opinion of the judge of a superior court being taken that it is a proper case in which to issue a summons which comes in lieu of the subpoena. It is only to be done by the court instead of by the litigant and against persons whom the court may deem capable of giving certain information. The whole argument of Mr. Bristowe was that it might put the witnesses to great expense and inconvenience, but the answer to that is that they are no worse off than ordinary witnesses subpoenaed in an action, and they are very much better off, for if a man chooses to subpoena a great number of persons who know nothing about the matter, they must either attend or, by refusing to attend, render themselves liable to proceedings being taken against them for disobedience of the subpoena. They cannot come to the court to discharge the subpoena. The court will not listen to such an application, and therefore the persons in this case, being better protected, could have still less ground for coming to the court, if, in fact, as I have said before, in the opinion of the judge of a superior court of law they are proper persons to be summoned under this section. I think that disposes entirely of the application of the witnesses purely. Now I come to the application of the liquidator. I agree, that where a contributory comes under the 115th section, whether it is under a compulsory winding-up or a voluntary winding-up, he must give notice to the liquidator. The liquidator, according to the practice of the court, comes *ex parte*; as a general rule he makes no affidavit, for a very good reason that he is not going to put something upon the files of the court, which can be inspected by the person against whom he intends to proceed and which, if inspected, would afford information, which might enable him, if he is a rogue, to defeat the action or proceeding taken against

him. But where a contributory comes to the court he is bound to give notice, and for this reason the liquidator is, if I may say so, a *dominus litis*, it is his business to enforce the claims of the company against individuals, and, if he is able to proceed, can make officers and directors liable for a misfeasance. He proceeds at his own time, and in his own way, and he is entitled to say that he will not have the conduct of these proceedings taken out of his hands by any contributory who chooses to intervene. When he gets the notice he comes the court and says, "I am about to institute proceedings myself, or I am thinking of doing so." The court says, "Very well, we will not interfere at the instance of a contributor, but will leave you to go on in the proper way." But if he comes to the court and says, "It is quite hopeless," as sometimes he does say, or "I have no funds available for the purpose, and it is not sufficiently promising for me to invest the small remainder of the funds of the company in litigation; but I have no objection to the contributory taking it up, and he may do so." If he does say either of these things there is an end of it, as far as he is concerned, and if he has notice of subsequent proceedings, he need not attend to them. The witnesses are summoned, as they are by this order, by the contributory applying. The liquidator is not affected in the least degree; if the proceeding fails he loses nothing, while, if they succeed, he gets something, or rather the company he represents gets the fruits of the proceedings, because the proceedings, although instituted by the contributory, if successful, can only be successful in procuring an addition to the funds of the company which is being wound-up. He has everything to gain and nothing to lose, therefore what right has he to interfere? The moment he says, "I do not wish to institute proceedings at all in this matter; I will have nothing to do with it," he has no business to interfere, much less to appeal against the order. It appears to me that not one of the present appellants has what is commonly called a *locus standi* for appealing. Now as to the merits independently. It seems to me that there are as little merits as there are technical grounds for allowing the appeal. The judge in the court below has expressed a decided opinion, after looking at certain books which I have not looked at, that there is very good ground for thinking certain recitals in the deed as to the application of moneys and shares is untrue, and that the matter requires farther investigation into. He has looked into the matter, and has exercised his judgment. He is also of opinion (and that is not contradicted) that the persons summoned are capable of giving information about the business in hand, and about the trade dealings and estate and effects, and also about this very transaction. I think as to some, it is quite certain that they know, and as to others it is by no means improbable. Now, that being the opinion of the learned judge in the court below, and the statute being that the court may summons witnesses if it deems them capable, and the court having exercised a discretion, how can the appeal court interfere? It certainly cannot interfere, as I understand, if the matter is within the section at all. In *Clement's case*, the point really argued before the Lord Chancellor, the other point not being taken on the part of the appellant, was whether the case put

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was within the section; that is, whether the matter alleged was concerning the trade dealings and estate and effects of the company, and on that point he confirmed the opinion of the judge in the court below, but he expressly said it was discretionary, and it was not for the court above to interfere with the discretion when the matter was actually within the terms of the section. Indeed, it would be almost impossible to do so, because in these matters, as I have said before, the court acts without legal evidence, the object, of course, being to keep the proceedings secret from the person sought to be effected; and the practice is, and, as far as I know, always has been, that the liquidator, instead of making an affidavit, if anybody proceeds, simply makes a written statement, which he leaves with the chief clerk, who thereupon issues an order; and the written statement cannot be got at by anybody, whereas an affidavit can. You must remember that both the chief clerk and the judge know a great deal more of the proceedings in the winding-up than the Court of Appeal can know, and there may be various grounds for exercising the discretion, as there were here, where the judge looked into the books, which we have not even got, until he found there was a *prima facie* case, or even only a case of suspicion, which the Court of Appeal cannot possibly determine. We must recollect also this (and I think this has been the subject more than once of decision) that it is not necessary to make out a *prima facie* case; the probability of a case will do. As I put it during the argument, a fair suspicion might be well worthy further investigation, and it might well be worth the expense and trouble of examining witnesses to see if the alleged claim could possibly be made out. It is not necessary that he should establish his case before he applies to the judge. He may say to the judge, "I have a strong ground for suspecting that such and such a transaction is not altogether right. If it is so, we shall get a large sum of money. Will you let me lay out a small sum of money in order to examine a witness or two so as to ascertain the facts?" In that case the court will exercise a discretion. In fact, the whole meaning of the section is to assimilate the practice in winding-up to the practice in bankruptcy, which was established in order to enable assignees (who are now called trustees in bankruptcy) to find out facts before they brought an action, instead of waiting to discover the facts after they had incurred all the expense and lost the action at the trial at a cost of some hundreds of pounds, when they might have got all the necessary information at a cost of 5*l.* or 10*l.* by examining a witness or two. I never heard, as far as I know, of any case of a witness moving to discharge an order in bankruptcy, and, except the case to which our attention has been called, I am unaware of any case of an application by a witness under a winding-up. It appears to me that this appeal fails as much in substance as it does in form, and must be dismissed.

BAGGALLAY, L.J.—I am of the same opinion. The Gold Mining Company is in voluntary liquidation. Mr. Carter is a proprietor in the company. The 138th section of the Act provides that where a company is being wound-up by voluntary liquidation either the liquidator or any contributory of the company may apply to the court, among other things, to exercise all or any of the powers which

the court might exercise if the company were being wound-up by the court. Those powers are contained in sect 115, and there we find the court may, after making an order to wind-up, summons before it persons of three classes: first, any officer of the company; secondly, any person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company; and thirdly, any person whom the court may deem capable of giving information concerning the trade dealings, estate or effects of the company. As regards the last two we find a certain qualification. As regards the summing before it any officer of the company that is not necessary, and there is no qualification added to it. They may summon before it any officer of the company. You may also summon a second class, composed of those persons as to whom there may be qualification; but they must be suspected of having in their possession some portion of the estate or effects of the company, or be supposed to be indebted to the company. And then we come to the third class, and there is the qualification "whom the court may deem capable of giving information"—not any person capable of giving information, but any person whom the court may deem capable of giving information. In the case now under consideration it has been stated that, with regard to those summoned as witnesses, some do not fill the character of officials of the company. Certainly as regards the liquidator he does not fill the office of an officer of the company, but as regards some of the other persons summoned, as far as I can see, they were directors. It is possible there may be some other person included in the schedule who is not an officer of the company. As regards such other person he must be a person whom the court may deem capable of giving information. I suppose with the object of assisting the trial, with a view to determining whether such a person may be considered capable of giving information, reference is made to sect. 165, which is for the purpose of making the directors or other officers of the company responsible in respect of misfeasance in connection with the discharge of their duty. An application having been made to Fry, J., he deemed the several persons were capable of giving information. It does not follow that where they are called they can give information which will be of the slightest use, but still he deems them capable of giving that information. It is not desirable in a case of this kind for the judge to go too far in stating the grounds on which he deems these persons capable of giving information, because it might prejudice the prosecution of subsequent inquiries against them in the form of being examined before the examiner. That being so, there may be a question whether there is a right of appeal at all in respect of the witnesses being summoned in this case. At any rate, I cannot understand that there is a right of appeal on the part of any of the persons summoned as witnesses. No doubt in the case to which our attention has been called *Clements v. The Merchant Banking Company* (*supra*) the person summoned as a witness was the party who appealed against the order. There no objection seems to have been raised upon that ground, but the appeal was dismissed, and therefore it was not necessary to raise a purely technical objection.

But I find that case of *Olements* cited in a note to the case of *Tricker v. The Bank of Hindustan, China, and Japan* (L. Rep. 13 Eq. 179), where it was relied upon as an authority by Mr. Higgins, who appeared for the official liquidator, the application being for an examination, and the summons in that case was *ex parte*, and the order was made *ex parte* for examination of the witnesses. It appears to me on every ground that this appeal must fail.

THE SINGER, L.J.—I prefer in this case to express no opinion upon the point whether the appellants have any *locus standi*, but, at the same time, I do not wish it to be supposed that I dissent in any way from the view which has been expressed upon that point by the Master of the Rolls. It seems to me, however, sufficient to say that no ground has been shown on which the court ought to interfere with the judicial discretion which has been exercised by Fry, J. under the 115th section of the Act. That section is pre-eminently one in which the judge of first instance ought to be trusted to exercise of his discretion properly. He is not to exercise that discretion in the way in which it would have been exercised where the rights between the parties are to be determined. He is not even to see that there is a *prima facie* case made out under the 165th section. All he has to see is, either that there is a reasonable suspicion that there may be a case under that section, or a reasonable probability that the evidence acquired through the medium of the examination of the witnesses may lead to such a case. This obviously is one of those cases in which it would be improper for the learned judge to express an opinion whether the case is made out under the 115th section, and a case pre-eminently difficult for this court to say whether or not he has exercised his discretion properly. And really one of my principal reasons for not giving any opinion as to whether the appellants in this case have any *locus standi* is this, that it appears to me that this court ought not to interfere with the discretion of the learned judge in the court below, except in such an extreme case that I am not sure it would not be one of those cases in which the witnesses would have a *locus standi*.

#### Appeal dismissed with costs.

Solicitors for appellants, *Stevens and Harris*.

Solicitors for respondent, *Wild, Droune, & Wild*.

May 21 and 24.

(Before JESSEL, M.R., JAMES, BRETT, and COTTON, L.JJ.)

#### THE CASSIOPEIA. (a)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Practice—Amended writ—Default cause—In rem—Service.

After a vessel has been sold under an order of the Judge of the Admiralty Division, and the proceeds are in the registry, no owner having appeared, the writ in an action against those proceeds, whether original or amended subsequent to the sale, must be personally served on the registrar.

An amended writ must in all cases be served in the same way as an original writ would be under

(a) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs. Barristers-at-Law.

similar circumstances. Where a writ is served on the registrar, to render the service good, the provisions of Order IX., r. 13, must be strictly adhered to.

THIS was an appeal from an order made by the Judge of the Admiralty Division refusing to sign judgment in a cause *in rem* by default.

The facts were, that a cause *in rem* was instituted against the *Cassiopeia*, a British colonial vessel, for necessaries supplied to her, and the writ was served on the ship in the usual way (Order IX., r. 10), but no appearance was entered for the owners.

At the time the writ was served the *Cassiopeia* was already under arrest in another action *in rem*, in which there was no appearance; a decree was obtained by default in the earlier action subsequent to the service of the writ in the later one, and under the decree the ship was sold, and the proceeds of the sale brought into court. The plaintiffs in the second action then amended the indorsement on their writ of summons by adding to their claim for necessaries a claim as mortgagees of the ship; the mortgage was a security for the payment due for necessaries.

May 15.—W. G. F. PHILLIMORE, for the plaintiffs in the second action, moved for judgment by default, under the Admiralty Rules of 1871 (L. Rep. 3 A. & E. *ad fin.* The *Polymede*, L. Rep. 1 P. D. 121; 34 L. T. Rep. N. S. 367), for his claim as mortgagee in the amended indorsement against the fund in court. [Sir R. PHILLIMORE.—Has the amended writ been served on the owners?] No, there is no necessity; the claim for mortgage is the same as that for necessaries stated in a different way; the owners, by not appearing in the necessaries suit, show that they have no defence against our claim. [Sir R. PHILLIMORE.—The owners may have a defence to your claim on the mortgage, though they have not when you claim for necessaries.] Where there is default of appearance, it is sufficient service to file with the registrar: (Order XIX., r. 6.) If there had been an appearance in the action, I should have been obliged to serve the amended writ after getting leave to amend under Order XXVII., r. 11 (see also Order III., r. 2), an the amendment may be made without prejudice to a pending motion:

*Caldwell v. Pagham Harbour Reclamation Company*, 2 Ch. Div. 221.

[Sir R. PHILLIMORE.—There may be other claimants against the fund in court, and they were entitled to notice of this claim.] If there were they would have objected to our claim for necessaries and have entered a caveat.

Sir R. PHILLIMORE.—I am not satisfied that there should not be a fresh service of the writ in this case, and therefore I refuse to grant the prayer of the motion for judgment.

From this decision the plaintiffs appealed.

May 21.—The appeal came on for hearing before JESSEL, M.R., James, and Brett, L.JJ.

W. G. F. PHILLIMORE for plaintiffs.—At the time the amendment was made in the writ the ship had already been sold, and therefore it was impossible and useless to serve the amended writ on her; the proceeds were in the registry, and the amended writ was served by being filed there.

JESSEL, M.R.—In this case the service on the registrar was sufficient, the ship having been sold

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under order of the court, though in general an amended writ should be served in the same way that an original writ is.

JAMES and BRETT, L.JJ. concurred.

May 26.—The case came before the court (James, Brett, and Cotton, L.JJ.) again, the registrar of the Admiralty Division having refused to draw up the order for judgment on the ground that it was made on the supposition that the amended writ had been served on him (the registrar), when in fact it had only been filed in the registry, and also because it was informal, having no date of service indorsed on it in accordance with Order IX., r. 13.

*Phillimore* for the plaintiffs.—Order IX., r. 13, does not apply to actions *in rem*; it is taken from sect. 15 of the Common Law Procedure Act 1852, and applies only where personal service is necessary:

*Dymond v. Croft*, 34 L. T. Rep. N. S. 786; 3 Ch. Div. 512.

[BRETT, L.J.—That case was a case of substituted service, this is one in which the practice has been to serve the registrar as holder of the proceeds.] The service on the registrar is mere matter of custom, it is not required by any rule. [By the COURT.—The practice is well established.] Our service of the amended writ in the registry was practically service on the registrar. [BRETT, L.J.—Delivering a writ to a clerk to file is not service on the registrar. JAMES, L.J.—An amended writ is like a new writ issued at the date of amendment, and should be served in the same way.] Not in all respects if a writ is amended after subsequent steps in the action have been taken; it is not necessary to go through all these steps *de novo*, the order is to amend the writ and all subsequent proceedings. [JAMES, L.J.—But this amendment is a change both of the nature of the action and of the character of the plaintiffs.]

E. C. Clarkson, for other parties, was not called on.

BRETT, L.J.—I am of opinion that the registrar was right in refusing to draw up the judgment. The service was not sufficient. When a writ is so amended as to introduce a new claim against the proceeds of the sale of a ship, it must be served on the registrar in the same way as an original writ in the like case. This amended writ was not served on the registrar, it was only filed in the registry. No intimation of the service was made. Delivery for the purpose of filing cannot be construed to be service. Moreover, the provisions of Order IX., r. 13, were not complied with.

JAMES and COTTON, L.JJ. concurred.

Solicitors for plaintiffs, *Speechley, Mumford, and Co.*, agents for *J. W. Carr*, Liverpool.

#### SITTINGS AT WESTMINSTER.

Friday, June 27.

(Before Lord COLERIDGE, C.J., BRAMWELL and BRETT, L.JJ.)

MIDGLEY AND ANOTHER v. COPPOCK. (a)

*Vendor and purchaser—Sale of land—Agreement to pay outgoings—Outgoing, what is.*

*Plaintiff bought a house and premises in Manchester from defendant under an agreement which provided that "all rents, rates, taxes, and*

*outgoings payable in respect of the premises should be received and discharged by the vendor up to the time of completion, such rents and outgoings being apportioned if necessary.*

*By sects. 15 and 17 of the Manchester General Improvement Act 1851 the council are empowered to require owners of property lying alongside any street (not being a highway repairable by the inhabitants at large) to sewer, pave, &c. the street, and if any such owner neglects to do so, the council may do the work themselves and charge the respective owners with their proportion of the charges and expenses. By sects. 18 and 19, by way of additional remedy, the council may require the occupier of the premises to pay the amount of such charges and expenses, and the same may be levied by distress upon the occupier out of the rent from time to time becoming due in respect of the premises; the owner shall allow every such occupier to deduct from the rent all sums of money which he shall so pay or which shall be so levied; the occupier shall in no case be liable to pay more in respect of such charges than the amount of rent due at the time of the council's demand; but if, after notice from the council requiring him not to do so, any occupier shall pay any rent to his landlord, such occupier shall be liable to pay, in respect of such charges and expenses, the amount of the rent so paid by him after such notice, or the same may be recovered from him by warrant of distress, &c. At the time of the completion of the purchase a sum was owing to the council in respect of severing and paving the street in which the premises were.*

*Held (reversing the judgment of Lopes, J.), that this sum was an "outgoing" which the defendant under his agreement was liable to pay.*

This was an appeal from a decision of Lopes, J.

The statement of claim alleged that, by an agreement made the 29th June 1877, the defendant agreed to sell to the plaintiff James Edmundson, and the plaintiff agreed to buy from the defendant three messuages called Richmond-terrace, Stockport-road, Manchester, with the land forming the site thereof, on the terms and conditions therein mentioned; that the said agreement contained (amongst others) the following terms: "all rents, rates, taxes, and outgoings payable in respect of the premises shall be received and discharged by the vendor (the defendant) up to the time of completion." That the plaintiff James Edmundson entered into the said agreement with the defendant on behalf of himself and the plaintiff John Bird Midgley jointly, and the said purchase was duly completed and the price paid by plaintiffs. At the time of the said completion there was due to the corporation of Manchester, for paving, sewerage, and draining done in respect of the said premises, and for interest thereon, the sum of 70*l.* 7*s.* 5*d.*, being an outgoing payable in respect of the said premises within the meaning of the said contract; that the defendant did not pay the said sum or any part thereof, and the plaintiffs became liable to pay, and were compelled to pay, and did pay, the same to the said corporation on the 8th Nov. 1877, together with the sum of 11*s.* 10*d.* for interest which had accrued since the date of the completion of the said purchase. The plaintiffs claimed 70*l.* 19*s.* 3*d.* and interest from the 9th Nov. 1877.

(a) Reported by W. AFFLETON, Esq., Barrister-at-Law.

Defence.—That the defendant did enter into the contract in the statement of claim mentioned, but that the sum of 70*l.* 7*s.* 5*d.*, due to the corporation of Manchester, and paid by the plaintiffs, was not an outgoing payable in respect of the said premises within the meaning of the said contract; that after the making of the contract in the statement of claim mentioned, the said contract and all claims upon it were merged and extinguished by the defendant executing and delivering to the plaintiffs, and the plaintiffs accepting and receiving from him, a certain deed dated the 7th Aug. 1877, which said deed still remains in full force and effect.

At the trial before Lopes, J. the following facts were proved or admitted:

By an agreement of the 29th June 1877 the plaintiffs entered into a contract to buy three houses from the defendant. The contract contained the following clause: "All rent, rates, taxes, and outgoings payable in respect of the premises shall be received and discharged by the vendor up to the time of completion, such rents and outgoings being apportioned if necessary." At the time of the completion there was due to the corporation of Manchester a sum of 70*l.* 7*s.* 5*d.* for paving, sewerage, and draining works done in respect of the purchased property. The work was done in the year 1873. In 1853 the property was vested in Smith and others in fee, and was then mortgaged by them to the plaintiff John Midgley and others. Subsequently on the 6th Dec. 1853 Midgley and others transferred the mortgage, discharged from the equity of redemption, to Rushton and others, trustees, with power of sale. Rushton was a surviving trustee, and in April 1877 the defendant entered into a contract with Rushton for the purchase of the property, but no conveyance was executed.

On the 24th June 1877 the contract above referred to for the sale of the premises by the defendant to the plaintiffs was entered into.

The conveyance was executed on the 7th Aug., and subsequently two bills were sent by the corporation to the defendant for the 70*l.* 7*s.* 5*d.*, which the defendant sent to the plaintiffs, who paid it together with 11*s.* 10*d.* for interest. At the time the contract of the 29th June was entered into neither the defendant nor the plaintiffs knew of the claim of the corporation, nor did either of them know of it when the conveyance was executed.

Upon these facts, LOPES, J. directed judgment to be entered for the defendant, on the ground that the sum due to the corporation was not such an "outgoing" as was contemplated by the agreement. The learned judge, in giving judgment, after further consideration, said:—I have to ascertain the intention of the parties from the words used. The words occur in an agreement for the sale of property, the purchase of which is to be completed on the 20th July. It would naturally occur to the parties that there would be rents, rates, taxes, and outgoings on the 20th July which would be current. I mean by "current," partly accrued but not then payable, and it would only be right that such should be borne by the vendor up to the time of completion, and should be apportioned if necessary. The words used all relate to money payments capable of apportionment. The words "such rents and outgoings to

be apportioned if necessary" show that the parties contemplated the possibility of apportionment in every case which the words "rents" and "outgoings" would cover. The provision cannot, in my opinion, be construed so as to include a debt incurred in 1873, which could not on any principle be apportioned between the defendant and the plaintiffs. There will be judgment for the defendant.

The plaintiffs appealed.

By sect. 15 of the Manchester General Improvement Act 1851 (14 & 15 Vict. c. 119) the council are empowered to order any street or part of a street (not being a highway repairable by the inhabitants at large) which shall not be sufficiently sewered and drained, levelled, flagged, and paved to the satisfaction of the council, to be sewered, &c., in such manner and within such time as the council shall order and direct; "and thereupon the respective owners of the houses and ground lying alongside or adjoining to the said street shall within such time and in such manner as shall be expressed in such order, at their respective charges and expenses . . . well and sufficiently sewer, drain, &c., such streets respectively."

By sect. 17, if any such owner shall neglect or omit to sewer, &c., such street, or any part of such street, within such time and in such manner as expressed in the said order, it shall be lawful for the council to do the work themselves, and to charge the respective owners with their proportion of the charges and expenses to be ascertained and settled as provided for in the section; "and all the charges and expenses which the council shall thereby sustain, incur, or pay, and shall so charge upon such owners respectively, shall, on demand, be forthwith refunded to the council by such owners respectively," and shall be recoverable by action of debt, &c.

Sect. 18:

By way of additional remedy, it shall be lawful for the council, whether any such demand shall have been made upon such owner or not, to require the payment of all or any part of such charges and expenses from the person who shall then or at any time thereafter occupy any such houses or ground, and in default of payment thereof by such occupier, on demand by the council, the same may be levied by distress, &c., and the owner shall allow every such occupier to deduct all sums of money which he shall so pay, or which shall be levied by distress, out of the rent from time to time becoming due in respect of the said houses or ground, as if the same had been actually paid to such owner as part of such rent.

Sect. 19:

In no case, except as hereinafter mentioned, shall any occupier be liable to pay more money in respect of such charges and expenses as aforesaid than the amount of rent due from him at the time of the demand made upon him for such charges and expenses, in case he shall pay the same or any part thereof on demand, or at the time of the issuing the warrant of distress or the levying thereof, in case such charges and expenses or any part thereof shall be levied by distress. Provided, nevertheless, that if any occupier shall pay any rent to his landlord after notice from the council requiring him not to do so, such occupier shall be liable to pay in respect of such charges and expenses the amount of the rent so paid by him after such notice, or the same may be recovered from him by warrant of distress as aforesaid. And after any such notice shall have been delivered as aforesaid, it shall not be lawful for the landlord of the premises to which such notice applies to commence or prosecute any action at law for the recovery of rent for such premises until the charges and expenses on

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account of which such notice shall have been given shall be paid.

By the interpretation clause, sect. 144, the word "owner" is to mean the person "for the time being" receiving the rack rent of the lands or premises in connection with which the word is used, or who would receive the same if such lands or premises were let at a rack rent.

*Edwards, Q.C. (J. W. Lowe with him)* for the plaintiffs.—This was clearly an "outgoing" within the meaning of the agreement. The plaintiffs have been compelled to pay the amount to the corporation, and are entitled to recover it from the defendant.

*Gorst, Q.C. and Leese* for the defendant.—The 70*l.* was a debt due to the corporation under sect. 17 of the Manchester Improvement Act, from a previous owner of the property, which the corporation could have recovered from that owner. This is not a charge on the premises, but a penalty on the owner :

*Tidwell v. Whitworth* (15 L. T. Rep. N. S. 574; L. Rep. 2 C. P. 326; 36 L. J. 10, C. P.)

That case was decided on the same section (17) of this Act. Bovill, C.J., in his judgment, says that a payment such as the one in the present case is in the nature of a penalty for the non-performance of a duty imposed upon the landlord. It is also treated as a penalty in *Thompson v. Layworth* (17 L. T. Rep. N. S. 507; L. Rep. 3 C. P. 149; 37 L. J. 74, C. P.); see the judgments of Bovill, C.J. and Willes, J.) This, therefore, is not an outgoing payable in respect of the premises, but a personal debt or penalty. It is true that sects. 18 and 19 give an additional remedy against a tenant of the premises who owes rent, but the power is only to attach the rent due. The tenant cannot be distrained upon. The claim can only be enforced against the "owner," who in the first instance becomes liable; it cannot be enforced against succeeding "owners." The remedy then is only in the event of there being a tenant of the premises, when sects. 18 and 19 would apply. "Owner at the time being," as defined by the interpretation clause, must be taken in sect. 17 to mean "owner at the time being" when the payment became due. In *Manson v. Thacker* (38 L. T. Rep. N. S. 209; L. Rep. 7 Ch. Div. 620; 47 L. J. 312, Ch.) there was a contract for sale similar to this, and Malins, V.C. held that the vendor was not compellable to make compensation in respect of a culvert, the existence of which was unknown to both parties when the contract was made, and to the use of which other persons were entitled. The principle of that case applies here. If this was a charge upon the freehold, it became merged when the conveyance was executed.

Lord COLERIDGE, C.J.—This is an appeal from a judgment of Lopes, J., who found and gave judgment for the defendant in an action upon a clause which was contained in an agreement, and was in these terms: "all rents, rates, taxes, and outgoings payable in respect of the premises shall be received and discharged by the vendor up to the time of completion." The action was to recover a sum of about 70*l.*, which was the remainder of a certain sum of money which was said to be due, and had in fact been paid, to the corporation of Manchester for paving, sewerage, and otherwise improving the street in which was the house the subject of the agreement. The plaintiffs, who had

bought the house from the defendant under the agreement containing this clause, were called upon to pay, and had to pay, the balance of the sum due to the corporation amounting to 70*l.* odd. The question for us is, whether the defendant ought or ought not to repay that sum to the plaintiffs. The plaintiffs had been compelled to pay it under the provision of the Manchester Improvement Act. Now it is not necessary to enter into a discussion of the various constructions which may be put on the various sections referred to in argument. This at least is clear, and I hardly understood it to be disputed, that if and when the owner had had a tenant of this house, this was a sum which the corporation would have been entitled to recover under the direct words of the Act from that tenant. It is clear that if there was such a tenant this sum could be recovered from that tenant by distress, or successive distresses, for such portion of the balance as represented the amount of rent due to the landlord from time to time. I say not whether successive owners, under such circumstances as these, could, in their own persons and by direct processes, be made to pay it. In the present case this is an outgoing clearly, as it appears to me, payable in respect of the premises within the meaning of the clause. I say clearly, because it is an outgoing which manifestly can be recovered from the tenant from time to time, and one which the tenant obviously would have imposed upon him as tenant in respect of his premises only. It is such an outgoing as the defendant by his agreement has undertaken to pay. It was one which was not paid up at the making of the agreement—one which has been paid by the plaintiffs, and therefore one which under the agreement the defendant was bound to repay. This is made clear by sect. 19 of the Act, which provides that the council may give notice to the tenant, where a sum in respect of these expenses is due, not to pay his rent to the landlord, and if after such notice the tenant does pay it, he is still liable, and may be distrained upon by the corporation for the amount so paid. It is only due to my learned brother Lopes to notice that the ground of his decision is one which has not been much argued to-day. He did not decide upon the actual liability, but upon the particular words of the clause, and he came to the conclusion on those words that this outgoing was not within them. The last words of the clause being "such rents and outgoings being apportioned if necessary," he says that those words can only apply to such outgoings as of necessity must be apportioned. Now if the words "if necessary" had been left out of the clause, I should think there would be great force in this view. But, if I may venture so to express myself, the effect of these words appears to have been overlooked by the learned judge. No doubt there would be outgoings, such as property tax perhaps, and other payments, which would be apportionable if the completion of the purchase took place between two quarter-days, and in such cases the words in the latter part of the clause would receive their full, and not more than their full, interpretation. But the words "if necessary" seem to show that the agreement contemplated something which was not apportionable, and was not confined to current outgoings, which of necessity would be apportionable. I may add that I do not desire to say a word in

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derogation of the authorities cited for the defendant. They were cases with respect to the rights of landlord and tenant. That relation does not exist between the plaintiffs and defendant here, and the same question is not before us.

BRAMWELL, L.J.—I am of the same opinion. I only desire to add that our judgment is not in the least inconsistent with the case of *Tidswell v. Whitworth* (sup.). There the tenant had undertaken to pay all taxes, rates, and impositions that became payable in respect of the premises, and it was held that the expense of sewerage and paving the street in which the premises were was not so payable, because the primary liability to do the act was on the landlord, and he could not by omitting to do it throw the liability on the tenant. With respect to the case before Malins, V.C. (*Manson v. Thacker*, sup.), there was no agreement to make compensation for some objectionable matter not stated in the conditions of sale. All that the parties agreed upon was, that certain cases of error or misstatement in the conditions which might render the contract void should not do so, but should be compensated for.

BRETT, L.J.—I am of the same opinion. I think it unnecessary to notice the cases which have been cited, because, to my mind, the reasons given by my Lord are sufficient for the decision of the case.

*Appeal allowed.*

Solicitors for plaintiffs, *Pitman and Lane*, for *J. E. and R. Whitworth*, Manchester.

Solicitors for defendant, *Sewell and Edwards*, for *F. J. Marlow*, Manchester.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

May 5 and 6.

(Before FRY, J.)

FLOOD v. PRITCHARD. (a)

*Specific performance—Sale of underlease as lease—Knowledge of purchaser—Form of judgment when contract disputed—Costs.*

*A contract for the sale of a "lease" is for the sale of the leasehold interest created by the lease.*

*A purchaser, who is aware at the time of entering into a contract for the purchase of a lease that the vendor's interest in the property is only under an underlease, is bound by the contract notwithstanding the misdescription.*

*When, in consequence of the contract itself having been disputed, an action for specific performance is heard before there has been a reference as to the title, judgment will at once be given for specific performance, and an inquiry ordered whether a good title can be made.*

*A vendor who seeks a specific performance should come prepared with his title; he ought to have it ready before he carries his estate to market. If he will sell it with a confused title he must be at the expense of clearing it.*

*Wilson v. Allen* (1 Jac. & W. 614) followed.

In 1875 the plaintiff Alexander William Flood occupied a dwelling-house in West-street, Reigate, as under-tenant of a person who held an underlease of the premises which would expire on the 29th Sept. 1875. Prior to that date the plaintiff

applied to Mary Ann Elgar, Martin Robinson and Maria his wife, and Charles Charman Elgar (who as tenants in common held an original lease of the property from Lord Somers), to grant the plaintiff an underlease from the 29th Sept. 1875, for the term of thirteen years and a half (except the last day thereof).

A draft lease was accordingly prepared, approved by all parties, and engrossed, and the counterpart was executed by the plaintiff.

The execution of the lease by the lessors was postponed on account of the illness of Charles Charman Elgar, who ultimately died without having executed the underlease.

The plaintiff, notwithstanding such non-execution, remained in possession, and paid the rent, and performed the covenants reserved by the underlease to him.

By Charles Charman Elgar's will his leasehold premises were bequeathed to Maria Robinson.

The executors proved the will and assented to the bequest to Maria Robinson. In or about Nov. 1877 the plaintiff issued the following advertisement with respect to the property :

Surrey (Reigate).—To Let, an old fashioned detached residence. . . . . Rent, furnished, two and a half guineas a week for six months or longer, or unfurnished, 48l. per annum. Lease eleven years unexpired. Premium 100l., to include carpets, stoves, gas fittings, &c.

In the same month the defendant, with Mr. Billings a surveyor, and Miss Pritchard, called on the plaintiff with reference to purchasing the property, and the defendant asked to see the lease. The plaintiff went to his solicitor's office and brought back the draft of the underlease, which he handed to the defendant, and it was examined by him and Mr. Billings.

After some further negotiations the defendant agreed to purchase the property with certain furniture and fixtures for the sum of 80l., and, on the 5th Dec. 1877, the following agreement was signed by the plaintiff and defendant :

Terms agreed upon between Dr. A. W. Flood, of Hopeton House, Reigate in the county of Surrey, and G. Pritchard, Esq., of No. 5, Howley-place, in the parish of Paddington and county of Middlesex, for an assignment of the lease of Hopeton House aforesaid. The said lease is dated in 1875, and is granted by Charles C. Elgar to Alexander W. Flood for a term of which about eleven years are unexpired, at a rental of forty-eight pounds (48l.) per annum. The said G. Pritchard to pay a sum of 80l. (eighty pounds) by way of premium, such sum to include the articles of furniture and fixtures as per schedule on other side. The said Dr. Flood to erect the boundary palings at his own cost before possession is given. Possession to be given and taken on the 1st day of Feb. 1878. All outgoings to be paid by the said Dr. Flood up to the 8th day of Feb. 1878.

On the same day the defendant paid a deposit of 10l. on the purchase.

The plaintiff and defendant afterwards agreed that the former should remain in occupation until the 5th Feb. 1878, on which day the defendant was to take possession, and that the defendant should accept a direct lease approved by him, instead of the plaintiff perfecting the lease and assigning it to the defendant.

The plaintiff removed from the house prior to the 5th Feb. 1878, and on that day the defendant and his surveyor met the plaintiff and the clerk of the plaintiff's solicitor on the premises, when the engrossment of the counterpart of the proposed lease was handed to the defendant, who took it away with the expressed purpose of considering it,

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.



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promising to let the plaintiff's solicitor know his determination in a day or two.

By an underlease, dated the 6th Feb. 1878, Mary Ann Elgar and Martin Robinson and Maria his wife demised the premises to the plaintiff for thirteen years and a half from the 29th Sept. 1875, at the rent of 48*l.*, and upon terms in all respects the same as those contained in the draft lease submitted to the defendant.

After this the defendant wanted some alleged defects in the premises made good, and alleged that the plaintiff had consented to bear the costs of the proposed lease. There was also some correspondence as to whether the defendant was to take an assignment or a new lease.

On the 20th Feb. the plaintiff's solicitor sent to the defendant's solicitors an abstract of the uncompleted underlease to the plaintiff, and of the probate of Charles Charman Elgar's will, with a letter stating that the abstract was sent to enable the defendant's solicitors to prepare an assignment of the lease to the defendant. The defendant afterwards declined to carry out the agreement of the 5th Dec. 1877 without requiring any further abstract or making any objection to the one delivered, and on the 21st March 1878 the plaintiff commenced this action for specific performance of the agreement of the 5th Dec. 1877, or in the alternative for damages for the breach thereof.

The action was transferred for hearing before Fry, J., and now came on to be heard with witnesses. The effect of the evidence and the rest of the material facts are sufficiently noticed in the judgment.

*J. E. Woodroffe* and *B. B. Muir* for the plaintiff.—The plaintiff is entitled to specific performance of the agreement. The only question that can arise will be as to what took place at the interview at the plaintiff's house. The draft of the lease or underlease, under which the plaintiff held, was then inspected by the defendant and his surveyor, and they had thus an opportunity of properly examining the document, and might have seen, if they did not, that it was only an underlease. Besides that, the surveyor knew that Lord Somers was the ground landlord, and his name was not inserted in the document as the lessor. The contract refers to "the lease" of the property; that is, the lease of which the defendant had notice. [Fry, J.—You may repel an implied term in a contract by notice, but not an express term.] In *Dart's Vendors and Purchasers*, 5th edit. p. 115, it is stated that it may be shown, even in support of a bill for specific performance, that the purchaser knew the actual nature of the interest contracted to be sold. They cited

*Gravenor v. Green*, 32 L. T. Rep. O. S. 252; 5 Jur. N. S. 117;

*Hayford v. Criddle*, 22 Beav. 490.

*Cookson, Q.C.*, and *B. C. Dobbs* for the defendant.—The plaintiff contracted to sell a lease when he had not even an underlease. The defendant is not a lawyer, and even if he inspected the document, he cannot be expected to have understood the technical phraseology. When the action was commenced the plaintiff had no title, whatever he may have now. He could not give us possession, for that means possession with a good title. They cited, on this part of the argument:

*Madeley v. Booth*, 2 De G. & S. 713;

*Hyde v. Warden*, 37 L. T. Rep. N. S. 567; L. Rep. 3 Ex. Div. 72;  
*Brumfit v. Morton*, 30 L. T. Rep. O. S. 98; 3 Jur. N. S. 1198;  
*Darlington v. Hamilton*, 24 L. T. Rep. O. S. 33;  
*Kay*, 550;  
*Tilley v. Thomas*, 17 L. T. Rep. N. S. 422; L. Rep. 3 Ch. App. 61.

If specific performance is ordered, the order ought not to be made against the defendant with costs. The plaintiff has brought us here, and wants to complete his title at the expense of the defendant. They cited

*Harford v. Purrier*, 1 Madd. 532, 536;  
*Wilson v. Allen*, 1 Jac. & W. 614;  
*Lewin v. Guest*, 1 Russ. 325;  
*Phillipson v. Gibbon*, 24 L. T. Rep. N. S. 602; L. Rep. 6 Ch. App. 428.

*Woodroffe* replied only as to the question of costs.—In all the cases cited for the defendant the title was the matter in dispute. The old practice used to be to direct an inquiry, and give judgment for the plaintiff in the conditional form. The present practice is laid down by Mr. Dart (*V. & P.* 5th ed. 1114) as follows: "The present practice, however, in suits where, by reason of the contract itself having been disputed, the cause is heard before the reference, seems to be to declare absolutely that the plaintiff is entitled to a specific performance of the agreement, and to direct a reference to inquire whether a good title can be made." The defendant's solicitors in their letter do not say, "Your title is bad," but they say that the contract is at an end. The existence or non-existence of a contract is the sole question in dispute. He cited

*Olive v. Beaumont*, 1 De G. & S. 397;  
*Gibbons v. North-Eastern Metropolitan Asylum*, 11 Beav. 5;  
*Upperton v. Nicholson*, 25 L. T. Rep. N. S. 4; L. Rep. 6 Ch. App. 436.

Fry, J.—The first question which I have to decide in this case is, whether the plaintiff is entitled to judgment for specific performance of the contract for sale entered into between the plaintiff and defendant. The second question is as to the costs of the action. It appears that Dr. Flood, the plaintiff, was, prior to Sept. 1875, the tenant of certain leasehold property held by him from one Harris. From Sept. 1875, his tenancy under Harris having expired, the plaintiff held under another title, under a contract for an underlease from Mary Ann Elgar, Martin Robinson and Maria his wife, and Charles Charman Elgar. Mr. Elgar never executed the underlease contracted for, and is now dead. The plaintiff remained in possession of the property till 1877, paying rent in the meantime, and there seems to be no doubt that he had a good equitable title up to the time when the contract for sale was executed. There never was any difficulty about obtaining a grant of the underlease, and the underlease has since been executed. In Nov. 1877 the plaintiff advertised the property for sale, and described it as a lease. If there had then been a lease to the plaintiff it would only have been a sublease, for the persons who had contracted with the plaintiff to grant him a lease held only under a lease themselves. The defendant in the same month, with Miss Pritchard and Mr. Billings, who was a surveyor, came by appointment to the plaintiff's house, and in the course of the interview between them and the plaintiff the defendant made inquiries

about the lease of the property offered for sale. The plaintiff left the table, went to Mr. Morrison, his solicitor, and obtained a document which has been produced, and which is the draft of the lease which was not completed by Mr. Elgar, and which was to have been for a term which was unexpired at the date of the interview. That document was brought back by the plaintiff, and the conclusion I have come to is, that the defendant undoubtedly looked at the document. He and the surveyor inspected it. The plaintiff has sworn that such inspection took place, and in doing so has only confirmed what I should otherwise have supposed to have occurred. Mr. Billings says he merely looked at the first sheet of the document. But if he only did that, the part he looked at ought to have shown him, a surveyor, that it was not in the form of an original lease, from the fact of the rent being reserved to the executors, administrators, and assigns of the lessor. Mr. Billings has sworn that the document now produced is not the same as that which was produced at the interview, and has given several reasons for believing so which seem insufficient, but I am of opinion that it is the same document. It has been questioned whether the defendant was informed that Lord Somers was the freeholder. I think he was so informed, and it appears that Mr. Billings was also aware of that fact, as Lord Somers was a large landowner in the neighbourhood. If they saw the document they must have known that it was an underlease. It is said that the term "underlease" was mentioned, but the defendant does not remember that. Having found that in November the defendant knew that Lord Somers was the freeholder, I find him on the 5th Dec. signing the agreement to purchase the property. Now, the first question which arises is this, Whether on an agreement in these terms the plaintiff can enforce specific performance? And Mr. Cookson would not argue the question if the agreement stood alone. With regard to its being an underlease only under which the plaintiff held, I may remark that Lord Hatherley in *Grosvenor v. Green* (sup.) called attention to the difference between a contract to grant a lease and a contract to sell a lease. In the former case only the usual covenants can be insisted on; but the sale of an existing leasehold interest is a different thing, and it is not to be understood that the lease contained only the usual covenants. In this case the defendant appears to have known perfectly well that the property was held under an underlease only. In the next place it is said that no such lease, strictly speaking, existed. The plaintiff says that that fact was mentioned to the defendant; and I think it was so mentioned, for the document shown to him and Mr. Billings had no date, and that omission must have been apparent to the practised eye of a surveyor. The real meaning of a contract for purchase of a "lease" is for the leasehold interest thereby created, and although, strictly speaking, it was not created by the contract, yet that contract was before the parties. When the subject-matter was wrongly described, but another subject-matter was clearly in the minds of the parties, I think it would not be right to hold that there could be no specific performance. The only question which remains is as to costs. If the sole question had been as already stated by me, I should have given the plaintiff his costs. It appears, however, that Mr. Morrison, having

learnt that the defendant had consulted another firm of solicitors, declined—and most properly—to continue to act for him. Mr. Morrison, however, furnished to the defendant's solicitors an abstract, but in that abstract he did not show that the underlease to the plaintiff, which had been contracted for, was not executed. He, however, chose to rely on that abstract, and never furnished a better one, though he offered, either before or after the action had been brought, to get the lease completed. I feel inclined to think, with Sir Thomas Plummer, that "a vendor who seeks a specific performance should come prepared with his title; he ought to have it ready before he carries his estate to market. If he will sell it with a confused title, he must be at the expense of clearing it" (1 Jac. & W. 623); and therefore I must give judgment for specific performance without costs, and refer to chambers the question whether a good title can be shown.

At the request of the plaintiff's counsel his Lordship prefaced his judgment with a declaration that the court was of opinion that the defendant was bound to accept an assignment of a lease according to the exhibit which embodied the underlease proposed to be executed by Elgar.

Solicitors for the plaintiff, *Morrison*, agents for *G. Carter Morrison*, Reigate.

Solicitors for the defendant, *Matthews and Greetham*.

Wednesday, June 18.

(Before FRY, J.)

SUTCLIFFE v. JAMES. (a)

*Practice—Pleading—Action for the recovery of land—Defendant's equitable title—Order XIX., rr. 4, 15—Judgment reserving defendant's rights—Evidence—Privilege.*

*In an action for the recovery of land the defendant, if he relies upon an equitable title, must in his statement of defence allege the nature of the deeds and documents upon which he relies, and it is not sufficient to allege that "by virtue of divers means acts and means assurances in the land all the estate and interest of the plaintiff's predecessor in title" is now vested in the defendant.*

*Where the defendant in such an action has failed on account of his pleading being defective as aforesaid, and leave to amend has been refused, judgment may be given "without prejudice to the rights, if any, of the defendant."*

*Letters between the defendant or his solicitor and the solicitors of his predecessor in title admitted as secondary evidence of contents of deeds in the possession of the defendant, and which he refused to produce.*

*Drafts of such deeds admitted as secondary evidence.*

JOSEPH PRICE, being entitled to certain premises in Cardiff, as to part thereof in Bridge-street, for the residue of a term for three lives (which had since fallen in), and for 999 years from the expiration of the last of such lives, and, as to the remaining part of such premises, for a term of 99 years from the 1st May 1839, died on the 11th Feb. 1846, having by his will, dated the 29th Aug. 1846, devised and bequeathed all his real and personal

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

CHAN. DIV.]

SUTCLIFFE v. JAMES.

[CHAN. DIV.]

estate to his wife Mary Price, his executrix, who duly proved his will.

By an indenture of the 16th Oct. 1851, made between Mary Price of the one part and E. Quelch and N. Clegg of the other part, the said Mary Price assigned all the premises to Quelch and Clegg, for the residue of the leasehold term, upon trust, out of the rents and profits, to pay certain expenses, and, subject thereto, upon trust to pay the clear weekly sum of 8s. to Mary Price for life, and subject thereto, upon trust, to pay the rents and profits to Eliza Miles, the wife of Thomas Miles, for her separate use, without power of anticipation, and after her death, upon trust, as to the Bridge-street premises and one moiety of the Noah-street premises, for Susannah Price, the granddaughter of Mary Price, her executors, administrators, and assigns, and, as to the other moiety of the Noah-street premises, in trust, to be equally divided between all the other grandchildren of Mary Price, their executors, administrators, and assigns.

Mary Price having died, the premises were, by an indenture of mortgage of the 12th Dec. 1851, made between Quelch and Clegg of the first part, Thomas Miles and Eliza his wife of the second part, and C. W. David of the third part, granted and demised by Quelch and Clegg, and by Thomas and Eliza Miles to David for certain terms of years, determinable on the death of Eliza Miles, by way of mortgage, to secure 60l. and interest.

By an indenture of the 19th June 1862, and made between David of the first part, Thomas Miles and Eliza his wife of the second part, and the defendant George James of the third part, the mortgage debt and securities were transferred to James, his executors, administrators, and assigns.

Eliza Miles died in 1874, and Clegg died in 1855.

By an indenture of the 23rd June 1877 the plaintiffs, Sutcliffe and Thomas, were appointed trustees of the settlement in the place of Quelch and Clegg, and the trust property was assigned to the new trustees.

All moneys due on the mortgages had been paid off, but the defendant continued in possession of all the premises, and refused to give up possession to the plaintiff, who in consequence commenced an action for the recovery of the premises, delivery of the title deeds relating thereto, and payment of mesne profits since the death of Eliza Miles.

The defendant James, by his statement of defence, declined to admit the settlement as stated in the statement of claim, and put the plaintiffs to strict proof of its contents and execution.

The 3rd and 4th paragraphs of the statement of defence were as follows:

3. This defendant claims to be possessed of and entitled to all the leasehold premises in the statement of claim mentioned, for all the respective residues of the terms granted by the indentures of lease in the statement of claim mentioned respectively, by a title not derived through such alleged indenture of settlement, by virtue of which title the legal estate in the same premises is now vested in him, and he is in possession by himself and his tenants of all the said premises.

4. If, however, such alleged indenture of settlement was in fact executed by Mary Price, in the statement of claim named, and the said leasehold premises did in fact thereby become vested at law in the trustees thereof, then the trustees or trustee for the time being of such indenture, in the events which have happened, and under the circumstances as hereinafter alleged, became and are

or is now trustees or trustee for this defendant George James, his executors, administrators, and assigns, and for no other person, of all the said premises for all the several residues of the said terms respectively.

The further allegations were that Susannah Price died unmarried and intestate, leaving Mary Price her only next of kin; that all the grandchildren of the latter died in her lifetime; that Mary Price was at her death entitled in equity to such interest as the grandchildren took under the alleged settlement, subject to the alleged trust for the benefit of Eliza Miles for her life; that the alleged trust in favour of the grandchildren (other than Susannah Price) was void for remoteness, and the equitable estate had resulted to Mary Price; that Eliza Miles, as the only next of kin of Mary Price, or John Miles in her right, was, if the settlement was executed, entitled in equity to all the premises for the residues of the terms aforesaid; that "by virtue of divers mesne acts and mesne assurances in the land all the estate and interest of the said Eliza Miles, or of the said John Miles, in her right in the said premises became and is now vested in this defendant George James"; and that the principal sum secured by the mortgage has not been repaid. It was, however, admitted at the hearing that Susannah Price was still living, and appeared by evidence that another grandchild of Mary Price was also alive.

By his affidavit as to documents, the defendant James admitted possession of deeds of the same date, and made between the same parties as the above-mentioned indenture of mortgage and transfer, but he objected in such affidavit to produce such deeds on the ground that they were his title deeds to the property in question in the action, which he declared had been purchased by him for a valuable consideration, and related exclusively to his title as such purchaser.

North, Q.C. and B. B. Rogers, for the plaintiffs, submitted that the only question which could arise would be as to whether certain evidence could be admitted. If the defendant had a good equitable title he ought to have set out such title in his statement of defence:

*Philippus v. Philippus*, 39 L. T. Rep. N. S. 329, 556; L. Rep. 4 Q. B. Div. 127; Order XIX., rr. 4 and 15.

The deeds of mortgage and transfer were in the possession of the defendant, who refused to produce them, and it was therefore proposed to read certain letters which had passed between Mr. T. T. Lewis, who had acted as solicitor for the defendant, and Messrs. Grover and Davies, who had acted as solicitors for David, the predecessor in title of the defendant, when the transfer of mortgage was executed.

J. G. Wood, for the defendant James, objected to the letters being read, as David was the predecessor in title of the defendant, and that the latter had the same privilege which David had had, and which the latter, having parted with his interest in the property, could not now waive. He relied on

*Doe v. Seton*, 2 Ad. & Ell. 171.

North contended that the title which the defendant had derived from David having determined, the privilege did not now exist.

Fry, J.—I think that under the circumstances I am bound to admit these letters. The letters passed between the solicitors of David and the defendant or his solicitor. It is said that the

defendant, claiming through David, has a right to insist on the privilege which David had with respect to the letters, and that the seal of secrecy having once been placed on the letters cannot now be removed. I think the privilege is personal, and that there is nothing in *Doe v. Seton* which prevents me from deciding that the letters may be admitted. In that case the solicitor acted primarily for the purchaser.

The letters were then read, and tended to show that, although the money was paid by the defendant to David on the 19th June 1862, the date of the transfer, the transfer itself was not actually executed till the end of November or the beginning of Dec. 1862, and tended to identify the deeds admitted to be in the possession of the defendant with those stated in the statement of claim and drafts of which were in the possession of the plaintiffs.

North proposed to give secondary evidence of the settlement and the indentures of mortgage and transfer, and called a solicitor, who stated that he had prepared the settlement and mortgage, and that his partner, who had since become insane, had prepared the transfer. The witness refreshed his memory by reference to a bill of costs and a memorandum of documents held by him for David, in which memorandum he had, soon after the occurrence, marked in pencil the names of those sent off to be transmitted to David, including the settlement, mortgage and transfer. David and a person employed by him confirmed this testimony. The drafts of the deeds were produced by the solicitor, and the draft settlement was tendered as evidence of the contents of the deed.

Wood objected to its being so tendered, on the ground that, as no party to the deed had been called as a witness, although one was still alive, the evidence of execution of the deed was not sufficient; that the bill of costs was not proved to have been paid, and was no evidence against the defendant, and that the memorandum could not be relied on.

Fry, J. admitted the evidence, considering that the facts sworn to and the fact, which he considered established, of the deed having been traced to the possession of the defendant, were sufficient proof of the contents of the settlement.

The draft of the mortgage was also tendered in evidence to show that the title of the defendant had terminated.

Wood objected to the draft being read as evidence, on the ground stated in his affidavit of documents, and that the recitals were only evidence by way of estoppel as between parties suing on the deed itself.

Fry, J. pointed out that the defendant claimed under David, a party to the mortgage, and the plaintiffs, through the then trustees of the settlement, who were also parties, though by prior title, and admitted the draft as evidence.

The draft of the transfer was admitted without objection, to show the connection between David and the defendant.

Wood admitted that he could not carry the matter further as to the legal title, and that the equitable title of the defendant could only extend to one moiety of the Noah-street property, as Susannah Price was living. The trusts being void for remoteness, there was a resulting trust of a moiety in favour of the settlor, whose next

of kin, Eliza Miles, had transferred all her interest to the defendant. This equitable title was shown by the allegations in the statement of defence.

Fry, J.—That depends on Order XIX., r. 15. What you have stated is the result of fact. You must state the facts on which you rely. If there are several deeds you must state them all. This may be done shortly, but they must be stated.

Wood asked for leave to amend the statement of defence, if insufficient.

Fry, J. (after stating that the plaintiff was entitled to succeed, the contents of the deeds of which drafts had been tendered having been sufficiently proved, continued):—This of itself was sufficient to entitle the plaintiff to judgment. But the defendant, after insisting on a legal title, putting the plaintiff to the strictest proof of the deeds, and making himself no disclosure, has set up an equitable title and a claim to be entitled to the property in remainder after Mrs. Price's life interest has determined. [His Lordship then read and commented on the statement of defence.] The defendant does not say what the assurances were by which Mrs. Miles's interest became vested in him. By Order XIX., r. 15, "no defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right, or he claim relief upon any equitable ground against any right or title asserted by the plaintiff." But the rule continues, "except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession." A defendant depending on an equitable title seems to be in exactly the same position as any other person who depends upon such an estate. Then by Order XIX., r. 4, "every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies." Now, what are the facts relied on by the defendant in this case? It appears to me they are the "divers mesne acts and mesne assurances," the result only of which have been stated in the defendant's pleading. In coming to the conclusion which I do that the facts themselves ought to have been stated, I am fortified by the decision in the case of *Philipps v. Philipps* (sup.). That case was one relating to allegations of a plaintiff; but it seems to me that a defendant relying on an equitable title is in the same position as a plaintiff. Then the question arises whether the defendant ought to have leave to amend. I think he ought not. He has resisted the production of his documents, and has refused even to state their effect. I think it would be unjust to allow him now to pursue a different course.

On the application of the defendant's counsel his Lordship allowed a proviso to be included in the judgment that it was "without prejudice to the rights (if any) of the defendant."

Solicitors for the plaintiff, *Ridsdale, Craddock, and Ridsdale*, agents for *Grover and Grover*, Cardiff.

Solicitor for the defendant, *R. H. Veal*, agent for *T. T. Lewis*, Bridgend.

CHAN. DIV.]

Re PARKER'S ESTATE; CASH v. PARKER.

[CHAN. DIV.]

Thursday, July 10.

(Before FRY, J.)

Re PARKER'S ESTATE; CASH v. PARKER. (a)

*Practice—Death of sole defendant—Appointment of receiver without order as to adding parties or continuing action—Order L.*

*Where the sole defendant, the executrix of the testator whose estate was being administered in an action, died after an order for administration therein had been made, and there was evidence that certain persons claiming a lien threatened to sell certain machines, which formed the largest and most valuable part of the estate:*

*Held, on motion ex parte by the plaintiff, a creditor, that a receiver might be appointed (without first obtaining an order under Order L., to add new parties or to continue the action) until after a personal representative of the testator had been appointed.*

THE testator, Thomas Parker, by his will appointed the defendant Kezia Parker, and other persons executors thereof.

The testator died on the 22nd April 1879, and his executors, other than the defendant, having renounced probate and execution of his will, the same was proved by the defendant alone.

Shortly afterwards the plaintiff, who was a creditor on the testator's estate, commenced an action against the defendant, the executrix, for the administration of the testator's estate, and an order for such administration was made on the 14th June 1879.

It appeared that the principal part of the testator's estate consisted of a number of lace machines, standing in the mill occupied by him, and that T. Maltby and E. Tringle claimed to have a lien on the machines.

A summons was taken out on the 25th June 1879 for the appointment of a receiver, but before it was heard the defendant died.

No will of the defendant was discovered, and no letters of administration were taken out to her estate or that of the testator. Application for letters of administration *de bonis non* of the testator had been applied for by a creditor in the same interest as the plaintiff, but had not yet been granted.

After the defendant's death Maltby and Tringle sold one of the machines, and threatened to dispose of the others.

The plaintiff being advised that the lien claimed by Maltby and Tringle could not be supported, a motion was now made on his behalf, *ex parte*, for the appointment of an interim receiver of the testator's personal estate.

*Russell Roberts* for the motion.—It will take some time before another personal representative of the testator can be appointed, and in the meantime the lace machines, which form the most valuable part of the estate, will have been disposed of, to the prejudice of the plaintiff and the other creditors. The action has not abated by reason of the defendant's death (Order L., r. 1). Under Order L., r. 2, the personal representative may be made a party, or served with notice of the action, but here there is no personal representative. The Probate Division seems to have no power to appoint even a creditor as administrator in a case like this:

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

20 &amp; 21 Vict. c. 77;

*Teague v. Wharton*, L. Rep. 2 P. & D. 360.

The only remedy is by obtaining the appointment of a receiver, and the fact of the defendant's death is immaterial, for, by the former practice, the death of a defendant, although causing an abatement of the suit, did not prevent all proceedings from being taken pending abatement. For certain purposes the proceedings might be continued without any order of revivor being obtained:

*Pemb. Revivor and Supplement*, 16 *et seq.*

Thus, where money had been carried to the separate account of a plaintiff, and he died, it might be paid out on the petition of his personal representatives without any order of revivor:

*Roundell v. Curren*, 6 Ves. 250;

*Legard v. Hodges*, cited *Pemb.* 18.

Here the plaintiff has established his right to have the estate administered, and his action will be useless unless these machines are protected from seizure and sale. That can best be done by the appointment of a receiver, which the court may order whenever it is "just and convenient:"

*Jad. Act 1873*, s. 25, sub-sect. 8.

The following cases were also cited:

*Jackson v. North-Eastern Railway Company*, L. Rep. 5 Ch. Div. 44;

*Lloyd v. Dimmack*, 38 L. T. Rep. N. S. 173; L. Rep. 7 Ch. Div. 398;

*Taylor v. Eckersley*, 34 L. T. Rep. N. S. 637; L. Rep. 2 Ch. Div. 302.

FRY, J.—I am inclined to accede to this application. It appears from Mr. Pemberton's book that the proceedings did not under the old practice abate altogether. I have, moreover, power in appointing a receiver to make the order on such terms and conditions as appear just; and the order which I shall make will be that the person proposed be appointed receiver of the outstanding personal estate, and manager of the business of the testator, as from this moment until ten days after a legal personal representative has been duly constituted. The plaintiff, however, must undertake that the security of the receiver shall be duly completed, that he will prosecute without delay an application for a grant to himself or some other creditor of letters of administration *de bonis non* of the testator, and that the plaintiff will accept short notice of any motion to be made on behalf of any person claiming to have purchased any of the lace machines or other property of which possession may be taken by the receiver.

Solicitors: Torr and Co.

Tuesday, June 10.

(Before FRY, J.)

REAL AND PERSONAL ADVANCE COMPANY v. MC CARTHY AND SMITH. (a)

*Practice—Action for recovery of land—Receiver—Occupation rent—Interlocutory application—Judicature Act 1873, sect. 25, sub-sect. 8.*

*The defendant brought an action against B. for redemption. The plaintiffs brought the present action against the defendants for the recovery of the land, which was the subject-matter of the redemption action. The plaintiffs in the present action were then added as defendants in the redemption action by the plaintiffs in that*

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

action, who obtained an order staying the present action until the redemption action should be ready for trial. The defence in the present action was that the plaintiffs were only sub-mortgagees. The plaintiffs in the present action moved for a receiver, and that the defendants, who were in occupation of the property, should attorn tenants to the plaintiffs. The uncontradicted evidence in support of the motion showed that the property was wasting, and was an insufficient security for the mortgage under which B. was alleged to hold.

Held, that it was "just and convenient" to appoint a receiver; and, following *Porter v. Lopes* (L. Rep. 7 Ch. Div. 358), that such appointment must be made unless the defendant within a certain time elected to pay into court an occupation rent, the amount of which was to be settled in chambers.

THE present action was commenced on the 24th Sept. 1878, the plaintiff company claiming to be entitled to the property, owing to the default of a person named Buckley, who had mortgaged the property to them, and was according to their statement an assignee of the defendant M'Carthy at the date of the mortgage. M'Carthy was in occupation of the property, with the exception of a portion occupied by Smith.

M'Carthy's defence was that, although the assignment to Buckley was in form absolute, it was in equity only a mortgage, and that the plaintiff company, having notice of a certain collateral instrument, took a sub-mortgage only from Buckley.

On the 4th Jan. 1878 an action of *M'Carthy v. Buckley* was commenced by the defendant M'Carthy for redemption of the property in question, and the plaintiff company and Smith were added as defendants in the redemption action on the 16th Dec. 1878.

The present action was set down for trial on the 22nd Jan. 1879; and on the 14th May 1879 a further amended statement of claim in the action of *M'Carthy v. Buckley* was delivered to the company.

Both actions were transferred to Fry, J. who on the 16th May 1879 made an order staying the trial of the present action until that of *M'Carthy v. Buckley* should be ready for trial.

The plaintiff company now moved, on notice in the present action, for the appointment of a receiver of the rents and profits of the property, and that the defendant M'Carthy should attorn tenant to the receiver of the portion of the property occupied by him at such rent as should be fixed by the judge in chambers, and that the defendant Smith should also attorn to such receiver.

The evidence filed on behalf of the plaintiff company stated that the property was wasting, there being only a few years of the lease to run, and that the defendant Smith was, contrary to the terms of the lease, pursuing on the property the business of a grease manufacturer; that there was a difficulty in insuring the property on account of the danger attending the business; that, if Buckley was a mortgagee, a sum of about 1000*l.* was owing to him from the defendant M'Carthy upon security of the property, and that the security was insufficient.

This evidence was, in his Lordship's opinion,

uncontradicted, or not fully met, except as to the exact sum alleged to be due.

M. Cookson, Q.C. and Oreed for the plaintiff company.—No injustice will be caused by granting the order we ask for, and to which we are entitled if we are only mortgagees. The rent will be paid into court. They cited

Jud. Act 1873, sect. 25, sub-sect. 8.

North, Q.C. and Quin for the defendant M'Carthy.—If the order is made, relief will be granted on an interlocutory application, which ought only to be granted, if at all, on the trial, when the mesne profits have been assessed. The plaintiffs knew the facts, and ought to have applied earlier, if at all before the trial.

Speed, for the defendant Smith, did not object to the order being made.

Cookson replied.

Fry, J. said that under the Judicature Act 1873, sect. 25, sub-sect. 8, a receiver might be appointed on an interlocutory application in all cases in which it appeared to the court to be "just and convenient" that such order should be made, such order being made either unconditionally or upon such terms and conditions as the court should think just. The court ought to be jealous about putting a narrow construction upon the words of the enactment, and ought to grant the relief asked in every case where it was just or convenient. The plaintiff company alleged that they were owners of, and they brought an action to recover, certain leasehold property. The defendants alleged that the plaintiff company were only sub-mortgagees. Supposing the plaintiff succeeded, he would be entitled to possession, and no injustice would be done by granting the order asked for. The fact that the court could not give possession of the property before the hearing of the action was its infirmity, but at such hearing it could give the plaintiff mesne profits as compensation for the enjoyment of the property of which he had been in the interval deprived. Supposing that the defendant was right in his contention, and proved that the plaintiff was only a sub-mortgagee, the plaintiff would then either be entitled or not entitled to the money. The only question was whether it was just and convenient, under the circumstances, to appoint a receiver. The evidence showed that the property was both wasting and inadequate as a security. These facts and the other circumstances being looked at, it seemed to his Lordship that in either event he should, in making the appointment, be granting an order which was just and convenient, and, having regard to the decision of the Master of the Rolls in *Porter v. Lopes* (L. Rep. 7 Ch. Div. 358), he should give the defendant M'Carthy an election, to be made within four days, whether he would pay an occupation rent into court, the amount thereof to be settled in chambers. If he did not so elect, a receiver would be appointed in the usual manner, the costs being costs in the action.

Solicitors for the plaintiff company, *Billing and Kent*.

Solicitor for the defendant M'Carthy, *John Hopkins*.

Solicitor for the defendant Smith, *O. Sawbridge*.

CHAN. DIV.]

Re BALL'S TRUST—LANGDON v. HOWELLS.

[Q.B. DIV.]

Friday, Feb. 28.

(Before FRY, J.)

Re BALL'S TRUST. (a)

*Settlement—Trust for persons entitled if married woman had died without having been married.*

*The ultimate trust of funds comprised in a marriage settlement was for such person as under the Statutes of Distributions would have been entitled thereto at the decease of the wife if she had died possessed thereof intestate and without having been married. The wife died intestate, leaving her husband and one child surviving.*

*Held, that the child was entitled to the funds.*

By an indenture of settlement, dated the 20th Oct. 1875, made on the marriage of Louisa Margaret Ball (then Louisa Margaret Holland) with Thomas Ball, certain moneys were transferred to trustees, upon trust, to pay the income to Louisa Margaret Ball during her life; and after her death, if she should survive Thomas Ball, in trust for herself, but if Thomas Ball should survive her, then upon such trusts and for such persons as Louisa Margaret Ball should, notwithstanding coverture, by will or codicil appoint, and in default of appointment "in trust for such persons or person as under the statutes for the distribution of the effects of intestates would have become entitled thereto at the decease of the said Louisa Margaret Holland had she died possessed thereof intestate, and without having been married, such persons, if more than one, to take as tenants in common in the shares in which they would have been entitled under the same statutes." Louisa Margaret Ball died without having exercised her power of appointment, leaving her husband and one child of the marriage, Louisa Mary Ball, surviving.

The trustees paid the trust moneys into court under the Trustee Relief Act.

Louisa Mary Ball presented a petition to have the money trusts invested and carried to her account.

J. Pearson, Q.C. and W. W. Karslake for the petitioner.—If Louisa Margaret Holland had died without having been married she could not have had a legitimate child, but the decisions in *Re Norman's Trust* (3 De G. M. & G. 965) and *Wilson v. Atkinson* (11 L. T. Rep. N. S. 220; 4 De G. J. & S. 455) are distinct authorities in favour of our contention that the child takes the trust moneys.

Bristowe, Q.C. and H. A. Giffard for the next of kin.—Louisa Margaret Ball has not exercised her power of appointment in favour of her child. Children are not mentioned in the settlement, and were not intended to take anything under it. The decisions in *Smith v. Smith* (12 Sim. 317) and in *Clarke v. Colls* (9 H. B. C. 601) are in favour of the next of kin.

Northmore Lawrence for the trustees.

Higgins, Q.C. and Lemon for other parties.

FRY, J.—If there had been no authority I should have had considerable difficulty in holding that the child was entitled to the fund, because if the mother had never been married she could never have had a child capable of taking. But the case appears to be covered by the decision in *Wilson v. Atkinson*, which is in substance the same as the case now before me, the exception being that it contained a declaration as to the illegitimate child.

One reason given for the decision in that case was that there was a declaration in the settlement that the illegitimate daughter should, for the purposes of the trust, be deemed to be a lawful child. Both the Lord Justices held that the words "next of kin" would, independently of the declaration, not be construed so as to exclude a child—in other words, that under a limitation like this a child may claim as statutory next of kin of the mother. I am bound by that decision, and I must decide in favour of the petitioner, and declare accordingly.

Solicitors for the petitioner, *Crosley and Burn*.

Solicitor for the next of kin, *A. H. Miller*.

Solicitor for the trustee, *J. Mole*.

## QUEEN'S BENCH DIVISION.

Saturday, May 17.

(Before COCKBURN, C.J. and MANISTY, J.)

LANGDON v. HOWELLS. (a)

*Railway passenger—Tourist ticket "not transferable"—Intention to avoid payment of fare—Railway Clauses Consolidation Act 1845 (8 Vict. c. 20, s. 103).*

*If A. attempts to travel with a "not transferable" tourist or return ticket purchased from B. the original holder who has partially used the same, he, A., may be convicted under the Railway Clauses Consolidation Act for travelling without having previously paid his fare, and with intent to avoid payment thereof.*

CASE stated by justices under 20 & 21 Vict. c. 43.

1. Upon the hearing of a certain complaint preferred by the appellant against the respondent under sect. 103 of the statute of 8 Vict. c. 20, "For that he, the said J. A. R. Howells, on the 18th Nov. 1878 at the parish of Neath in the said borough, unlawfully did travel in a certain, that is to say, a third-class carriage belonging to the Great Western Railway Company, and then being upon their line of railway in the borough aforesaid without having previously paid his fare, and with intent to avoid payment thereof, contrary to the statute in that case made and provided;" we dismissed the said complaint.

2. The said section enacts as follows:

If any person travel, or attempt to travel in any carriage of the company, or of any other company or party using the railway without having previously paid his fare, and with intent to avoid payment thereof, or if any person having paid his fare for a certain distance knowingly and wilfully proceed in any such carriage beyond such distance without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof, or if any person knowingly and wilfully refuse or neglect on arriving at the point to which he has paid his fare to quit such carriage, every such person shall for every such offence forfeit to the company, a sum not exceeding forty shillings.

3—5. It appeared from the evidence that the respondent had purchased the forward half of a tourist ticket from Ludlow to New Milford from a Mr. Aaron, who had used the ticket from Ludlow to Hereford which was a portion of the journey to New Milford. The respondent then attempted to use the ticket from Hereford to New Milford, when his name and address were taken, and the charge was preferred against him by the Great Western Railway Company. It also appeared that tourists' tickets are available for two months, and allow

(a) Reported by FRANK EVANS, Esq., CLERK-at-LAW.

(a) Reported by A. H. POTTER, Esq., BARRISTER-at-LAW.



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the holder to break the journey at places mentioned in the tourist programme, and that when trains are not continued to the end of the journey, there is no objection to the tourist getting out at the limit where the train stops, and going on by another route until he could rejoin the line. One of us was of opinion that the facts disclosed by the above evidence showed that the respondent had travelled in a carriage of the Great Western Railway Company without having previously paid his fare, and with intent to avoid payment thereof, and ought therefore to be convicted of the offence charged in the complaint; but the other of us was of a different opinion, and considered that it was not necessary for a railway traveller personally to pay his fare, and that as it was proved

(a) That the proper fare had been paid in the first instance for the ticket with which the respondent was found travelling (though not by the respondent himself); (b) That travellers holding tourist tickets are allowed to "break" their journeys; (c) That as the respondent was still travelling on a part of the line for which the half ticket he held was, at all events, available for the use of the person to whom it was issued (it having been issued on the 28th Sept., and in force for two months), he was not liable to be convicted for an offence under the section above referred to, and that although the words "not transferable" were printed on the back of the railway ticket the holder of a transferred ticket ought not to be treated as guilty of a fraud under the Act of Parliament, but should either have been proceeded against by a civil action, or, at most, for breach of some bye-laws of the company under which, possibly, the indorsement of the words "not transferable" was made. In the result, therefore, we dismissed the complaint.

6. The question of law upon which this case is stated is whether upon the foregoing facts we were bound or ought to have convicted the respondent of the offence charged in the complaint, or whether we rightly dismissed such complaint.

7. If the court should be of opinion that the complaint was properly dismissed, then our order dismissing the same is to stand, but if the court should be of opinion that we ought to have convicted the respondent, then the court is humbly solicited to return this case to us with their opinion thereon.

*Bowen*, for the appellant, contended that the respondent ought to have been convicted under 8 Vict. c. 20 s. 103. He referred to *Bentham v. Hoyle* (3 Q. B. Div. 289; 37 L. T. Rep. N. S. 753), and *Dearden v. Townsend* (L. Rep. 1 Q. B. 10; 13 L. T. Rep. N. S. 323), but was stopped by the Court.

No counsel appeared for the respondent.

COCKBURN, C.J.—I think this case clearly comes within the statute. It is not even the case of a ticket taken by A., which A. makes up his mind not to use, and hands it over to B., that might be open to a different consideration; but this is a tourist ticket, as to which everybody is perfectly aware that the ticket is issued at a cheaper rate, because the person who takes it is about to make his return journey by the same railway, and the company therefore finds it to its advantage to issue the ticket at a cheaper rate, upon the understanding that the tourist ticket shall be used by the man to whom

the ticket was originally issued. But if it is given at the end of the journey, by the person who originally took it, to someone else who is to have the advantage of it on the single journey, and who would not be entitled to get a ticket at that rate if he took a ticket only for the single journey, it is quite clear the conditions upon which the ticket was issued are violated, and that the man who seeks to travel by such a tourist ticket, not having himself originally taken it out, does not pay his fare, but defrauds the company to the extent of the difference between the tourist ticket fare and what would have been the fare for the single journey. He therefore does not pay his fare, and as I think in this case the evidence is abundantly clear to show that he took his ticket with the intention to avoid the payment of his fare, he is therefore within the terms of the statute.

MANISTY, J.—I am of the same opinion.

*Case remitted to justices.*

Solicitor for the appellant, *R. R. Nelson.*

*Saturday, June 14.*

(Before COCKBURN, C.J. and LUSH, J.)

OAKLEY v. SPEEDY. (a)

*Compulsory pilotage—Master of vessel on board—Criminal proceedings against master—Onus of proof—17 & 18 Vict. c. 104, ss. 354, 370, 376, and 388—Thames Conservancy Act (29 & 30 Vict. c. 89), bye-laws 28 and 72.*

*In criminal proceedings against a master of a vessel who has a compulsory pilot on board, such master is not bound to prove that at the time of the act or omission the subject of such proceedings he was not interfering with the navigation of his vessel.*

*The respondent, the master of a vessel carrying passengers and within a district in which he was compelled to take a pilot on board, was summoned and charged by the appellant, acting on behalf of the Thames Conservancy Board, before the police magistrate at W., with not having navigated his vessel in a careful and proper manner; but the magistrate dismissed the summons on the ground that as the master had on board a pilot compulsorily in charge, he was exempt from liability, unless it was proved that he was actually navigating the vessel himself.*

*Held, that the summons was properly discussed, for as there was a pilot compulsorily on board, it must be assumed that he was in charge of the vessel, since in criminal proceedings against the master for a breach of the rules and laws of navigation, it is incumbent on the prosecution to prove that at the happening of the accident the master actually took part in the management and navigation of the vessel.*

This was a case stated by a stipendiary police magistrate under 20 & 21 Vict. c. 43. The following were the material parts:—

The defendant was charged at the police court of Woolwich, by a summons taken out at the instance of the complainant, acting on behalf of the conservators of the river Thames, that he the said Wm. Speedy, on Nov. 16, 1878, being master of the steam-vessel *Britannia*, did not navigate the said vessel while passing on the river Thames in a careful and proper manner as well with regard

(a) Reported by A. H. FOYSEE, Esq., Barrister-at-Law.

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to the safety of such vessel as of other vessels on the river.

At the hearing of the said summons it was admitted on the part of the defendant that he was, on the said 16th Nov. 1878, master of the said steam vessel *Britannia*; and it was proved on behalf of the complainant that on the afternoon of that day the said steamship was navigated on the river off Woolwich at a rate of speed by reason of which one of the mooring chains of the *Warspite*, moored at Charlton, was by the heavy wash carried away.

It was proved on behalf of the defendant that the *Britannia*, was on the said 16th Nov. 1878, on a voyage from Wapping, in the port of London, to Dundee, in Scotland, and that she had on board certain passengers, and that at the time of the said navigation a pilot duly licensed by the Trinity Corporation was compulsorily on board the *Britannia* to take charge of and navigate her to Gravesend. The navigation of the river Thames is regulated by the bye-laws made by the conservators of the said river in pursuance of the Thames Conservancy Acts, and the Thames Navigation Acts, and allowed by order in council, dated the 5th Feb. 1872.

The 28th of such bye-laws is as follows :

Every vessel shall at all times while passing on the river be navigated in a careful and proper manner, as well with regard to the safety of such vessel as of other vessels on the river.

The 72nd is :

Any person committing any breach of, or in any way infringing any of these bye-laws, shall be liable to a penalty of and shall forfeit a sum not exceeding 5*l.*, which said penalty shall be recovered, enforced, and applied according to the provisions of the Thames Conservancy Act-1857 and 1864.

By 17 & 18 Vict. c. 104, s. 354, it is enacted that :

The master of every ship carrying passengers between any place in the United Kingdom, or the islands of Guernsey, Jersey, Sark, Alderney, and Man, and any other place so situate, when navigating upon any waters situate within the limits of any district for which pilots are licensed by any pilotage authority under the provisions of this or of any other Act, or upon any part thereof so situate, shall, unless he or his mate has a pilotage certificate enabling such master or mate to pilot the said ship within such district, granted under the provisions hereinafter contained, or such certificate as next hereinafter mentioned, being a certificate applicable to such district and to such ship, employ a qualified pilot to pilot his ship.

Sect. 370 defines the "London district" as "comprising the waters of the Thames and Medway as high as London Bridge and Rochester Bridge respectively, and also the seas and channels leading thereto or therefrom as far as Orfordness on the north and Dungeness on the south."

Sect. 376 enacts that "subject to any alteration to be made by the Trinity House, and to the exemptions hereinafter contained, the pilotage districts of the Trinity House, within which the employment of pilots is compulsory, are the London district and the Trinity House outpost districts as hereinbefore defined."

It was contended on the part of the defendant that, inasmuch as the *Britannia* was being navigated at the time of the alleged offence by a pilot compulsorily acting in charge, and was under compulsory pilotage, he (the defendant) could not be convicted of committing the breach of the bye-law charged in the summons, and was exempt from liability thereof, in proof of which contention sect.

388 of the last-mentioned Act was quoted, which section is as follows :

No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law.

Being of opinion that such contention was correct, the magistrate dismissed the summons.

The question for the opinion of the court was whether the contention of the defendant was good in law.

*Argument for the appellant.*—The act complained of was running down the river at an undue rate of speed, and causing an accident. The master was rightly summoned, but the charge was incorrectly dismissed. I admit that there was a pilot compulsorily on board; but the onus of proving that the act complained of was caused by the pilot is cast on the master, who must relieve himself of the liability. The master shields himself under the 72nd bye-law and sect. 388 of the Merchant Shipping Act; but notwithstanding the exemption afforded by this section the Admiralty Court has always in cases in which it is the defence cast upon the master or owner of the ship the burden of proving that the loss or damage was due to the wrongful act of the pilot :

*The Mobile*, Sw. Ad. Rep. 127;

*The Admiral Bower*, Sw. Ad. Rep. 198;

*The Schwabbe*, Lush. Ad. Rep. 239;

*The Carrier Dove*, Br. & Lush. Rep. 113.

The principle of these cases is applicable to the matter now before the court. [LUSH, J.—This is not an action, or within the exempting clause, but a penal matter; and is there not a presumption that, when a pilot is on board, he is in charge of the whole navigation of the ship? The cases you have cited are civil actions for loss or damage, and rest on the statutory exemption, and their decisions do not apply to criminal charges upon the bye-laws for improper navigation, as to which it is ordinarily to be presumed that the pilot in charge of the vessel at the time should be responsible.] This is a question of the onus of proof. We were not on board of the defendant's vessel, and cannot know whose fault it is that has caused the mishap, but the defendant does, and it is for this reason that the Admiralty Court casts upon the master the burden of showing that he was not to blame for the accident. [LUSH, J.—By the terms of sect. 354 of the Merchant Shipping Act there ought to have been a pilot on board this vessel, and you admit there was. Now, can you presume that the master was interfering in the management and navigation of the ship without presuming that he was guilty of a wrongful act?] The master might actually have been in charge of the vessel at this moment, for the pilot might have gone below; yet the defendant says, "I was not navigating the vessel when the accident occurred; there was a pilot on board; the law took the navigation out of my hand." Now, if such statement is final, and the respondent's contention is good, those in whose charge is the proper ordering of the navigation of the Thames will find their hands fettered, and much mischief will ensue. [LUSH, J.—The last bye-law, number 72, of the conservancy bye-laws, lays it down that the person actually committing the wrongful act of careless navigation is

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liable. The owner clearly would not be liable in this case, yet he would have been liable *prima facie* in a civil action for a collision, as in the cases cited to us. This clearly shows the distinction between the two classes of cases.]

*Bucknill*, for the respondent, was not called upon.

COCKBURN, C.J.—This appeal must be dismissed. The principle of the cases cited to us is not applicable to the case before us now, though I must confess the decisions go a very long way. The Act of Parliament in consideration of its being compulsory on owners and masters to take on board pilots in certain districts, affords them a certain exemption from liability for the default of such pilot, but it will not permit the owner or master to say, without contradiction, that the accident has been caused by the default of the pilot, and not of the master. This, in my opinion, goes a very long way, and for this reason, that it seems to me that when the pilot takes up the navigation of the vessel, and gives his orders and the others are to obey him, the presumption is really the other way. Here, however, we are not dealing with the civil, but penal exemption of the master of a vessel, on board of which there is a pilot directed by the law to be taken. The 28th bye-law says, "every vessel on the river must be navigated with due care;" and its infraction is visited with a penalty. But now we must look to see how far, if the master is not navigating the vessel, he is responsible, and how far he has interfered with the navigation, when his authority is properly merged into that of the pilot. It is the duty of the master to repeat the orders of the pilot and to see them obeyed; now, if he did the reverse of what the pilot told him, and interfered in the working of the ship, he would be responsible. But this is not proved. Those who seek to impose a penal responsibility on the defendant must prove that he has committed the offence imputed to him, and that he wrongfully interfered with the management and navigation of this vessel.

LUSH, J.—I am of the same opinion. *Prima facie*, in a civil action the owner of a vessel in which is a pilot compulsorily taken on board, is bound by the acts of his servants, and he must prove that the accident happened not through the fault of his servants, but of the pilot. The 72nd bye-law inflicts the penalty on the guilty person, not on the owner. When you summon a master of a vessel under this bye-law, you must prove, to obtain a conviction, that he is the guilty party. If it is shown that he had a pilot compulsorily on board, and as the law presumes that the pilot had the charge of the vessel, you must prove that the master took part in the navigation. To take a cognate example, the master of a servant who has driven furiously may not be personally liable to punishment for an accident resulting therefrom, though he might be sued in a civil action for damages; but under the police regulations, the driver is made personally liable, and can be punished for his misconduct. In this case, the master having a pilot compulsorily on board, and so not being in command of the vessel, it is to be presumed that he took no share in the navigation. If he is to be personally fixed for a breach of the laws and rules of navigation, it is incumbent on those who would so fix him, to prove that because

of some act of interference on his part the matter complained of occurred.

*Appeal dismissed.*

Solicitors for the appellant, *Elmslie, Forsyth, and Sedgwick*.

Solicitors for the respondent, *J. and A. Farnfield*.

Thursday, June 19.

(Before COCKBURN, C.J., LUSH and MANISTY JJ.)

LEICESTER v. GRAZEBROOK. (a)

*Practice—Arbitration—Application to refer back an award—Discretion of the court or judge to entertain such an application within reasonable time—9 & 10 Will. 3, c. 15, s. 2.—11 Geo. 4 & 1 Will. 4, c. 70, s. 6—17 & 18 Vict. c. 125, ss. 5 and 8.*

*The court has a discretion to entertain an application to refer back an award if made within a reasonable time, or for good cause shown, though made after the time which was fixed for such applications under the old system of terms.*

In this case, which was a boundary dispute, the arbitrators made their award on the 7th April 1879; and the defendant made an application for and obtained a rule *nisi* to refer back the award on the 30th May, 1879. The plaintiff when showing cause took a preliminary objection that the application was out of time and too late, and that it should have been made in the same period of time as an application to set aside an award must be made.

*Spokes* (for the plaintiff).—This application is too late. The award was made on the 7th April; and the application for a rule *nisi* to refer it back was made on the 30th May. Such an application must be made within the same time as an application to set aside an award; and 9 & 10 Will. 3, c. 15, s. 2, says, "and be it further enacted by the authority aforesaid that any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties." The next term after this award was Easter; and (11 Geo. 4 & 1 Will. 4, c. 70, s. 6) enacts that Easter term shall begin on the 15th April, and end on the 8th May. It has been determined in this division and the Court of Appeal that though the Judicature Act 1873 abolishes the old law terms generally with reference to the administration of justice, it still preserves them as the measure for determining the time within which motions must be made under the old statutes (9 & 10 Will. 3, c. 15, s. 2, *ubi sup.*) Therefore at the latest, according to the decisions, this application should have been made on 8th May, but the defendant does not make it until the 30th. I contend he is clearly out of time, and that his application should be dismissed:

*Doe dem. Banks v. Holmes*, 12 Q.B. 951 [but see *Caswell v. Groncutt*, 2 L. T. Rep. N. S. 230].

Defendant in person.—The full notification of

(a) Reported by A. H. POYNER, Esq., Barrister-at-Law.

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the award was not finally made to me until the 28rd April, and intending to appear in person in my application for a rule, I was unable to make it any sooner than I did. The court has power to entertain such applications at any time. There is a recent case of *Warburton v. Haslingdon Local Board* (48 L. J. 451, C. P.), in which this division ordered an award to be referred back to the arbitrator nearly a year after it been made; for the award had been made on the 24th April 1878, while the notion to refer back, was not until the 29th March 1879. Again, the Common Law Procedure Act 1854 (17 & 18 Vict. c. 125), s. 5, says: "It shall be lawful for the arbitrator upon any compulsory reference under this Act, or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the superior courts of law or equity, if he shall think fit, and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case, for the opinion of the court, and when an action is referred, judgment if so ordered, may be entered according to the opinion of the court." Sect. 8 says: "In case where reference shall be

made to arbitration as aforesaid, the court or a judge shall have power at any time to remit the matters referred, or any or either of them to the reconsideration and redetermination of the said arbitrator, upon such terms as to costs, and otherwise as to the said court or judge may seem proper."

LUSH, J.—We are of opinion that we are not bound to hold that such applications as this must be brought with the time specified by the Acts of Will. 3 & Geo. 4 and Will. 4; but on the authority of the case cited to us by the defendant, and the sections of the Common Law Procedure Act 1854 quoted to us, we have a discretion to allow these motions to be made at any time. Of course they must be brought within a reasonable time; and if not, the party applying for such order must satisfy us on good grounds that it could not have been applied for sooner, and within what we should deem a reasonable period. This objection must be overruled.

*Objection overruled.*

Solicitors for the plaintiff, *Robertson and Barlow.*

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